

What if Teachers Could Bill by the Hour?

Time and Learning from the Lawyer's Perspective

Rich Haglund¹ – November 2008

Introduction

It's about education. And it's about time.

Many attorneys charge clients by the hour. This practice encourages unethical conduct.² Some lawyers “pad” their time to meet the billable hour requirements imposed by their firms. They might bill one client for travel time while spending that time doing work for—and billing—another client. Or a senior associate or partner might have a junior associate perform work, but bill the client at the higher senior associate's or partner's hourly rate.

At least in the law, sophisticated clients have the choice to select another lawyer if they are not satisfied with the quality of the work. They may also establish a working relationship that limits the number of hours or the rates they will pay for services. They can also end the attorney-client relationship and ask different attorneys to represent them.

Public school students are not adults, let alone sophisticated clients contracting for services from attorneys. They arrive at school, having accepted—not chosen—the length of the school year, the length of the school day and the minutes per day that will be dedicated to each specific course. In most cases they also attend a school that has been chosen for them based solely on the location of their residence.

Imagine clients forming relationships with attorneys under those circumstances. Attorneys decide which clients will be represented by which attorneys, and they base their decision solely on the location of the clients and the attorneys. What the client's previous experience has been and what the client's capabilities and future plans are have no bearing on the assignment. Attorneys dictate to the client how much time they will dedicate to which particular assignment. And the clients pay regardless of the quality of the service, regardless of whether

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² One might argue, as Scott Turow did, that any billing by the hour violates one of the Rules of Professional Responsibility, which all lawyers are expected to follow. “The Billable Hour Must Die”, ABA Journal, Aug. 2007 (available at http://www.abajournal.com/magazine/the_billable_hour_must_die/; last viewed Nov. 7, 2008).

the service provided actually gets the client closer to the goal it had at the beginning of the relationship.

Oh, and don't forget, at any time during the relationship, the supervising attorneys can change which attorneys work for which client, where the client will go to receive consultation, and the supervisors can even decide to place the poorest clients in the care of the least capable attorneys. And the clients cannot go elsewhere. So much for the arm's length relationship.

Most clients seeking legal services presumably want the best service at a price that is related to the potential risk or reward of non-representation or poor representation. Corporate clients can measure the value of getting the legal work they need at a given price, and then decide which attorneys to engage (looking also at the attorneys' experience and suitability to the task at hand). Litigants can measure the damages they anticipate paying or receiving and make a conscious choice about representation based on their estimates of the chances of success a given firm or attorney is likely to achieve. Clients have knowledge, choices and influence (money).

Public school students cannot choose their education service provider. And, even if they have some limited choices, through public charter schools, open enrollment policies or choice under Federal or state accountability laws, they do not have adequate knowledge or influence to wield. Public school students don't yet know the potential return to be made from their investment in education. Some of their parents may understand, but many do not. Public school students can't meaningfully gauge the potential impact on their success a given teacher, school or curriculum may have on their post-secondary success in workforce training, further education or citizenship. Public schools are allotted money on a per pupil basis from federal, state and local sources. That money is distributed based on the actual attendance of actual children. But the district decides how and where and when to spend that money. The students—the actual consumers—do not get to choose how to invest their resources. The parents—who have actually paid for this investment through property and sales taxes—are also powerless to choose.³ And even the lower level “associates”—principals and teachers—do not get to decide how to spend the resources allotted for those particular “clients”.

Now, this essay is about time, not choice. But the two topics are related.

³ Those parents who opt to send their children to private schools or to homeschool their children are forfeiting services they have paid for.

Time and Learning

In 1994, the National Education Commission on Time and Learning [wrote](#): “The boundaries of student growth are defined by schedules for bells, buses, and vacations instead of standards for students and learning.”⁴ The Commission explained that because we have and continue to rely “on time as the metric for school organization and curriculum, we have built a learning enterprise on a foundation of sand, on *five premises educators know to be false*.”⁵ The Commission outlined these false premises:

The first is the assumption that students arrive at school ready to learn in the same way, on the same schedule, all in rhythm with each other.

