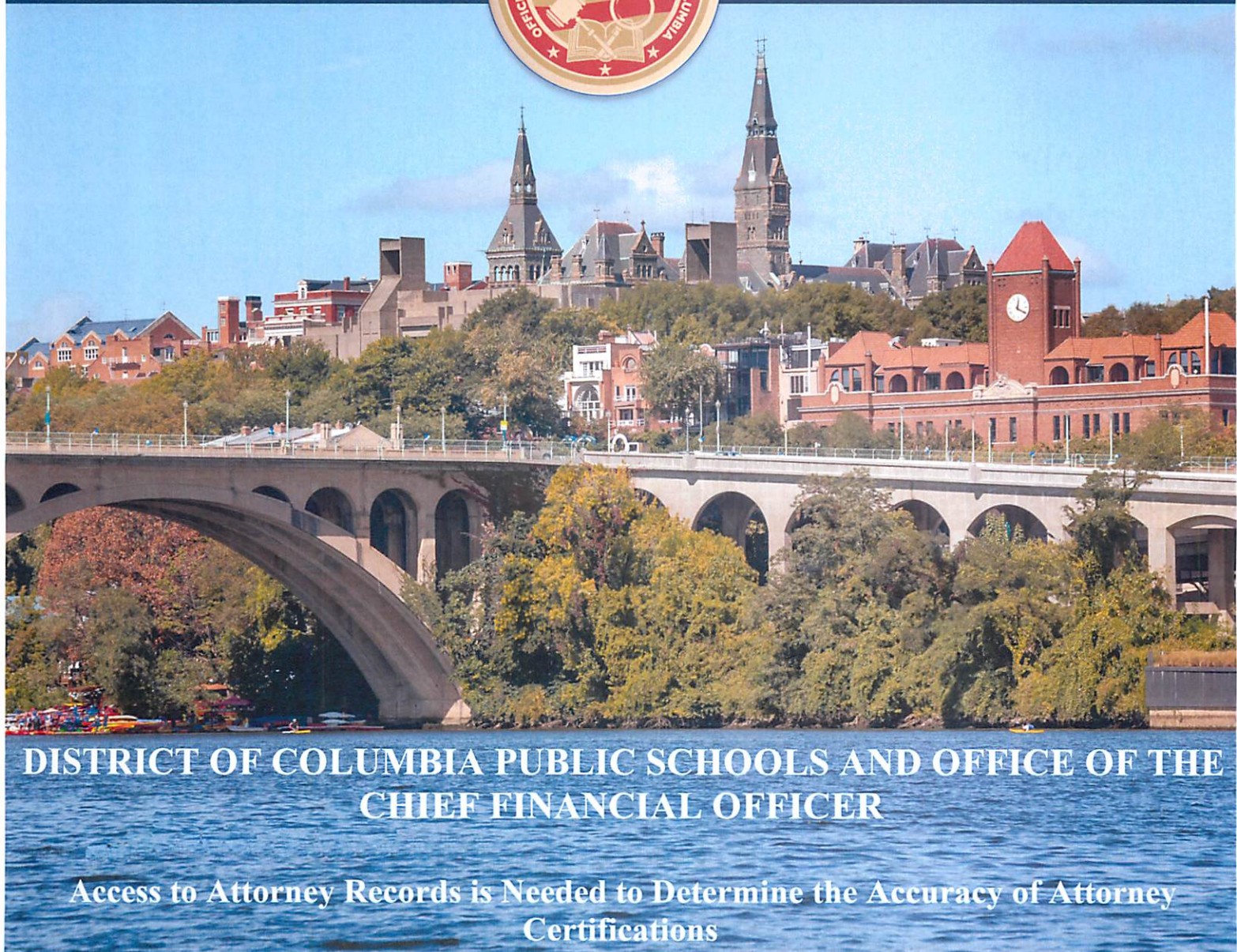


DISTRICT OF COLUMBIA OFFICE OF THE INSPECTOR GENERAL

OIG Project No. 19-1-26AT

November 2019



DISTRICT OF COLUMBIA PUBLIC SCHOOLS AND OFFICE OF THE CHIEF FINANCIAL OFFICER

Access to Attorney Records is Needed to Determine the Accuracy of Attorney
Certifications

Guiding Principles

*Workforce Engagement * Stakeholders Engagement * Process-oriented * Innovation
* Accountability * Professionalism * Objectivity and Independence * Communication * Collaboration
* Diversity * Measurement * Continuous Improvement*

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Our mission is to independently audit, inspect, and investigate matters pertaining to the District of Columbia government in order to:

