

**STATUS
UPDATE****APPEALS: Appeals Has Taken Important Steps Toward Increasing Campus Taxpayers' Access to In-Person, Quality Appeals, But Additional Progress is Required****RESPONSIBLE OFFICIAL**

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TAXPAYER RIGHTS IMPACTED¹

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

In several Annual Reports to Congress, the National Taxpayer Advocate has discussed the importance of in-person conferences to both taxpayers and the IRS Office of Appeals (Appeals).² An in-person conference is sometimes essential to properly explaining and settling a controversy. Such is particularly true for cases involving factual or legal complexity, credibility of witnesses, or hazards of litigation settlements.³ Taxpayers whose cases are assigned to Appeals field offices have historically had access to in-person conferences.⁴ By contrast, Appeals campus cases, which typically involve low and middle income taxpayers, were made ineligible for such conferences in October 2016.⁵ This disparity in rights broke down along income lines, as, for example, for fiscal year (FY) 2018 the median adjusted gross income (AGI) of field taxpayers was 33 percent higher than that of campus taxpayers, while the average AGI of field taxpayers was 156 percent higher than that of campus taxpayers.⁶

To its credit, Appeals, taking to heart the urgings of the National Taxpayer Advocate and other stakeholders, has recently changed its policy and reinstated the right of campus taxpayers to transfer their cases to field offices in order to accommodate an in-person conference.⁷ Appeals has also indicated that it will continue to pursue additional strategies aimed at ensuring that taxpayers' requests

1 See Taxpayer Bill of Rights (TBOR), <http://www.taxpayeradvocate.irs.gov/taxpayer-rights>. The rights contained in the TBOR are also codified in the Internal Revenue Code. See IRC § 7803(a)(3).

2 National Taxpayer Advocate 2017 Annual Report to Congress 195-202; National Taxpayer Advocate 2016 Annual Report to Congress 206-210; National Taxpayer Advocate 2014 Annual Report to Congress 46-54; National Taxpayer Advocate 2014 Annual Report to Congress 311-314.

3 Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016), 2016 TNT 197-16. See also Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16; *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10 (May 10, 2017).

4 IRS, Interim Guidance Memorandum (IGM) AP-08-1017-0017, Appeals Conference Procedures, (Oct. 13, 2017).

5 Effective October 1, 2016, Internal Revenue Manual (IRM) 8.6.1.2.2, *Transfers for the Convenience of Taxpayers*, was deleted, eliminating the right of taxpayers to transfer cases out of campuses.

6 Appeals response to TAS information request (Oct. 26, 2018). As used here, the term "average" is synonymous with the term "mean."

7 IRS, IRM AP-08-1118-0013, *Appeals Conference Procedures* (Nov. 30, 2018).

for in-person conferences are accommodated, regardless of whether the assigned Appeals Technical Employee (ATE) is located in a campus or in the field.⁸

The National Taxpayer Advocate applauds Appeals for undertaking this significant step with respect to in-person conferences. This progress, however, does not fully address the larger systemic problems attributable to the reality that the cases of low and middle income taxpayers are disproportionately channeled to campus locations. Although somewhat mitigated by Appeals' new transfer policy, this approach continues to limit geographic access to in-person conferences and causes cases to be assigned to less experienced, lower-graded ATEs, who generally lack firsthand familiarity with the local issues and community circumstances that often are at the heart of taxpayers' cases.⁹ Likely unintentionally, Appeals is still systematically perpetuating disproportionate hardships for low and middle income taxpayers.

Accordingly, the National Taxpayer Advocate remains concerned that:

- Appeals has consolidated cases involving smaller dollars and low and middle income taxpayers in campuses;
- Appeals' reliance on campuses presents physical barriers to in-person conferences and makes it difficult for campus taxpayers to have their cases heard by higher-graded, locally based ATEs; and
- Due process issues arise from the disproportionate channeling of low and middle income taxpayers to Appeals campus locations.