The second is the notion that academic time can be used for nonacademic purposes with no effect on learning.

Next is the pretense that because yesterday's calendar was good enough for us, it should be good enough for our children—despite major changes in the larger society.

Fourth is the myth that schools can be transformed without giving teachers the time they need to retool themselves and reorganize their work.

Finally, we find a new fiction: it is reasonable to expect “world-class academic performance” from our students within the time-bound system that is already failing them.⁶

The Commission points out that “time, the missing element in the school reform debate, is also the overlooked solution to the standards problem. Holding all students to the same high standards means that some students will need more time, just as some may require less. . . . Used wisely and well, time can be the academic equalizer.”⁷

The Commission concluded, “The six-hour, 180-day school year should be relegated to museums, an exhibit from our education past. Both learners and teachers need more time—not to do more of the same, but to use all time in new, different, and better ways. The key to liberating learners is unlocking time.”⁸

⁴ National Education Commission on Time and Learning, *Prisoners of Time*, 5 (1994) (available at <http://www.ed.gov/pubs/PrisonersOfTime/Prisoners.html>; last viewed Nov. 7, 2008).

⁵ *Id.* at 6 (emphasis added).

⁶ *Id.*

⁷ *Id.* at 7.

⁸ *Id.* at 8.

Teachers also need freedom to use their time differently. New research has shown that teachers' job satisfaction—their working conditions—is closely related to student achievement. Thus, teachers and school leaders need “*time* for reform. They need *time* to come up to speed as academic standards are overhauled, *time* to come to grips with new assessment systems, and *time* to make productive and effective use of greater professional autonomy, one hallmark of reform in the 1990s.”⁹

The Commission had eight recommendations, all of which are timely today:

Reinvent Schools around Learning, not Time.

Fix the Design Flaw: Use Time in New and Better Ways.

Establish an Academic Day.

Keep Schools Open Longer to Meet the Needs of Children and Communities.

Give Teachers the Time They Need.

Invest in Technology.

Develop Local Action Plans To Transform Schools.

Share the Responsibility: Finger Pointing and Evasion Must End.¹⁰

Reinvent Schools Around Learning

The first of these recommendations is fundamental: “reinvent schools around learning, not time.” In discussing the second recommendation about design, the Commission stated, “Above all, fixing the flaw means that time should be adjusted to meet the individual needs of learners, rather than the administrative convenience of adults.”¹¹ The Commission made two specific suggestions for redesign under this principle: First, that “grouping children by age should become a thing of the past.” Second, that American schools follow the international model where teachers come to students rather than students going to teachers.¹²

My wife and I recently met with staff at the school of one of our children. The school psychologist, the guidance counselor and our child's teacher met with us and explained that a series of tests and observations meant our child met the district and state standards for giftedness. They explained and then we all discussed how our child could continue to be challenged and

⁹ *Id.* at 19. I'm not sure how many teachers today feel they have more autonomy. So, I don't know of that reform was effective or just not widespread!

¹⁰ *Id.* at 29.

¹¹ *Id.* at 31. That time must also be adjusted regardless of the practice that has evolved of families using school as child care so both parents can work outside the home.

¹² This could also potentially save a lot of money that teachers often spend out of their own pockets – decorating and setting up their “own” rooms each year. If the rooms belong to the students, the teachers wouldn't feel compelled to modify a room that they will only be in for a limited time each day. More rooms could be uniform, based on the learning needs and styles of students.

progress using tools in the classroom, things we could do at home and an additional program offered once a week for groups of students who met these standards.

Why couldn't such an individual learning plan be developed for all students? Federal law requires such a plan for students who are eligible for special education services. Some states include giftedness within such eligibility. And studies have shown that most students deemed eligible for special education services are not really disabled but are not reading well. Programs are being implemented to address that problem sooner rather than later. And many states or districts require learning plans for middle or high school students that outline those students' anticipated paths to post-secondary workforce training and further education.

It doesn't seem to be too big a leap to simply incorporate that for all students.

Fix the Design Flaw: Use Time in New and Better Ways

In a [lecture](#) about imagination and how we systematically (though not intentionally) destroy imagination through school, Sir Ken Robinson noted that in Finland, for every 45 minutes of instruction time, students must have 15 minutes of physical activity.

