UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIKEISHA BLACKMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 97-1629 (PLF)**
	)	**Consolidated with**
DISTRICT OF COLUMBIA, et al.,	)	**Civil Action No. 97-2402 (PLF)**
	)	
Defendants.	)	
_____	)	

REPORT OF THE MONITOR
FOR THE 2010-2011 SCHOOL YEAR

Submitted by:

Clarence J. Sundram
Court Monitor

Filed

December 23, 2011

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I. INTRODUCTION

The Blackman/Jones Court Monitor submits this monitoring report to the parties and to the Court pursuant to the provisions of the Consent Decree entered on August 24, 2006 (Docket #1856). This report covers the 2010-11 SY. As the previous report to the Court submitted by the Blackman Jones Evaluation Team (Docket #2243, filed December 10, 2010) extended into the first half of the 2010-11 SY, this report focuses primarily on performance between January 1 and June 30, 2011, especially in reviewing case closure practices.

As recognized in the previous report, both the Office of the State Superintendent ("OSSE") and the District's major Local Educational Agency ("LEA"), the District of Columbia Public Schools ("DCPS"), have made major strides in transforming the system for management of special education due process complaints, issuing timely Hearing Officer Decisions ("HODs") or Settlement Agreements ("SAs", collectively "HOD/SAs") resolving such complaints, and managing the implementation of the obligations imposed by HOD/SAs. Consequently, unlike previous years when much of the effort of the Evaluation Team focused on elementary issues such as accurately identifying the schools which students attended, and ensuring that the data systems were correctly reporting the status of cases, the Monitor has been able to focus oversight on the substantive implementation of HOD/SAs. In this area as well, there has been significant progress in the management and tracking of obligations imposed by HOD/SAs, which is reflected in the vastly improved level of performance measured against compliance standards identified in the Consent Decree.

Much of the work of implementing and closing HOD/SA cases in the 2010-11 SY occurred against the backdrop of an ongoing ADR process which was invoked by the Plaintiffs in September 2009 pursuant to paragraph 113 of the Consent Decree. That process eventually resulted in the dismissal of the *Blackman* portion of this case upon a joint motion of the parties approved by an order of the Court entered on July 5, 2011 (Docket #2259). Regarding *Jones*, the parties were unable to reach an agreement and the ADR specialist, Judge Richard Levie (Ret.), filed his report with the Court on July 11, 2011 (Docket #2260). Subsequently, with further mediation by the Monitor, the parties reached an agreement to resolve their disagreements regarding compliance with the requirements of the *Jones* portion of the Consent Decree (Docket

#2268, filed August 18, 2011). On November 21, 2011, the Court approved that agreement (Docket #2273).

The lengthy dispute resolution process which involved, in part, practices regarding the counting of cases as timely implemented in order to meet the performance benchmarks contained in the Consent Decree, created a state of uncertainty about the application of these counting rules both by the Defendants in the first instance, and by the Court Monitor in the year-end report, and in part contributed to a delay in preparing the year-end report. The appropriateness of these counting rules was first questioned by the Plaintiffs in the ADR process, and later by the Evaluation Team at a status conference on May 21, 2010. In its report on the 2009-2010 SY, the Evaluation Team identified seven categories of cases counted as timely implemented by the Defendants where it disagreed that cases in these categories were appropriately counted. Defendants chose not to challenge these conclusions of the Evaluation Team although given an opportunity by the Court to do so (Docket # 2244). Nevertheless, they pressed the correctness of their position in the ADR process before Judge Levie who determined in his report to the Court:

> . . . The conclusion reached here is that Defendants' counting methodology be rejected. The practices noted by the Evaluation Team do not comport with the language or intent of the Decree nor are they consistent with what presumably are the goals of the District to serve this particular body of students with special needs. (Docket # 2260, p. 9)

Notwithstanding their expressed disagreement in the course of the ADR process with some of the conclusions reached by the Evaluation Team in its previous report, the Defendants informed Judge Levie that:

> The practice of closing Settlement Agreements pursuant to a 45-day clause was suspended in December 2010. As of April, no new Settlement Agreements have been closed pursuant to a 45-day clause. In the event of parental inaction, Settlement Agreements that authorized the receipt of an [IEE] are closed in accordance with the administrative closure protocol of 2006. (*Id*. At 10)

This brief history is recounted here as background for the Monitor's review of case closure practices during the subsequent period from January 1-June 30, 2011 which will be described later in this report.