ANALYSIS OF PROBLEM

Appeals Has Consolidated Cases Involving Smaller Dollars and Low and Middle Income Taxpayers in Campuses

Beginning in the mid-1990s and then more actively in FY 2004, Appeals reallocated some ATEs out of field offices and into campuses.¹⁰ This incremental shift cannot be precisely tracked, as Appeals did not maintain separate staffing data prior to FY 2012, by which time 29 percent of Appeals personnel had been assigned to campuses.¹¹ This proportion has remained consistent ever since, with campuses containing 30 percent of Appeals personnel in FY 2018.¹² The shift to campuses can be more clearly glimpsed by looking to field offices, which shrank from 93 in FY 2003 to 67 in FY 2018.¹³ The end result is that, as of FY 2017, 53 percent of Appeals cases are assigned to only six campus locations.¹⁴

⁸ IRS, IGM AP-08-1118-0013, *Appeals Conference Procedures* (Nov. 30, 2018).

⁹ In this context, "experienced" refers to familiarity with the broad range of issues potentially faced by taxpayers and the contexts in which these cases are resolved.

¹⁰ IRS response to TAS information request (May 7, 2018).

¹¹ *Id.*

¹² IRS response to TAS information request (Oct. 26, 2018).

¹³ *Id.*

¹⁴ *Id.*

In conversations with TAS, Appeals' primary justification for this shift and the reluctance to transfer cases out of campuses has been the need to accommodate decreased funding.¹⁵ Nevertheless, Appeals' funding rose steadily until FY 2011, when it peaked at \$250 million.¹⁶ By FY 2012, however, when budget decreases began, Appeals had already largely implemented its personnel shift to the campuses.¹⁷

The criteria utilized by Appeals for case assignment cause most small dollar cases, along with low and middle income taxpayers, to be allocated to the campuses. Although the criteria for assigning cases to campus or field locations are treated by the IRS as "official use only," and are therefore not publishable, the data make clear that higher-dollar cases are channeled out of the campuses and to the field.¹⁸ This approach likewise has the impact of providing wealthier taxpayers with direct access to field offices, but initially assigning less affluent taxpayers to campuses. This relationship is illustrated in Figure 1.S1.1:

FIGURE 1.S1.1, Average and Median Adjusted Gross Income Among Appeals Field and Campus Individual Taxpayers, FY 2018¹⁹

Measure	Field	Campus	Percentage Difference – Field Versus Campus
Average	\$294,000	\$115,000	+156%
Median	\$84,000	\$63,000	+33%

Appeals' Reliance on Campuses Presents Physical Barriers to In-Person Conferences and Makes It Difficult for Campus Taxpayers to Have Their Cases Heard by Higher-Graded, Locally Based Appeals Technical Employees

Currently, Appeals has only six campus locations spread throughout the United States: Philadelphia, Pennsylvania; Brookhaven, New York; Fresno, California; Ogden, Utah; Memphis, Tennessee; and Florence, Kentucky.²⁰ Fifty-three percent of Appeals cases are assigned to these campuses.²¹ By contrast, the remaining 47 percent are spread among Appeals' 67 field offices.²² The geographic dispersal of the campuses and field offices is shown in Figure 1.S1.2:

15 Conference call between TAS and Appeals (May 31, 2016). In its response to TAS's information request dated May 7, 2018, Appeals elaborates, "Following passage of the IRS Restructuring and Reform Act of 1998 and the creation of the Collection Due Process workstream, Appeals expanded campus operations to effectively and efficiently manage the workload generated by Compliance campuses." Appeals also explains that there are many reasons for consolidating cases in the campuses, including case complexity, ease case routing, and reduced cycle time. Appeals response to TAS fact check (Nov. 21, 2018).

16 IRS response to TAS information request (May 7, 2018).

17 *Id.*

18 IRS response to TAS information request (Oct. 9, 2018). Appeals clarifies that it does not intentionally assign cases based on taxpayers' adjusted gross incomes (AGI), and instead routes cases based on prior assignments by Compliance or based on the type of case (e.g., Innocent Spouse, Penalty, or Collection Due Process cases). IRS response to TAS fact check (Nov. 21, 2018).