- prevent and detect corruption, mismanagement, waste, fraud, and abuse;
- promote economy, efficiency, effectiveness, and accountability;
- inform stakeholders about issues relating to District programs and operations; and
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Excellence * Integrity * Respect * Creativity * Ownership
* Transparency * Empowerment * Courage * Passion
* Leadership



EXECUTIVE SUMMARY

WHY WE DID THIS AUDIT

The Individuals with Disabilities Education Act (IDEA) is the federal law that establishes the right of students with disabilities to a free, appropriate public education. Under the Act, a student with disabilities may have attorney services when DCPS does not provide adequate educational services to address the disability, and the school district pays attorneys' costs if the student succeeds in an administrative hearing.



The District of Columbia Public Schools (DCPS) provides free, appropriate public education to special education students. The Office of the General Counsel within DCPS receives, reviews, and approves invoices for services attorneys provided. The Office of the Chief Financial Officer (OCFO) processes and pays the approved invoices.

D.C. Code § 1-301.115a(a)(3)(J) requires that the Office of the Inspector General (OIG) determine annually the accuracy of attorney certifications made to OCFO.

We conducted this audit to determine the accuracy of the 133 certifications attorneys made to OCFO in fiscal year (FY) 2018.

OBJECTIVES

The objective of the audit is to determine the accuracy of certifications made to the Office of the Chief Financial Officer by attorneys in special education cases successfully brought under the Individuals with Disabilities Education Act in the District.

WHAT WE FOUND

Attorneys who successfully represented students with special education complaints billed the District \$4.9 million in FY 2018 for legal services in accordance with the Individuals with Disabilities Education Act. As part of the negotiation process, the District and the attorneys settled for less than \$3 million. However, we could not determine why attorneys would settle for substantially less than the amount billed. To determine the accuracy of the invoices and settlements, we requested access to the underlying case files from 8 of the 26 attorneys who submitted certified invoices to the District. The attorneys cited attorney-client privilege and denied access to the case files.



EXECUTIVE SUMMARY

Analysis of case files is necessary to determine the accuracy of certifications that attorneys made to the District. Without access to the underlying documentation that supports these attorney certifications, we could not comply with generally accepted government auditing standards. These standards require auditors to obtain sufficient, appropriate evidence to provide a reasonable basis for findings based on the audit objectives.

When certifying their invoices, the attorneys did not disclose “any financial, corporate, legal, membership on boards of directors, or other relationships with any special education diagnostic services, schools, or other special education service providers to which the attorneys have referred any clients in any such cases” as required by D.C. Code § 1-204.24d(28)(B). The attorneys did not disclose because the certification form that attorneys sign does not include these disclosure requirements, or alternatively require attorneys to affirmatively state no such relationships exist.

Finally, DCPS did not track complaints and their outcomes, including highlighting when DCPS was not providing a free, appropriate public education to students with disabilities and analysis of underlying reasons for the complaint that would inform improvements in special education services. Tracking the progress of complaints is important because attorneys’ fees and costs that DCPS pays increase depending on how long it takes to resolve cases.

WHAT WE RECOMMEND

We made five recommendations to the District and the DCPS Chancellor to use the same language in the law requiring attorneys to certify services rendered, and start tracking IDEA complaints to help identify areas to reduce attorney fees and provide better service to students with disabilities.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General



Inspector General

November 15, 2019

Jeffery S. DeWitt
Chief Financial Officer
Office of the Chief Financial Officer
The John A. Wilson Building
1350 Pennsylvania Avenue, NW, Suite 203
Washington, D.C. 20004

Lewis Ferebee, Ph.D.
Chancellor
District of Columbia Public Schools
1200 First Street, NE, Suite 1230
Washington, D.C. 20002

Dear Chief Financial Officer DeWitt and Chancellor Ferebee:

Enclosed is our final report, *Access to Attorney Records is Needed to Determine the Accuracy of Attorney Certifications* (OIG Project No. 19-1-26AT). This audit was conducted pursuant to D.C. Code § 1-301.115a (a) (3) (J), which requires the OIG to annually conduct an investigation into the accuracy of the attorney certifications. Due to restrictions on access to the underlying case files, we could not perform the audit in accordance with Generally Accepted Government Auditing Standards (GAGAS). The objective of the audit is to determine the accuracy of certifications made to the Office of the Chief Financial Officer by attorneys in special education cases successfully brought under the Individuals with Disabilities Education Act in the District. This audit was included in the *Fiscal Year 2019 Audit and Inspection Plan*.