As the Evaluation Team has previously noted:

> The requirements of the Consent Decree are deeply rooted in fundamental mandates of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*., including:

> requirements for the timely development and actual delivery of annual, tailored Individualized Education Programs ("IEPs") with appropriate consideration of evaluations and each student's level of academic performance and specific strengths and needs;[1] provision of timely evaluations and reevaluations;[2] establishment and operation of due process complaint and hearing procedures that adhere to specific federal requirements;[3] and timely implementation of binding due process hearing decisions and agreements. A host of exacting federal law timeline, procedural, and substantive requirements surround these obligations. Due process complaints in the District of Columbia typically raise basic legal compliance issues under IDEA with respect to evaluations and the development of appropriate IEPs, claims of the District's failure to implement earlier HOD/SAs, and claims of the denial of a Free and Appropriate Public Education ("FAPE") associated with the above legal breaches or schools' failure to implement required IEP services. The District's capacity to achieve and durably sustain compliance with the Consent Decree's central requirements and their parallel requirements under IDEA is tied to the District's capacity to implement management accountability changes, functional data tracking systems, and substantive changes in schools' delivery of special education services.
> (Report of the Evaluation Team for the 2008/09 School Year, Docket #2184, filed September 25, 2009, pp. 6-7 ["Evaluation Team 08/09 Report"]).

A. Evidentiary Foundation for the Findings in this Report.

The Monitor relied on a diverse array of information sources and data collection methods in reaching the findings contained in this report. These included:

1. Review of samples of student case files selected at random, and examination of the records contained in the Blackman/Jones database used to manage the implementation of HOD/SAs, and the records in SEDS (also known as EasyIEP).

2. Interviews with compliance case managers, their supervisors, DCPS case reviewers, students' attorneys and meetings with class counsel and members of the special education roundtable.

[1] Individualized educational programs include provisions for specialized instruction, related services (by counselors, speech and language therapists, occupational therapists, etc. as applicable), supplementary aids and services, accommodations, program modifications as needed, positive behavior supports, and transition services to address the post-secondary needs and goals for students 16 years or older with respect to education, training, employment, and independent living skills. The IEP must also address the student's appropriate educational placement and the extent to which the student will be served inside or outside of the general education classroom. 20 U.S.C. § 1414(d).

[2] 20 U.S.C. § 1414 (a)-(c).

[3] 20 U.S.C. § 1415.

3. Ongoing review and analysis of the school district's databases developed to track HOD/SA implementation, related services at charter and nonpublic schools, and compensatory education services.

4. Regular ongoing meetings, phone and in-person interviews, and email exchanges with a broad range of DCPS and the OSSE staff[4] throughout the school year relating to a wide range of issues touching their management of operations and initiatives in the realm of special education and the Consent Decree.

5. Communications with nonpublic schools' representatives.

6. Meetings with Defendants' staff and consultants and participation in web-based conferences with respect to the operation and issues presented by currently functioning or planned data systems and programs.

7. Ongoing review of a host of reports and memoranda generated by Defendants' staff relating to special education, due process cases, related services delivery, data accuracy and data systems.

8. The annual enrollment audit report and supporting data tables.

B. Demographics

There were a total of 74,510 students enrolled in all LEAs for the 2010/11 SY, including 8,972 students with IEPs (12.04%).[5] Of these, 45,234 (60.7%) attended DCPS schools, including 6,022 students with IEPs or 67.12% of all students with disabilities enrolled by LEAs. Charter schools enrolled 29,276 (39.29%) of the total students, of which 2,950 students had IEPs or 32.88% of all students with disabilities enrolled by LEAs. In addition, non-public schools had a residence verified enrollment of 1,925 students with IEPs. These overall numbers are generally in line with the patterns reported the last year except that the number of students with IEPs in nonpublic schools has declined from 2,336 students in the previous SY to 1,925, a decrease of 17.59%.