The psychologist Mihaly Csikszentmihalyi coined the term "flow" to describe "the mental state of operation in which the person is fully immersed in what he or she is doing by a feeling of energized focus, full involvement, and success in the process of the activity."¹³ In lay sportsman's terms, what he is describing is Michael Jordan playing "in the zone."

Csikszentmihalyi explains that the following conditions accompany the experience:

1. *Clear goals* (expectations and rules are discernible and goals are attainable and align appropriately with one's skill set and abilities).
2. *Concentrating and focusing*, a high degree of concentration on a limited field of attention (a person engaged in the activity will have the opportunity to focus and to delve deeply into it).
3. *A loss of the feeling of self-consciousness*, the merging of action and awareness.
4. *Distorted sense of time*, one's subjective experience of time is altered.
5. Direct and immediate *feedback* (successes and failures in the course of the activity are apparent, so that behavior can be adjusted as needed).
6. *Balance between ability level and challenge* (the activity is neither too easy nor too difficult).
7. A sense of personal *control* over the situation or activity.
8. The activity is *intrinsically rewarding*, so there is an effortlessness of action.

¹³ [http://en.wikipedia.org/wiki/Flow_\(psychology\)](http://en.wikipedia.org/wiki/Flow_(psychology)).

9. People become absorbed in their activity, and focus of awareness is narrowed down to the activity itself, *action awareness merging*.¹⁴

Is the school day designed to maximize flow? Is the school year?

In a study on flow in the classroom, Dr. David Shernoff reported that students were most likely “engaged” or in a state of flow when they were challenged, worked in groups and were more active in their learning environments. “Overall, studies on student engagement suggest that traditional academic subjects would benefit by rethinking their pedagogical strategies in order to allow students a better balance between challenges and skills, as well as higher levels of activity and control.”¹⁵

Establish an Academic Day

In order to “reclaim the academic day”, the Commission recommends that students should receive “at least 5.5 hours of core *academic instructional time* daily.”¹⁶ The Commission understood the implications of such a change: “Many worthwhile student programs—athletics, clubs, and other activities—will have to be sacrificed unless the school day is lengthened.”¹⁷ They believed that “all student activities should be offered during a longer school day.”¹⁸

This recommendation should be tempered with findings from the recommendation to reinvent schools around learning, not time, and the recommendation to invest in technology. Having an academic day may mean different things for different students. And, as outlined by Dr. Shernoff, redesigned pedagogy may make these core academic classes appear more like the additional, “non-academic” classes, or blend them in a way that resolves any concerns about giving up one type of class or program for the other.

Keep Schools Open Longer to Meet the Needs of Children and Communities.

Geoffrey Canada, President and Chief Executive Officer of the [Harlem Children’s Zone](#) has often [argued](#)¹⁹ that students need more time in school to succeed. Especially, it seems, if we want them to have the right-brained skills that they will need to compete in the flat world (i.e., to

¹⁴ *Id.*

¹⁵ David Shernoff, *Flow States and Student Engagement in the Classroom*, Wisconsin Center for Education Research University of Wisconsin – Madison, Statement to the California State Assembly Education Committee (Feb. 27, 2002), available at <http://www.amersports.org/library/reports/8.html> (last viewed Nov. 18, 2008).

¹⁶ *Prisoners of Time*, 32.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See also <http://www.americanprogress.org/events/2008/10/harlem.html>.

be able to take architectural renderings and video game code and create a [virtual tour of a library](#), as Zaki Tahiri, a high school student at the [Washington International School](#) did).

Many public charter schools have recognized that for their students, who often come from financially and educationally poor homes, more time at school is critical. One public charter school in Memphis, Tennessee, the Memphis Academy of Science and Engineering, has students attend each class twice a day. The first class meeting is for instruction. The second class meeting is essentially a study hall for students to complete work, but the teacher is there, available to work with students individually or in groups. In some cases, the public charter school leaders sense that students go home to environments that may not be conducive to further schoolwork, and so they extend the school day so all “homework” is actually done at school.