We provided DCPS and OCFO with our draft report on September 26, 2019, and received their responses on October 10, 2019, and October 15, 2019, respectively. We appreciate that DCPS and OCFO officials began addressing some of the findings immediately upon notification during the audit. DCPS's and OCFO's responses to the draft report are included in their entirety at Appendix C and D, respectively. OCFO in its response indicated that the report does not contain any findings and recommendations within the purview of the OCFO. DCPS concurred with Recommendations 2, 4, and 5. DCPS's actions taken and/or planned are responsive and meet the intent of these recommendations. Therefore, we consider these recommendations resolved but open pending evidence of stated actions.


In its response to Recommendation 1, DCPS indicated that it is not in a position to address the attorney-client privilege issue that restricted OIG's access to the primary source records and data that support the fees and related costs certified by attorneys. DCPS also stated that OIG's access to attorneys' records and data would not shed further light on the accuracy of attorney invoices because attorneys may choose to accept less than the amounts billed for various reasons that may have little to do with the actual hours and costs reflected in billing records. However, the OIG needs access to attorneys' records and data to further validate the accuracy of the original invoiced amount.

We request that DCPS reconsider its response and provide additional comments that fully address and meet the intent of the recommendation. Therefore, we consider this recommendation unresolved and open.

DCPS disagreed with Recommendation 3 and stated that establishing standard operating procedures (SOP) to guide professional judgements would be extremely difficult, if not impossible, and doing so would in fact lead to the District paying more than necessary. DCPS's actions taken and/or planned are responsive and meet the intent of these recommendations. Therefore, we consider this recommendation resolved but open pending evidence that the cost of implementing this recommendation is higher than the benefit.

We appreciate the cooperation and courtesies extended to our staff during this audit. If you have any questions concerning this report, please contact me or Benjamin Huddle, Assistant Inspector General for Audits, at (202) 727-2450.

Sincerely,


Daniel W. Lucas
Inspector General

DWL/tda

Enclosure

cc: See Distribution List

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BACKGROUND

The Individuals with Disabilities Education Act (IDEA)¹ is federal law that establishes the right of students with disabilities to a free, appropriate public education. Section 1415 of this Act (20 U.S.C.S. § 1415) provides certain procedural safeguards to ensure that students who file a free appropriate public education complaint may obtain legal representation even if they cannot afford to pay attorneys' fees. If the student succeeds in an administrative hearing, the student can obtain attorney services and recover the attorneys' fees from the local education agency.

The complaint resolution process in the District of Columbia begins with filing a complaint at the Office of Dispute Resolution in the Office of the State Superintendent of Education (OSSE). The District of Columbia Public Schools (DCPS) may make an offer to settle the complaint within 30 days of receiving of the complaint. DCPS and the complainant may reach a settlement within 30 days of receiving the complaint; if both parties resolve the complaint during this period, they enter into a legally binding settlement agreement. If negotiations fail, the complaint proceeds to an administrative hearing. OSSE has impartial hearing officers assigned to hear students' complaints and issues a hearing officer determination at the end of the hearing.

During the administrative due process hearing, attorneys from both sides present expert witnesses and documents to support their respective positions. DCPS must reimburse attorneys' fees to the complainant if the hearing officer issues an award for the complainant. It has become the practice for complainants to authorize attorneys to invoice their fees and obtain payment directly from DCPS.

DCPS's Process for Reviewing Attorney Invoices

The DCPS Office of the General Counsel (DCPS-OGC) receives, examines, and approves attorney invoices for payment by the Office of the Chief Financial Officer (OCFO). To streamline the process, DCPS-OGC designed an attorney invoice submission packet that attorneys seeking payment must complete. The packet contains the certification signed by the attorney, listing each activity, person performing it, allowed rate, and amount claimed. The DCPS-OGC policies and procedures manual provide detailed instructions about how its staff is to evaluate the accuracy of the attorney invoice, including the fee rates and allowable costs.

After examining and approving the invoices, DCPS-OGC's Attorney Invoice Processing Team prepares a cover sheet indicating the amount approved for payment. The team transmits the packet to the OCFO Business Center for processing.

OCFO's Process for Paying Attorneys

OCFO receives the attorney invoice submission packet from DCPS-OGC with the approved amounts for payment. OCFO staff input the payee name and approved payment into the Procurement Automated Support System (PASS) and the System of Accounting and Reporting

¹ Codified as amended at 20 U.S.C.S. §§ 1400-1491o (Lexis current through Public Law 116-47, approved Aug. 21, 2019).