Also consistent with the Evaluation Team reports in the past two years, charter schools continue to enroll a smaller proportion of students with IEPs at 10.07% of their enrollments

[4] Meetings included, among others, DCPS and the OSSE special education staff, the Deputy Chancellor for Special Education and a large range of his staff, the State Superintendent and various members of OSSE staff with responsibility for special education, school based staff, and D.C. information technology staff and consultants.

[5] These data come from the Enrollment Audit for District of Columbia Public Schools and Public Charter Schools, (TCBA, Independent Accountant's Report, December 20, 2010).

compared to the 13.31% at the DCPS schools. Moreover, while 1,944 (32.28%) of DCPS students with IEPs are categorized at Level 4 requiring the most intensive level of services, an increase of 4% over the last school year, the 564 students needing this level of service at charter schools comprise 19.11% of their students with IEPs, a slight decrease. The vast majority of these students at charter schools attend two schools.

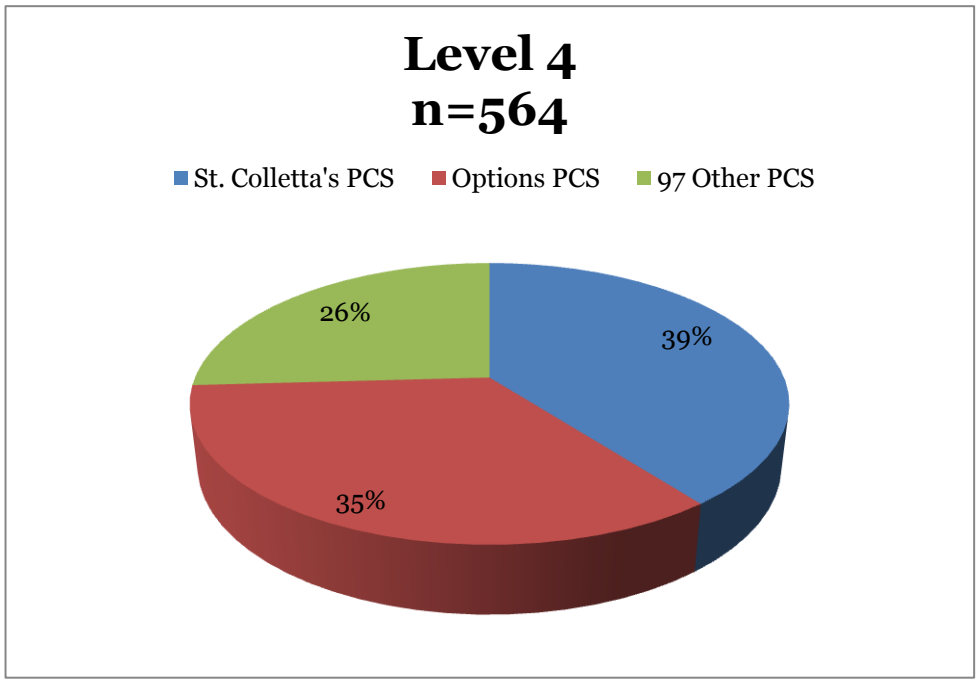

Fig. 1 Distribution of Level 4 Students at Charter Schools

C. Due Process Complaints and HODs

After a continuing downward trend in the number of due process complaints ("DPCs") that began in the second half of SY 08-09 year, and continued into SY 09-10, the number of DPCs increased from 1,167 in the last school year to 1,223 in SY 10-11, according to data provided by the SHO.[6]

[6] However, for the same period of time, DCPS reported that the number of complaints was substantially higher, at 1,561, a difference of 338 complaints. While the OSSE has provided some theories of why the discrepancies might exist, they do not conclusively explain them. The OSSE is conducting a further analysis of the reasons for the varying number of complaints reported by DCPS and the SHO. Some of that difference may be accounted for by the differing reporting periods used by DCPS and the SHO. The initial analysis identified a discrepancy of 185 due process complaints over the last two years. A partial explanation for the discrepancy may lie in the a practice of DCPS counting complaints involving multiple defendants as separate complaints in the Blackman Jones Database ("BJDB") used for the purpose of managing and implementation, while the SHO treats such complaints as a single event. Similarly, DCPS BJDB counts an amended complaint as a separate event, while in the SHO system they are a single event. All of the data in this report has been provided by the Defendants. The Monitor has not independently audited their accuracy. The OSSE has stated an intent to perform monthly reconciliation of the complaints in the two