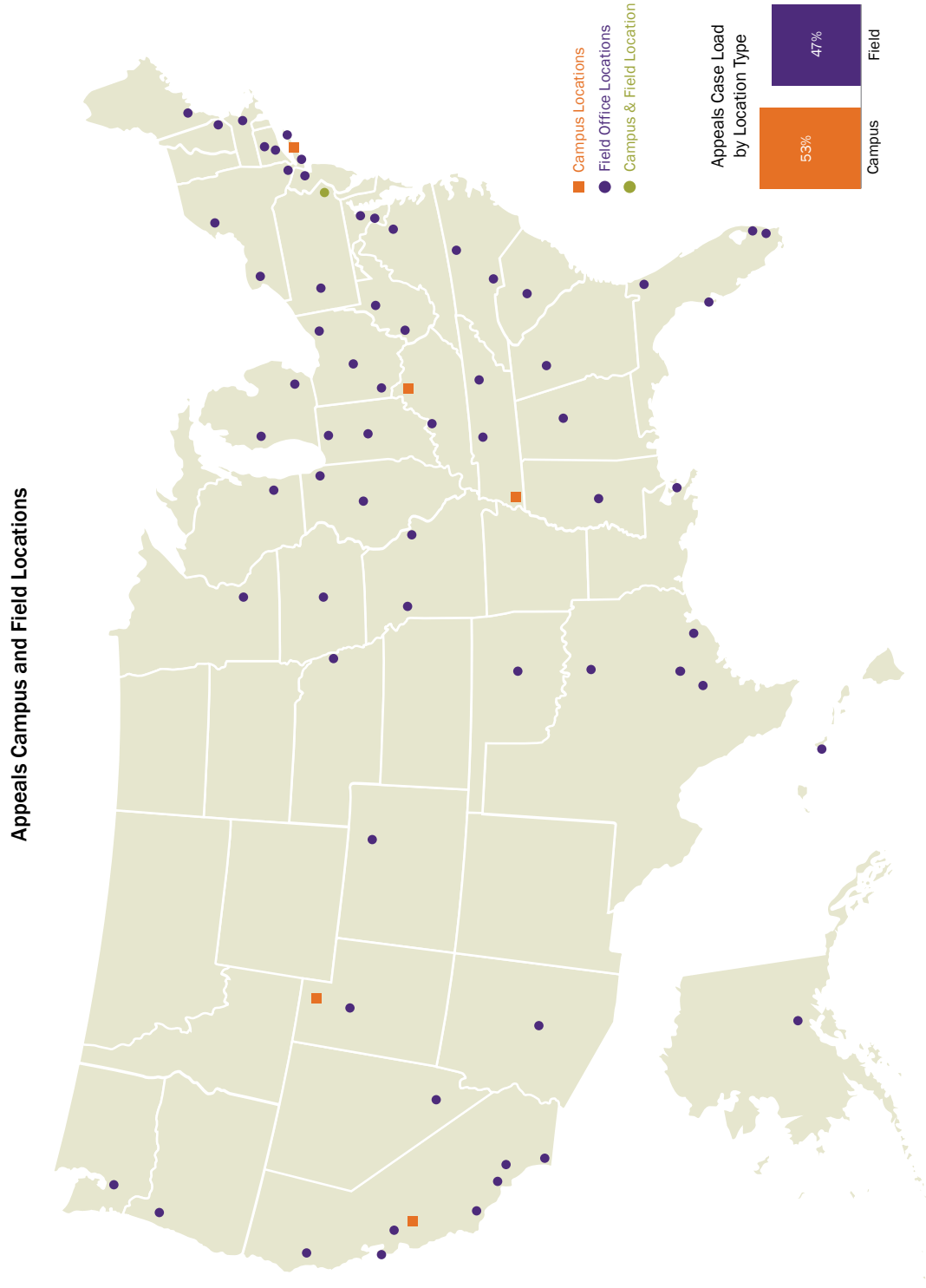
19 IRS response to TAS information request (Oct. 26, 2018). The percentage difference from average campus AGI to average field AGI is calculated by subtracting average campus AGI from average field AGI, then dividing the difference by the average campus AGI. Note that the median AGI calculation helps to adjust for outliers in the dataset. According to Appeals, this data was provided by IRS Research, Applied Analytics & Statistics (RAAS), which drew the information from the Compliance Data Warehouse (CDW). IRS response to TAS fact check (Nov. 21, 2018).