(SOAR). OCFO also prepares and submits quarterly reports to the House of Representatives and Senate Committees on Appropriations to comply with D.C. Code § 1-204.24d(28)(C).

Court-Ordered Attorney Fee Payments

Attorneys who do not wish to have their invoices evaluated by DCPS-OGC can take their claims to court. The IDEA, as codified at 20 U.S.C.S. § 1415(i)(3)(B), specifically assigns courts the authority to award reasonable fees to the prevailing party in an IDEA proceeding. The District of Columbia Office of the Attorney General (OAG) defends the District in cases filed in court. OAG may also enter into negotiations with the attorney for out-of-court settlements. OAG communicates the court's award or the negotiated result to DCPS-OGC, which then prepares a payment sheet for the court-ordered or OAG-negotiated amounts.

Internal Control Definition

We used the *United States Government Accountability Office (GAO) Standards for Internal Control in the Federal Government* (Green Book) to evaluate the design and implementation of DCPS's control activities over the IDEA complaint settlement process, and over tracking and analyzing the outcome of IDEA complaints.

The Green Book defines internal control as “a process used by management to help an entity achieve its objectives.”² Internal controls are the systems in place to provide reasonable assurance about the integrity of the process. Further, the Green Book explains: “[m]anagement is directly responsible for all activities of an entity, including the design, implementation, and operating effectiveness of an entity's internal control system.”³ Besides the federal government, GAO recommends that state, local, and quasi-governmental entities also use internal control standards.

Scope Limitation

Pursuant to the attorney certification requirements under D.C. Code § 1-204.24d(28), and D.C. Code § 1-301.115a(a)(3)(J), the OIG is required to annually investigate the accuracy of these certifications to OCFO in special education cases that are successfully brought under the IDEA in the District. Unfortunately, restricted access to records and data resulted in significant scope limitations, and we were unable to satisfactorily perform the audit in accordance with Generally Accepted Government Auditing Standards (GAGAS). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives.

² U.S. GOVERNMENT ACCOUNTABILITY OFFICE, STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT, GAO-14-704G Title Page (Sept. 2014), <https://www.gao.gov/products/GAO-14-704G> (last visited Sept. 19, 2019).

³ *Id.* § OV2.14.

FINDINGS

WE COULD NOT DETERMINE THE ACCURACY OF ATTORNEY CERTIFICATIONS AS REQUIRED BECAUSE OF ATTORNEY-CLIENT PRIVILEGE

D.C. Code § 1-301.115a(3)(J) requires the OIG to annually “conduct investigations to determine the accuracy of certifications made to the Chief Financial Officer of the District of Columbia under § 1-204.24d(28) of attorneys in special education cases brought under the Individuals with Disabilities Education Act in the District of Columbia.”

OCFO received 133 certifications and certified \$4.9 million in attorney fee payments in FY 2018. The District of Columbia Superior Court, OAG, and DCPS-OGC, however, reduced the certified amounts by \$1.9 million (39 percent) to \$3 million. The reduction occurred during legal proceedings and settlement negotiations. After winning an award at an administrative hearing, attorneys either seek payment through the District of Columbia Superior Court or through DCPS. When the District of Columbia Superior Court is involved, the OAG represents DCPS during legal proceedings. Attorneys also seek payment by directly negotiating payments with DCPS. Table 1 indicates that payments were far less than what attorneys certified.

Table 1: Amount Attorneys Certified vs. Amount Paid

	# of Attorney Certifications	Certified Amount	Reduced Amount	Final Amount Paid
Court Settlements	8	\$541,674	(\$87,480)	\$454,194
OAG Settlements	14	\$1,064,164	(\$287,826)	\$776,338
DCPS-OGC Settlements	111	\$3,286,649	(\$1,545,989)	\$1,740,660
Total	133	\$4,892,487	(\$1,921,295)	\$2,971,192

Source: OIG analysis of DCPS and OCFO data.

To determine the accuracy of 133 certifications valued at \$4.9 million, we requested access to the underlying case files from 8 of the 26 attorneys who certified fees to OCFO. We selected the top 8 attorneys who each received more than \$100,000 in attorneys’ fees. The attorneys claimed attorney-client privilege and denied access to their case files.

Analysis of case files is necessary to obtain a reasonable assurance of the accuracy of the certifications that attorneys made. Auditors needed to review case files to follow generally accepted government auditing standards requiring auditors to plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings based on our audit objectives.