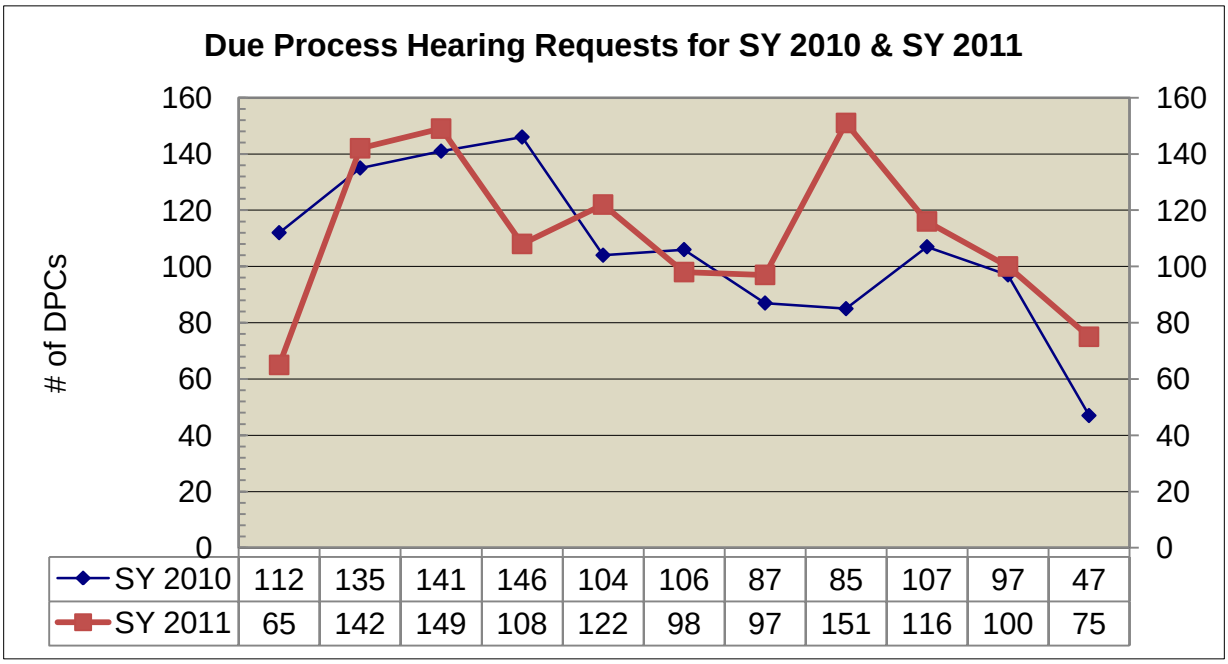

Fig. 2 Monthly Filing of due process complaints August-June

These DPCs resulted in 887 HOD/SAs, apparently continuing a downward trend from the 938 HOD/SAs in the 2009-10 SY, and 1,199 in the 2008-09 SY. However, during the period July 22, 2010 to July 22, 2011, the school year covered by this report, there were 243 DPCs that did not result in an HOD or SA. A member of the private bar filed a state complaint with the OSSE pursuant to IDEA (34 CFR 300.151-153) alleging that DCPS was violating provisions of the IDEA by failing to execute legally binding agreements following the resolution of a dispute at a resolution meeting. More specifically, the allegation was

> that DCPS attempted to resolve due process complaints through an offer of compensatory education or funding of an independent educational evaluation, but refused to execute written agreements that contained these offers. The attorneys indicated that although they would indicate that they would proceed to hearing without a written agreement, DCPS would not sign the resolution disposition form to indicate that no agreement could be reached in the resolution period. At hearing, DCPS would argue that their offer had rendered the complaint moot and the hearing officer would dismiss the complaint.[7]

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data systems going forward.

[7] OSSE Letter of Decision, State Complaint 011-003, issued November 4, 2011, p. 3.