In Tennessee, home school students are required to have at least four hours of instruction per day. The statute does not define that instruction further. So, it doesn’t necessarily mean that a student must be sitting at the feet of a lecturing parent for four hours.

Give Teachers the Time They Need

Invest in Technology

One of the Commission’s concerns was that the practice of sending children home for teachers to have professional development days should be eliminated. “We will never have truly effective schools while teachers’ needs are met at the expense of students’ learning time.”²⁰ I address these two recommendations together because investing in technology is one way to allow schools to meet the learning needs of teachers and students simultaneously. If students can access electronic or online materials to facilitate their own learning, then students can still be in school and learning at the same time that instructors are in school, learning.

Harvard Business School professor Clayton Christensen predicts that by 2019 half of all high school course content will be delivered online. In the book, [DISRUPTING CLASS](#), Christensen and his coauthors talk about how the demands on schools and teachers have dramatically increased. Teachers and principals have been asked to do more, and to do everything differently, but the lengths of the school day and year have remained the same.

²⁰ *Id.* at 36.

Christensen notes that usually the efforts to improve the output of education production have focused on teachers. The use of technology to improve output has also focused on the “technology of teacher-instruction”:

What would you have the teacher do: Skip every other chapter? Talk twice as fast? If instead we focused on the “listener” and thought about connecting the student directly with information through digital electronic technology, would that necessarily degrade the quality of the learning experience? Or might that disintermediation, the shift of work to the student, actually enhance it?²¹

Christensen predicts that “user networks” of students and parents, and then teachers, will emerge with access to software tools so easy to use that the users will “pull” these technologies into classrooms.²² “These instructional tools will look more like tutorial products than courseware.”²³ The products will determine the shape of the organization, rather than the other way around.²⁴

The potential exists for disruptive innovations to help us get back to the model of the one room school house to achieve the goal of eliminating poverty. And the goal to leave no child left *bored*. As teachers use innovative tools to facilitate student-led, differentiated instruction, students may become lifelong learners, ready for successful work, education and citizenship.

Develop Local Action Plans to Transform Schools

Here is where choice fits into this discussion.

In 1994, the Commission explained, “School reform cannot work if it is imposed on the community top-down. Genuine, long-lasting reform grows from the grassroots.”²⁵ The Commission explained—and many others have argued for similar changes—“that larger school districts can offer families a wide array of alternative school calendars by encouraging individual schools to adopt distinctive approaches. . . . Districts of *any* size, with a sense of vision, boldness, and entrepreneurship can experiment with block scheduling, team teaching, longer days and years, and extending time with new distance learning technologies.”²⁶

²¹ Clayton M. Christensen et al., *DISRUPTING CLASS: HOW DISRUPTIVE INNOVATION WILL CHANGE THE WAY THE WORLD LEARNS* 116, note 18 (2008).

²² *Id.* at 134.

²³ *Id.*

²⁴ *Id.* at 201.

²⁵ *Prisoners of Time*, 38.

²⁶ *Id.*

For these action plans to work, however, real power must be delegated as far as possible. School districts must empower principals with authority over all the per-pupil funding for the students in those schools. If districts provide services to those schools, they can charge those individual schools. But, all decisions must be made as close as possible to the individual students. When a principal only has discretion over \$90 of the \$12,000 per pupil allocation of local, state and federal funding, that student is being disserved.²⁷ As well-intentioned as they may be, central offices cannot best determine how to allocate those resources to meet the needs of individual students. On the other hand, if principals have authority over funding, they can then delegate that authority to teams of teachers who work with students every day. They may decide that one class needs a teaching assistant full-time, while another class needs more computers. They may decide to save money previously spent on textbooks by [creating their own textbooks](#) and give their teachers pay increases.

This delegation is critically important in this age of accountability.