We recommend that the District:

1. Address the attorney-client privilege issue discussed above so OIG can determine the accuracy of certifications made to the Chief Financial Officer as required by D.C. Code § 1-301.115a(a)(3)(J).

DCPS-OGC OMITTED DISCLOSURE LANGUAGE FROM THE ATTORNEY CERTIFICATION FORM

The DCPS-OGC attorney invoice submission form (the form) that attorneys sign to certify they provided services before they can receive payments does not properly state the requirements outlined in the D.C. Code § 1-204.24d(28)(B).

Specifically, the form does not cite D.C. Code § 1-204.24d(28)(B) requiring attorneys “to disclose any financial, corporate, legal, membership on boards of directors, or other relationships with any special education diagnostic services, schools, or other special education service providers to which the attorneys have referred any clients in any such cases.” Instead, the packet has language from the District of Columbia Appropriations Act, 2005, Sec. 327, which provides in relevant part that no funds contained in the Act may be available to pay:

the fees of any attorney or firm whom the Chief Financial Officer of the District of Columbia determines to have a pecuniary interest, either through an attorney, officer or employee of the firm, in any special education diagnostic services, schools, or other special education service providers.

As a result, attorneys may have not adequately disclosed relationships per the D.C. Code requirement.

We recommend that DCPS:

2. Include the language of D.C. Code § 1-204.24d(28)(B) in the certification section of the packet.

DCPS DID NOT ESTABLISH POLICIES AND PROCEDURES OVER THE IDEA COMPLAINT SETTLEMENT PROCESS

DCPS established procedures for reviewing attorney invoices but did not establish standard operating procedures (SOP) to provide guidance on how DCPS-OGC staff attorneys determine attorneys’ fees in negotiated settlements. During FY 2018, DCPS-OGC settled 111 cases for a total of \$1.7 million reduced from \$3.2 million invoiced. DCPS did not maintain documentation or evidence to support the \$1.5 million reduction.

Green Book Principle 10.02 (Response to Objectives and Risks) states “[m]anagement designs control activities in response to the entity’s objectives and risks to achieve an effective internal control system. Control activities are the policies, procedures, techniques, and mechanisms that enforce management’s directives to achieve the entity’s objectives and address related risks.”

DCPS would need policies and procedures over the IDEA complaint settlement process to proactively identify and respond to the risk of inaccurate attorney certifications. Establishing SOPs helps DCPS obtain reasonable assurance that attorney certifications are free from material misstatement. SOPs also help DCPS to ensure consistency of performance among DCPS-OGC staff attorneys when determining attorneys' fees in negotiated settlements.

We recommend that DCPS:

3. Establish standard operating procedures to provide guidance on how DCPS-OGC staff attorneys determine fees in negotiated settlements.
4. Maintain documentation or evidence of the basis on which negotiated settlements were determined.

DCPS DOES NOT TRACK AND ANALYZE THE OUTCOME OF IDEA COMPLAINTS

DCPS did not track complaints and their outcomes, including highlighting when DCPS was not providing a free, appropriate public education. DCPS-OGC has access to a database owned by OSSE for tracking cases. The database, however, does not contain financial data (i.e., attorney payments, settlement amounts, court-ordered payment amounts) and DCPS-OGC does not use information from the database to prepare management reports.

Tracking the progress of complaints resolution is important because attorneys' fees and allowable costs that DCPS pays increase depending on how long it takes to resolve cases. We compared the "period of service" stated in a selection of attorney fee packets to the invoiced amounts and found that the invoiced amounts increased with time. For example, when the period of service was 3 months, the invoice amount was \$ 9,000 per student. The invoiced amount ranged from \$65,000 to \$ 75,000 per student when the period of service increased to 7 months. Extending the period to 9 months increased the invoiced amounts to \$ 90,000 per student.

In addition to avoiding the cost of prolonged cases, continuous monitoring of complaints would provide DCPS a means for analyzing reasons for complaints. DCPS could use the analysis to reduce attorney costs and improve the quality of special education services it provides to students with disabilities.

Tracking and analyzing outcomes on a monthly basis using the following metrics would help management improve efficiency of operations and service to students with disabilities:

- Number of complaints filed during a particular month.
- Number of cases pending for up to 3 months; between 3 and 6 months; and over 6 months.
- Number of hearing officer determinations issued classified as favorable or unfavorable to DCPS.

- Number of settlements completed each month with the amounts awarded to the attorneys and to the complainant, respectively.
- Suggestions for avoiding unfavorable elements of similar future determinations.