20 IRS response to TAS information request (May 7, 2018).

21 IRS response to TAS information request (Oct. 26, 2018).

22 *Id.*

FIGURE 1.S1.2, Appeals Campus and Field Locations²³



23 This map is developed based on information provided in the IRS response to TAS information request (May 7, 2018).

Thanks to Appeals' reinstatement of campus taxpayers' right to seek a case transfer to facilitate an in-person conference, taxpayers are no longer inextricably bound to campuses. Nevertheless, Appeals' campus-centric approach can make this right difficult to exercise. Appeals states that it will use its best efforts to schedule an in-person conference at a location that is reasonably convenient for taxpayers and Appeals. However, given the geographic scarcity of field offices, which are the primary venues for in-person conferences, and the fact that twelve states and Puerto Rico lack a field office altogether, taxpayers wishing for an in-person conference may well be required to travel substantial distances and incur significant cost in order to attend an in-person conference.²⁴

The circumstance that 53 percent of all Appeals cases are decided out of only six widely scattered offices is problematic because Appeals best serves taxpayers when it has a broad and diverse geographic footprint.²⁵ This presence allows ATEs to negotiate case resolutions based on an understanding of the local economic circumstances and prevailing community issues faced by taxpayers. Similarly, taxpayers are more likely to develop a rapport with, and respect the decisions of, ATEs with whom they share common experiences.²⁶ An Appeals function that is embedded within communities provides a more effective environment for establishing trust and achieving case resolutions.²⁷ This optimal environment, however, is systematically denied to campus taxpayers unless they opt for an in-person conference, which they may or may not need to resolve their cases. Additionally, given Appeals' current staffing model, Appeals may lack any personnel whatsoever located within a taxpayer's vicinity.

Appeals could expand its geographic footprint and minimize its reliance on campuses by using attrition from the campuses to increase staffing in local field offices with ATEs of various grades and designations such that the office could cover cases ranging from the Earned Income Tax Credit (EITC) to itemized deductions to Schedule C controversies.²⁸ Likewise, Appeals could enhance its case assignment flexibility by re-designating technically or factually complex case categories, such as those involving EITC claims, such that they could be assigned to higher-graded ATEs where appropriate.²⁹ These steps would not only expand Appeals' geographic footprint and facilitate the accessibility of in-person conferences, but would lay the foundation for a structure that more effectively and equitably serves both campus and field taxpayers.

24 IRS response to TAS fact check (Nov. 21, 2018).

25 Although 67 field offices would appear ample in comparison with only six campus locations, that number is insufficient to cover the entirety of the U.S., its territories, and the District of Columbia. Currently, 12 states and Puerto Rico lack any Appeals presence offering in-person conferences. IRS response to TAS fact check (Nov. 21, 2018).

26 National Taxpayer Advocate Fiscal Year (FY) 2019 Objectives Report to Congress 138.

27 *Id.*

28 Appeals explains its reluctance to allow case transfers out of the campuses because Appeals concentrates specialized knowledge in particular campuses and because Appeals Technical Employees (ATEs) in campuses are typically lower graded than those in the field and therefore handle less complex cases. Andrew Velarde, *IRS Appeals Confident That In-Person Campus Conferences Will Return*, 2018 TXN 21-63 (May 21, 2018).

29 This step was recommended by the National Taxpayer Advocate to the Chief of Appeals as part of a May 31, 2016, meeting. In that meeting, the then-Chief of Appeals expressed the view that Earned Income Tax Credit (EITC) cases were less complex and therefore best suited for lower-graded ATEs. Given the often challenging factual scenarios and legal issues involved in these cases, however, this perspective should be reevaluated.

Due Process Issues Arise From the Disproportionate Channeling of Low and Middle Income Taxpayers to Appeals Campus Locations

The way in which cases are assigned to campus locations, combined with Appeals' current staffing model, limits the practical ability of low and middle income taxpayers to avail themselves of an in-person conference, while making that right more easily available to most corporations and wealthy taxpayers. Similarly, low and middle income taxpayers face disproportionate difficulty in obtaining review from an ATE who is familiar with the taxpayers' local issues and economic circumstances. Further, because large and complex cases generally are assigned to the field, senior ATEs have remained in field offices. Ninety-four percent of ATEs in field offices are Grade 13 or above, whereas all ATEs in campuses are Grade 12 or below.³⁰ Thus, taxpayers whose cases are channeled to the campuses are initially denied access to the most experienced and highly graded ATEs.³¹