School leaders and teachers cannot truly be held accountable for results if the methods are dictated to them and resources are controlled by others.²⁸ To empower others, leaders “[f]ocus talent on results, not methods.”²⁹ “[Y]ou cannot hold people responsible for results if you supervise their methods. *You* then become responsible for results and rules replace human judgment, creativity and responsibility.”³⁰ Effective leaders “set up the *conditions of empowerment* and then . . . get out of people’s way, clear their path and become a source of help as requested.”³¹

Accountability is only meaningful if parents have choices about where to send their children based on the accountability measures of individual schools.

Share the Responsibility: Finger Pointing and Evasion Must End

In conclusion, the Commission offered three more recommendations for reform around time and learning to work:

- Government should focus on results, not red tape.

²⁷ See page 11 of http://www.flbcinc.org/ne/ne_pdf/PerPupilBudgetingCityCouncilHearing021508.pdf.

²⁸ Paul T. Hill, Lawrence C. Pierce, James W. Guthrie, *REINVENTING PUBLIC EDUCATION: HOW CONTRACTING CAN TRANSFORM AMERICA’S SCHOOLS* 67-68 (Univ. of Chicago Press 1997).

²⁹ Stephen Covey, *THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS* 114 (2004).

³⁰ *Id.* at 286.

³¹ *Id.* at 264.

- Higher education needs to get involved.
- Parents, students, and teachers must lead the way.³²

Mike Petrilli, of the Fordham Foundation, recently proposed how to help the government's focus change under the No Child Left Behind Act:

Right now, NCLB micromanages the formula and timelines by which schools are labeled and sanctioned, yet it allows states total discretion over the academic standards and tests used to judge schools (and kids) in the first place. These should be flipped. Provide incentives for states to sign up for rigorous nationwide (not federal) standards and tests. Make the results of this testing publicly available, sliced every which way by school and group. But then allow states and districts (or private entities, such as GreatSchools.net) to devise their own school labels and ratings - and let them decide what to do with schools that need help.³³

Post-secondary education institutions not only must be involved—they will want to be involved when they see how much money they could save and earn. Post-secondary institutions are best equipped to help middle and high school policymakers determine what students need to do to be prepared to succeed without taking remedial coursework. In Tennessee, for example, 60 percent of first time freshman in the State's public two or four year colleges have to take some remedial math or English. The state is paying for that instruction twice! When post-secondary institutions work with local school districts and state policymakers to blur the line between high school completion and post-secondary education—through dual credit and dual enrollment programs, for example—they will significantly increase the number of paying students they have in their courses.

If students, parents and teachers are given the opportunity and authority to lead the way, they will. Right now, students are told how long they must attend school, parents are told where their children may attend school, and teachers are told what resources are best for them and their students. Imagine if all of those situations were overturned: If students could choose or if teachers were empowered to construct classes around students' individual needs and learning styles; if all parents could choose from a variety of themed or magnet schools to meet their children's needs—using information gleaned from accountability measures; and if teachers could

³² *Prisoners of Time*, 40-41.

³³ Michael J. Petrilli, *PETRILLI: Nailing down specifics on 'No Child'*, Washington Times (Oct. 23, 2008), available at: <http://www.washingtontimes.com/news/2008/oct/23/nailing-down-specifics-on-nclb/> (last viewed Nov. 18, 2008).

determine what resources and schedules would be most beneficial for their students (and their own professional development).

CONCLUSION

A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good.³⁴

A stable and democratic society is impossible without widespread acceptance of some common set of values and without a minimum degree of literacy and knowledge on the part of citizens.”³⁵

The strongest message this Commission can send to the American people is that education must become a new national obsession, as powerful as sports and entertainment, if we are to avoid a spiral of economic and social decline.”³⁶

Thankfully, because I work for the government, I need not obsess about the billable hour. But because I am a lawyer, a parent and a citizen, I am obsessed with education.

Fourteen years have passed since this report was issued. Perhaps a hundred years have passed since the way your children spend their time in school has changed.

It's about time.

³⁴ Tennessee Rules of Professional Conduct, Preamble.

³⁵ MILTON FRIEDMAN, *THE ROLE OF GOVERNMENT IN EDUCATION*, available at: <http://www.schoolchoices.org/roo/fried1.htm> (last viewed Aug. 30, 2007) (first published in 1955).

³⁶ *Prisoners of Time*, 8.