We recommend that DCPS:

5. Track and analyze the outcome of complaints on a monthly basis.

CONCLUSION

We could not determine the accuracy of the certifications made to the OCFO by attorneys as required by the law. Our analysis was limited because the attorneys cited attorney-client privilege in denying access to their records. Access to the attorneys' records would have allowed auditors to determine why the fees attorneys invoiced were substantially higher than the amount DCPS ultimately paid the attorneys.

AGENCY RESPONSES AND OFFICE OF THE INSPECTOR GENERAL COMMENTS

We provided DCPS and OCFO with our draft report on September 26, 2019, and received their responses on October 15, 2019, and October 10, 2019, respectively. We appreciate that DCPS and OCFO officials began addressing some of the findings immediately upon notification during the audit. DCPS's and OCFO's responses to the draft report are included in their entirety at Appendix C and D, respectively. OCFO in its response indicated that the report does not contain any findings and recommendations within the purview of the OCFO. DCPS concurred with Recommendations 2, 4, and 5. DCPS's actions taken and/or planned are responsive and meet the intent of these recommendations. Therefore, we consider these recommendations resolved but open pending evidence of stated actions.

In its response to Recommendation 1, DCPS indicated that it is not in a position to address the attorney-client privilege issue that restricted OIG's access to the primary source records and data that support the fees and related costs certified by attorneys. DCPS also stated that OIG's access to attorneys' records and data would not shed further light on the accuracy of attorney invoices because attorneys may choose to accept less than the amounts billed for various reasons that may have little to do with the actual hours and costs reflected in billing records. However, the OIG needs access to attorneys' records and data to further validate the accuracy of the original invoiced amount. Therefore, we consider this recommendation unresolved and open.

DCPS disagreed with Recommendation 3 and stated that establishing standard operating procedures (SOP) to guide professional judgements would be extremely difficult, if not impossible, and doing so would in fact lead to the District paying more than necessary. DCPS's actions taken and/or planned are responsive and meet the intent of these recommendations. Therefore, we consider this recommendations resolved but open pending evidence that the cost of implementing this recommendation is higher than the benefit.

ACTIONS REQUIRED

We request that within 30 days of the date of this final report, DCPS reconsider and respond to recommendation 1.

APPENDIX A. OBJECTIVES, SCOPE, AND METHODOLOGY

This audit was conducted pursuant to D.C. Code § 1-301.115a(a)(3)(J), which requires the OIG to annually investigate how the District pays attorneys (attorney certifications) who provide services in special education cases brought under the Individuals with Disabilities Education Act in the District of Columbia. The objective of the audit was to determine the accuracy of the certifications that attorneys in special education cases made to the OCFO during fiscal year 2018. The scope of our audit was limited as OIG was denied access to attorneys' billing or case files to verify the accuracy of the certifications; therefore, we were unable to conduct this audit under GAGAS.

To accomplish our objectives, we conducted interviews with staff members and officials from DCPS, DCPS-OGC, and OCFO, reviewed and assessed compliance with laws and regulations, and acquired an understanding of DCPS, OCFO, and OAG's processes for approving, recording, and reporting attorney certification payments.

To test the accuracy of attorney certifications, we analyzed 133 payments made in FY 2018 and verified the amounts to what attorneys invoiced. We also assessed whether the attorney certifications were made in accordance with law. We reviewed documents and transactions, including certifications, invoices, and supporting documentation from attorneys. We also reviewed DCPS-OGC's documentation of transactions, OCFO's financial data and quarterly reports, and policies and procedures. We interviewed staff from DCPS, OCFO, and OAG and contacted the top 8 attorneys who received more than \$100,000 in attorneys' fees to interview and review case files.

The OIG conducted these prior audits: (1) OIG Project No. 11-1-15AT issued on October 13, 2013, covering FYs 2006 - 2010; (2) OIG Project No. 16-1-10AT issued July 27, 2017, covering FYs 2011 - 2015; and (3) OIG Project No. 18-1-18AT issued August 31, 2018, as a follow-up audit to review the implementation of previous audits recommendations.

We conducted our work from April 4, 2019, to July 17, 2019. Although we performed no formal reliability assessment of computer-processed data, we relied on data generated from SOAR. We performed audit procedures to verify the accuracy of the information.

