



The Council of Parent Attorneys and Advocates, Inc.  
*Promoting excellence in special education advocacy nationwide*

April 20, 2006

Russell Smith  
Executive Director  
D.C. Board of Education  
825 North Capitol Street N.E.  
9<sup>th</sup> Floor  
Washington, D.C. 20002

Re: Change to 5 D.C.M.R. 3030.3 (Burden of proof)

Dear Mr. Smith:

The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization of attorneys, advocates, and parents whose primary mission is to protect the civil rights of children with disabilities and secure for them high quality educational services. Members of COPAA come from many states and the District of Columbia.

The Individuals with Disabilities Education Act requires DCPS to provide to children with disabilities a Free Appropriate Public Education. When parents believe their children's right to FAPE has been denied, they are entitled to an impartial due process hearing. Under current District of Columbia Board of Education rules, DCPS (or other LEA) has the burden and is required to prove affirmatively that it has in fact provided FAPE. For reasons we explain below, COPAA believes that the current rule should be retained to protect the educational rights of children with disabilities in the District of Columbia. We therefore urge the Board to withdraw the proposed change to 5 D.C.M.R. § 3030.3

We understand that there is some belief that the Supreme Court's recent decision in *Schaffer v. Weast* requires states to place the burden of persuasion on the party seeking relief. According to Board Resolution SR 06-20, "section 3030.3 is inconsistent with the [*Schaffer*] ruling and should be amended to bring DCPS into compliance with the Congressional intent of IDEA as interpreted by the US Supreme Court."

This is incorrect. The Supreme Court did just the opposite stating clearly that states should retain the right to decide how to handle burden of proof issues as a "state's right" issue. Therefore, a change in the District's rule is not required at all.

The Board has proposed the rule change in part on the belief that "shifting the burden of proof will result in reduction of litigation and expenses." Res. SR06-20. Other than the possible chilling effect the change would have on parents it is unclear why this would occur. The vast majority of hearings and associated litigation expenses do not occur because DCPS has the burden of proof. They occur because of long standing problems within DCPS including most notably the failure to timely evaluate and develop IEPs and DCPS' failure to

obey Hearing Officer Decisions and comply with settlements.<sup>1</sup> “An estimated one-third of all due process hearings arise from DCPS’ failure to comply with a previous HOD or to implement a settlement agreement.”<sup>2</sup> As recently as March 1, 2005, DCPS told the court in *Blackman v. District of Columbia* that 2,501 Hearing Officer Decisions and settlements were overdue for implementation. Another one-third of hearing requests are filed because DCPS fails to timely evaluate children<sup>3</sup> or develop IEPs. This is a chronic problem that has resulted in conditional federal grant awards.<sup>4</sup>

Indeed, the Appleseed Center concluded that DCPS could save \$640,000 annually in hearing costs by completing evaluations in a timely fashion<sup>5</sup> and save \$600,000 by completing IEPs in a timely fashion.<sup>6</sup>

Moreover, DCPS’ own attorneys estimate that “DCPS has no valid defense in about 70 percent of cases.”<sup>7</sup> In other words, DCPS loses cases because it has no valid reason for why it failed to provide children with the Free Appropriate Public Education required by federal law or otherwise comply with the Individual with Disabilities Education Act. Shifting the burden of proof to parents will not relieve DCPS from liability in any case in which it has no valid defense.

Furthermore, COPAA has examined whether there is a decrease or increase in litigation based upon the burden of proof. The Board should be aware that there is no research showing that litigation increases if the burden of proof is placed on school districts.

The Board has also proposed the rule change based on the belief that “shifting the burden of proof will promote the successful early resolution of special education cases.” Res. SR 06-20. Again, COPAA knows of no research to suggest that this is the case.

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<sup>1</sup> *A Time for Action, The Need to Repair the System for Resolving Special Education Disputes in the District of Columbia*, D.C. Appleseed Center (2003), [http://www.dcappleseed.org/projects/publications/Special\\_Ed\\_Rpirt.pdf](http://www.dcappleseed.org/projects/publications/Special_Ed_Rpirt.pdf). Similar findings have been made by others, including Dr. Thomas Hehir in his 2002 report.

<sup>2</sup> *A Time for Action, The Need to Repair the System for Resolving Special Education Disputes in the District of Columbia*, 18, 28 and n. 6 at 65 citing DCPS statistics. D.C. Appleseed Center (2003), [http://www.dcappleseed.org/projects/publications/Special\\_Ed\\_Rpirt.pdf](http://www.dcappleseed.org/projects/publications/Special_Ed_Rpirt.pdf).

<sup>3</sup> Under D.C. law DCPS has 120 days to evaluate. D.C. Code 38-101. This provision, and prior to it, appropriations riders, overruled the *Mills* decree under which DCPS had 50 days to evaluate, develop an IEP and place an eligible child.