In response to this complaint, the OSSE reviewed a sample of 50 such DPCs, and interviewed seven attorneys who had DPCs that did not result in an HOD/Settlement Agreement. It found 11 files containing documentation that an agreement was reached but not reduced to a written agreement. Five of the 11 files (10% of the sample) included orders of withdrawal indicating that the complaint was resolved or agreement was reached at the resolution meeting, but there was no written agreement available in the file. Four other files (8%) included documentation in the form of meeting notes or withdrawal orders indicating that DCPS offered substantive relief in the form of a prior written notice of placement, authorization for independent evaluation, invitation to a meeting, or determination of eligibility, but did not make an offer of written settlement. The files in these cases did not indicate whether the offer was acceptable to the parent and therefore the OSSE could not make a determination whether a written agreement would have been required. The OSSE concluded that DCPS was out of compliance with federal law. "If a resolution to the dispute is reached at this meeting, the parties must execute a legally binding agreement that is signed by both the parent and a representative of the agency who has the authority to bind the agency and is enforceable in any State court of competent jurisdiction or in a District Court of the United States. (34 CFR §300.510 (d))"[8]

This OSSE investigation suggests that the actual number of HOD/SAs that should have been entered during the 2010/11 SY should have been higher than the number reported. Such SAs, if properly entered and counted, would be subject to the *Jones* requirements for timely implementation. The additional cases would be added to the denominator upon which the calculation of timeliness is done. The practice of settling cases without a written and enforceable agreement also affects the parent's entitlement to attorneys' fees, which in turn probably affects the availability of attorneys to represent students in due process complaints.

Defendants reported on August 8, 2011 that they had met the Consent Decree standard of 90% timeliness in the implementation of HOD/SAs over the preceding 12 months (Consent Decree, ¶ 42 (d)). The primary focus of this report in Section II is on the Defendants' case closure process and on the decisions made to count cases as timely implemented, in light of the Evaluation Team's findings in the last report that there were systemic practices in closing cases and counting them as timely implemented with which the Evaluation Team disagreed. This

[8] *Id.* P. 4.

review is intended in part to ascertain whether such practices have ended, and whether all of the cases counted as timely implemented have been properly included in the calculation.

In Section III, the Monitor examines and reports upon the delivery of related services and evaluations, an issue which frequently prompts the filing of due process complaints and which is often addressed by the provisions of HOD/SAs which resolve such complaints. Section IV of the Report addresses miscellaneous issues including the Defendants' plans for an accuracy audit of its data management systems, as required by the Consent Decree (Consent Decree, ¶ 60-65); follow-up on issues regarding attorneys fees; and the closure of Rock Creek Academy, a nonpublic school, during the school year.

II. VERIFICATION OF TIMELY IMPLEMENTATION OF HOD/SAS AND REPORTING; REVIEW OF ISSUES RAISED BY DEFENDANTS' METHODS OF CLOSURE

A. Overview

The goal of the Blackman/Jones Consent Decree is, in part, for Defendants to achieve and maintain "timely implementation of HODs and SAs in all instances . . . ." (Consent Decree, § I. C, Docket #1856). The Consent Decree establishes as a standard of compliance for the *Jones* case that by June 30, 2010 "(i) no case in the subsequent backlog will be more than 90 days overdue and (ii) 90% of the HODs/SAs issued on or after June 1, 2009 will be timely implemented (i.e., not "overdue")." (*Id.* ¶ 42 (d)).

The Defendants' August 8, 2011 report identifies 17 cases as being overdue more than 90 days. The Consent Decree recognizes that some HOD/SAs cannot be implemented because DCPS is waiting for the parent to provide a necessary precursor to implementation, such as an independent evaluation which must be completed before an IEP meeting can be held (Consent Decree, §III (7) (a)). Such cases are defined as "outstanding" and are removed from the count in calculating the rate of timely implementation (*Id.* ¶ 46), provided Defendants have demonstrated diligent efforts to secure action on the part of the parent/guardian (*Id.* ¶ 52). The Consent Decree also requires the Defendants to adopt a protocol for the closing of HOD/SAs and to reach an agreement with the Plaintiffs on the content of the protocol (*Id.* ¶ 44). Such a protocol was adopted in August 2006 after intensive negotiation of counsel (Protocols for Closing Hearing Officers Decisions (HOD's) and Settlement agreements (SAs), hereinafter "Protocols"). These