APPENDIX B. ACRONYMS AND ABBREVIATIONS

DCPS	District of Columbia Public Schools
DCPS-OGC	District of Columbia Public Schools, Office of the General Counsel
FY	Fiscal Year
GAGAS	Generally Accepted Government Auditing Standards
IDEA	Individuals with Disabilities Education Act
GAO	Government Accountability Office
OAG	Office of the Attorney General
OCFO	Office of the Chief Financial Officer
OGC	Office of the General Counsel
OIG	Office of the Inspector General
OSSE	Office of the State Superintendent of Education
SOAR	System of Accounting and Reporting
SOP	Standard Operating Procedures

APPENDIX C. RECOMMENDATIONS

We recommend that the District and DCPS:

1. Address the attorney-client privilege issue discussed above so OIG can determine the accuracy of certifications made to the Chief Financial Officer as required by D.C. Code § 1-301.115a(a)(3)(J).
2. Cite D.C. Code § 1-204.24d(28) (B) in the certification section of the packet.
3. Establish standard operating procedures to provide guidance on how DCPS-OGC staff attorneys determine fees in negotiated settlements.
4. Maintain documentation or evidence of the basis on which negotiated settlements were determined.
5. Track and analyze the outcome of IDEA complaints on a monthly basis.

APPENDIX D. DCPS' RESPONSE TO THE DRAFT REPORT



VIA EMAIL and FIRST-CLASS MAIL

October 15, 2019

Daniel W. Lucas
Inspector General
717 14th Street, N.W.
Washington, DC 20005

Dear Inspector General Lucas:

The District of Columbia Public Schools (DCPS) is in receipt of your September 26, 2019 draft audit report entitled *District of Columbia Public Schools and Office of the Chief Financial Officer: Access to Attorney Records is Needed to Determine the Accuracy of Attorney Certifications*. Thank you for conducting this statutorily required audit and providing your opinion as well as allowing us the opportunity to respond and provide feedback. Our responses to the audit recommendations are set forth below.

RECOMMENDATIONS AND DCPS RESPONSES

We recommend that the District and DCPS:

1. Address the attorney-client privilege issue discussed above so OIG can determine the accuracy of certifications made to the Chief Financial Officer as required by D.C. Code §1-301.115a(3)(J).

DCPS Response:

DCPS is not in a position to implement this recommendation. The draft report correctly observes that attorneys representing plaintiffs with complaints against DCPS pursuant to the Individuals with Disabilities Education Act (IDEA) voluntarily reduced their claims for fees by a substantial amount after negotiation with DCPS, resulting in significant savings to the District. Such reductions could occur for several reasons, including but not limited to DCPS questioning the amount of the fees billed or a willingness on the part of the attorney to accept less than the amount initially billed in order to obtain prompt payment and avoid further litigation.

The draft report suggests OIG should have access to the underlying billing records maintained by the attorneys in order to “determine the accuracy of the invoices and settlements”. Such access would not shed further light on the “accuracy” of attorney invoices because attorneys may choose to accept less than the amounts billed for various reasons that may have little to do with the actual hours reflected in billing records. More important is the fact that DCPS does not have access to such records—and could not feasibly obtain such access—because the internal billing records maintained by an attorney are subject to the attorney-client privilege. OIG’s requests to the attorneys to review their internal billing records were rejected, which should have been the end of the matter.

The attorney-client privilege is held by the client, not the lawyer, and a lawyer may not waive the privilege without affirmative consent of the client. The recommendation in the draft report appears to suggest

1200 First Street, NE Washington, DC 20002 T 202.442.5885 F 202.442.5026 www.dcps.dc.gov

APPENDIX D. DCPS' RESPONSE TO THE DRAFT REPORT

DCPS Response – OIG Audit of Special Education Attorney Certifications
October 15, 2019

that DCPS should communicate directly with parents who are represented by counsel on matters related to their legal representation. However, DCPS attorneys are strictly prohibited from communicating directly with parents who are represented by counsel pursuant to the DC Rules of Professional Conduct. Thus, DCPS counsel communicates only with the parent's attorney. OIG's recommendation runs contrary to the ethical requirements to which all attorneys are bound, i.e., not communicating directly with represented parties. As such, there is no mechanism to have the parent waive their attorney-client privilege. Moreover, this type of communication has been specifically frowned upon by the US District Court for the District of Columbia. Specifically, the court has noted that program staff should not take any actions that can be construed as interfering with the attorney-client relationship (see, Blackman, et al v. District of Columbia, 97-1929 (Doc 2491, 11/14/2014)). Attorney-client privilege applies not merely to matters communicated in confidence by the client to the attorney, but also to all information gained in the course of the professional relationship.

Thus, DCPS is not able to "[a]ddress the attorney-client privilege issue" identified in the draft report for the reasons set forth above.