<sup>4</sup> Lee (DoED)/Vance (Superintendent), July 30, 2002, Enclosure C – Special Conditions to FY 2002 Grant Award at 1 ¶ 1 (“According to data submitted by DCPS under the FFY 2001 Special Conditions, DCPS had not achieved the goal of ensuring that all initial evaluations were completed and placements made in a timely manner” with **204 overdue at the end of the reporting period**); Lee/Janey (Superintendent) September 17, 2004 Enclosure C at 1 (“At the end of the final reporting period for FFY 2003, DCPS identified 262 students as overdue for initial evaluation and placement.”); Guard (DoED)/Janey, March 18, 2005, 11 (262 students not timely evaluated as of September 30, 2004; 375 not timely evaluated as of December 31, 2004).

<sup>5</sup> Appleseed at 60.

<sup>6</sup> *Id.*

<sup>7</sup> Appleseed, *supra* at 59.

Instead, as the Board's Ad Hoc Committee, the Appleseed Center, and Dr. Thomas Hehir's reports in the *Blackman* case found, the keys to reducing hearings and to early resolution of requests are found in developing more programs and making better and more frequent use of mediation. White Paper at 13; T. Hehir, Ed.D. *DCPS Special Education Study: Assessment and Recommendations* (October 2002), 1, 12, 21-22; Appleseed at 40 ("the absence of an "effective mechanism to resolve special education complaints short of due process hearings ... forces DCPS to expend much time and resources battling an overwhelming number of hearing requests, instead of dealing with the problem of service delivery.") The D.C. Appleseed Center estimates if DCPS settled only another 1,500 cases per year it could save \$3 million.<sup>8</sup>

We are particularly concerned that if the new proposed regulation is passed, parents of children who are initially seeking eligibility under IDEA will have the burden of proof. These parents will likely lack background or knowledge in special education. Yet, they may, at times, have to take the affirmative step, to obtain initial eligibility and services for the child through seeking a due process hearing. The failure to identify children with disabilities and determine their eligibility is a serious problem in the District of Columbia, as explained in footnote 4 above.

Moreover, the Individuals with Disabilities Education Act mandates an active and equal role for parents in advocating for their child's education because Congress recognized that parental participation is critical to the success of IDEA. Parents often find it hard to participate as Congress envisioned and to navigate the special-education maze dominated by teachers and other professionals who are more familiar with special-education, the law and hearing procedures. For example IEP meetings are inherently intimidating for parents where they are outnumbered by school personnel, who control the process.

DCPS has free, unfettered access to all relevant information about a proposed placement, putting it at a distinct advantage in due process hearings. Parents' access is limited to times and conditions dictated by DCPS. When parents' experts are permitted to observe children in class, observations are limited and also supervised. DCPS relies on psychologists, service providers, and other employees in IEP meetings to develop IEPs. Parents, if they want outside opinions must hire their own experts--a costly endeavor.

Furthermore, when parents disagree with decisions made by DCPS and exercise their "due process" rights they continue to be at a disadvantage. DCPS can and does use the same experts who appeared at IEP meetings as hearing witnesses. DCPS also has in-house (or retained) lawyers to determine the district's responsibilities and rights and prosecute

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<sup>8</sup> *Id.* at 59. Appleseed concluded that "strengthening settlement and mediation procedures will enable DCPS to concentrate on the cases where it has a valid defense" and that "if DCPS went to a hearing for only 15% of its cases, the number of hearings would decrease to about 500." *Id.* at 60. Moreover, additional fee savings would accrue because DCPS would presumably only litigate the most difficult cases and win many just as in other jurisdictions. *Id.*

hearings. Parents must hire, if they have the money, or, if they are able, find *pro bono* legal services, which few parents are able to do.

Parents also must hire experts to prove their cases, something many simply cannot do because of poverty or difficult financial circumstances. Indeed, according to the Board's recent "White Paper" on special education, the greatest number of children with disabilities live in wards 5, 7, and 8, *Ad Hoc Committee on Special Education* (January 13, 2006), 20. These are the three poorest wards in the District of Columbia. *District of Columbia Government, Office of Planning, 1999 Median Household and Per Capita Income by Ward*.<sup>9</sup> Moreover, many children with disabilities have parents who are less well-educated than parents of children in the general population. It is important, therefore, to retain the existing rule to protect the rights of children with disabilities.

For many children, good special-education services make the difference between success and failure. But when parents believe that the school district has failed to provide the free appropriate public education mandated by law, their only recourse is to seek due process if they cannot convince the school team otherwise. DCPS uses its built-in expert witnesses and lawyers (both paid for with tax dollars) at these hearings and DCPS does this literally thousands of times each year. Parents, on the other hand have individual cases, know little about the law, and lack the copious resources available to DCPS. Hence, placing the burden of proof on school districts, as § 3030.3 currently does, is fair and necessary to level the playing field for parents and children in the District of Columbia.

The Board should retain the current language of 5 D.C.M.R. § 3030.3 along with the many other states that place the burden of proof on school districts. This will put "children first" by protecting the educational rights of children with disabilities in the District of Columbia.

Please let us know if COPAA may be of assistance or provide further information.

Sincerely,

Selene Almazan  
Chair, COPAA Board of Directors

Robert I. Berlow  
Chair, Government Relations

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<sup>9</sup> <http://www.planning.dc.gov/planning/cwp/view,a,1282,q,569971.asp>.