Appeals' reinstatement of the right to transfer cases from campuses to the field provides a path for mitigating the most extreme aspects of differential treatment between low and middle income taxpayers and wealthier taxpayers. Appeals deserves substantial credit for taking steps to partially address this disparity. However, the campus-centric model itself obligates taxpayers initially assigned to campuses to take the additional step of seeking case transfers and, in many cases, requires them to incur travel costs and delays, to which wealthier taxpayers are not subject or are better situated to address. Given the importance of in-person conferences, geographic familiarity, and quality case reviews, Appeals' current design and policy continues to disadvantage the group of taxpayers who can least afford litigation as an alternative to an undesirable Appeals outcome. This situation is problematic because, as explained by the Supreme Court in *Goldberg v. Kelly*, "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."³²

Regardless of resource constraints or administrative efficiency, such a disparity, albeit unintentionally, presents due process issues that undermine the trust on which the voluntary tax system is based. Appeals has taken a commendable first step toward addressing deeply embedded inequities affecting taxpayers' *right to appeal an IRS decision in an independent forum*.³³ Appeals should continue this progress by expanding its geographic footprint and removing the systemic barriers that make it difficult for low and middle income taxpayers to have the same access to a quality appeal as wealthier taxpayers.

30 IRS response to TAS information request (Oct. 26, 2018).

31 This differential matters for practical as well as philosophical reasons because the relatively smaller cases typically assigned to campus locations are not necessarily simpler or easier to resolve than cases involving larger amounts in controversy. For example, TAS experience indicates that earned income tax credit (EITC) cases and those relating to innocent spouse relief, while often not monetarily large, can be extremely factually and legally complex. See, e.g., National Taxpayer Advocate 2015 Annual Report to Congress 240-247.

32 *Goldberg v. Kelly*, 397 U.S. 254, 268-269.

33 IRC § 7803(a)(3)(E).

CONCLUSION

Appeals' reinstatement of the right to transfer campus cases to the field in order to accommodate an in-person conference is a very positive step and removes the worst of the disparity between low and middle income taxpayers on the one hand and wealthier taxpayers on the other hand. Nevertheless, taxpayers whose cases are channeled to the campuses still must apply for a case transfer and, because of Appeals' current staffing model, often will find themselves needing to incur significant cost and other travel-related hardships in order to obtain the same quality appeal to which wealthier taxpayers have more ready access. Appeals has taken an important first step in remedying this disparity but progress remains to be made toward ensuring that all taxpayers have access to a quality appeal.³⁴

As a result, the National Taxpayer Advocate continues to encourage Appeals to utilize attrition and other strategies as a means of staffing local Appeals offices so as to have at least one permanent Appeals office in every state, the District of Columbia, and Puerto Rico. Additionally, in conjunction with TAS, Appeals should continue exploring ways of adapting facilities or implementing other approaches to accommodate in-person conferences for taxpayers who prefer to have their cases remain in a campus location.

34 One aspect of a quality appeal is that a taxpayer's appeals conference should be attended by IRS Counsel or Compliance only with the taxpayer's consent. TAS recently learned, however, that some Appeals managers are seeking out cases that lend themselves to Compliance participation as a means of actively contributing to Appeals' future vision. IRS Appeals, *FY19 Frontline Manager Commitments – Exam Appeals* (on file with TAS). As previously pointed out by the National Taxpayer Advocate, inclusion of either Counsel or Compliance against taxpayers' wishes jeopardizes Appeals' independence and may lead to increased litigation and decreased tax compliance. Accordingly, such performance goals on the part of team managers, which presumably are encouraged by Appeals' leadership, can do significant harm to both Appeals and taxpayers. These goals are also precipitous, as the related pilot program designed to evaluate this initiative has not yet been completed. Nina E. Olson, *When Evaluating its Pilot Program on the Participation of Counsel and Compliance in Conferences, Appeals Should be Transparent and Should Consider Both Objective and Subjective Data*, NTA BLOG (Nov. 7, 2018) [https://taxpayeradvocate.irs.gov/news/nta-blog-appeals-should-be-transparent?category=Tax News](https://taxpayeradvocate.irs.gov/news/nta-blog-appeals-should-be-transparent?category=Tax+News); National Taxpayer Advocate 2017 Annual Report to Congress 203-210.