2. Include the language of D.C. Code §§1-204.24d (28) (B) in the certification section of the packet.

DCPS Response:

DCPS accepts this recommendation. For the past 14 years, DCPS has used the language contained in Section 327 of the Consolidated Appropriations Act of 2005. The statutory language covers the overall purpose of that section of the Act which is to secure certification from the attorney of all work done on a particular case as well as verification of the absence of any conflicts of interests. The OIG has deemed this language to be appropriate in several previous audits. By January 31, 2020, DCPS will modify the language of the certification package to include language consistent with D.C. Code §§1-204.24d (28) (B).

3. Establish standard operating procedures to provide guidance on how DCPS-OGC attorneys determine fees in negotiated settlements.

DCPS Response:

DCPS disagrees with this recommendation. DCPS attorneys currently evaluate the merits of each claim for attorneys' fees and use their professional judgment to determine whether and to what extent to negotiate the amount of such fees with plaintiffs' counsel. Attempting to codify this professional judgment would be extremely difficult, if not impossible, and would unduly infringe on the DCPS attorneys' ability to properly manage and evaluate their cases, which could in fact lead to the District paying more than necessary in these cases. Because each case is different, trying to develop "standard operating procedures" would be futile. In every case, the DCPS attorney must determine at the outset of the case, the value of the case and the potential exposure of liability to DCPS (and the District) in proceeding to a due process hearing. Where early resolution is in the best interest of DCPS (and ultimately the District), DCPS attorneys will make this decision in consultation with their attorney supervisor. Such decisions are based on unique factors in each case. This recommendation seems to conflate the DCPS staff attorneys' practice of negotiating early resolution of cases in the overall best interest of DCPS and the student with the parent attorneys' obligation to certify the work performed. The development of recommended standard operating procedures bears no relationship to the parent attorneys' certification of work performed and appears to be well outside the scope of this audit.

4. Maintain documentation or evidence of the basis on which negotiated settlements were arrived.

APPENDIX D. DCPS' RESPONSE TO THE DRAFT REPORT

DCPS Response – OIG Audit of Special Education Attorney Certifications
October 15, 2019

DCPS Response:

DCPS agrees with this recommendation, which was in place prior to the audit. All files maintained by DCPS contain the final decision, i.e., Hearing Officer Determination (HOD) or judicial order, and other documentation that may support a negotiated settlement.

5. Track and analyze the outcome of IDEA complaints on a monthly basis.

DCPS Response:

DCPS agrees with this recommendation, which was in place prior to the audit. DCPS utilizes a HOD tracker, formerly the Blackman/Jones database, that tracks complaint outcomes, and houses documents that analyze the outcome of cases.

Thank you for the opportunity to respond to the draft report. DCPS has made great strides to address issues identified in the audits previously conducted of special education attorney certifications made to the Office of the Chief Financial Officer in IDEA cases, and we look to continue to represent the interests of DCPS and the District effectively in the future.

Sincerely,



Lewis D. Ferebee, Ed.D.
Chancellor
District of Columbia Public Schools

APPENDIX E. OCFO'S RESPONSE TO THE DRAFT REPORT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER



October 10, 2019

Mr. Daniel W. Lucas, Inspector General
Office of the Inspector General
717 14th Street, NW
Washington, DC 20005

Dear Inspector General Lucas:

The DCPS/CFO's Office has reviewed the draft report entitled: Access to Attorney Records is Needed to Determine the Accuracy of Attorney Certifications for Payments. The OIG recommendations are as follows:

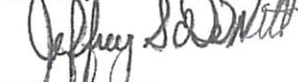
We recommend that District and DCPS:

1. Address the attorney-client privilege issue discussed above so OIG can determine the accuracy of certifications made to the Chief Financial Officer as required by D.C. Code §1-301.115a(3)(J).
2. Cite D.C. Code § 1-204.24d(28)(A) and (B) in the certification section of the packet.
3. Establish standard operating procedures to provide guidance on how DCPS-OGC staff attorneys determine fees in negotiated settlements.
4. Maintain documentation or evidence of the basis on which negotiated settlements were arrived.
5. Track and analyze the outcome of IDEA complaints on a monthly basis.

The report does not contain any findings or recommendations within the purview of OCFO. DCPS-AFO and Accounting Officer attended the exit conference on August 8, 2019. The focus of the discussion was on scope limitations relative to attorney/client privilege. There were no questions or concerns directed or addressed to the OCFO. Accordingly, responses to the recommendations in the report will be provided by DCPS.

Thank you for bringing these issues to our attention and providing this opportunity to respond.

Sincerely,



Jeffrey S. DeWitt
Chief Financial Officer