Protocols established a process for dealing with cases that remain outstanding more than 120 days and for administratively closing them.[9]

In its last report, the Evaluation Team described how the Defendants had made a number of significant changes to the case closing protocols:

> [D]uring the past school year, in November 2009, DCPS also unilaterally, without consultation or notice, made several significant changes in its practices for closing cases. Some of these changes are inconsistent with the Protocols negotiated with the Plaintiffs pursuant to ¶ 44 of the Consent Decree, which were described earlier. These changes have substantially shortened the period of time for the parent/attorney to obtain the independent evaluation from 120 days typically to 45 calendar days. While parents and their counsel often welcome the opportunity to have access to independent assessments and services, for a host of reasons, they often find that they are unable to ensure completed independent assessments in this truncated 45-day period. In this connection, the Evaluation Team notes that DCPS often has not been able itself to complete assessments for many months on end and now is apparently not willing to undertake these obligations.[10] Also typically, no offer is made by DCPS to undertake the precursor

[9] The Protocols include, among other provisions, ones which govern how to handle outstanding Independent Educational Evaluations, as quoted below:

Independent Educational Evaluations.

A. Once Independent Educational Evaluations (IEE), ordered through a Hearing Officer's Determination (HOD) or Settlement agreement (SA), have been pending for more than 60 calendar days, the compliance specialist will send a letter to the parent's representative, with a copy to the parent, inquiring as to the status of the evaluation(s) and notifying the representative that if the evaluations have not been received within the 120 calendar day timeline, the case will be administratively closed.

B. Once such independent evaluations have been outstanding for more than 120 days, DCPS will exercise due diligence, as defined in Section I.A. to inform the parents and their representatives:

1. The case has been administratively closed;

2. DCPS is willing to complete assessments within 60 calendar days if the parent now elects to have DCPS conduct the assessments;

3. If IEE become available, to whom they should be sent, since the case is now administratively closed.

C. Once the evaluations are available (either DCPS evaluations pursuant to #2 above or the IEE), the case will be reopened and the issues will be reactivated.

The Protocols also contain specific provisions for how to provide notice to parents/guardians that are tailored to address circumstances where families have moved or where written notices are returned as undeliverable.

[10] The District of Columbia, indeed, authorizes for its own LEAs one of the longest periods of time in the nation for the assessment and initial evaluation of students for special eligibility process (120 days). *See* D.C. Code § 38-2561.02. (The typical time frame authorized by other states pursuant to IDEA's provisions is 60 days. *See* 34 C.F.R. 300.301)

> task or to offer meaningful assistance to the parent in completing the task (e.g., the assessment) as is required in the original Protocols. When there are obligations placed upon DCPS, there are frequently no deadlines for which DCPS can be held accountable. Rather, once the deadline set in the Settlement Agreement for the completion of the precursor task by the parent/attorney expires, the case closure process begins. The effect of this new process adopted by DCPS has been to substantially shift the workload and onus of responsibility for obtaining services from itself to the parent/attorney. Yet, as will be discussed later, counsel for parents in these circumstances often feel obligated to agree to the form settlements, in order to move the student's case and services forward, even if they are cognizant that the timelines may well fall outside their ability to meet for a variety of reasons.
>
> The cases closed under this new process are finally closed substantively, not merely administratively, rather than being subject to being re-opened as provided in the Protocols (Protocols, II.B.4). Cases closed through this process are reported as timely implemented – as are the actions such as assessments or meetings required by the respective HOD/SAs, even though these actions or events have not, in fact, transpired. As a result of these unilateral changes, the administrative closure protocol adopted pursuant to the Consent Decree has been rendered substantially irrelevant, and the number of administrative closures has declined sharply to zero from earlier years. Instead, closures of cases based on the asserted failure of the parent/attorney to complete a precursor task are now reported as substantive "timely implemented" and are not removed from the data calculation as "outstanding" as required by Consent Decree paragraphs 7, 46, and 52. (Evaluation Team Report for SY 2009-10 [some footnotes omitted]).

As described earlier, in the course of the ADR process, DCPS announced that it had "suspended" the practice of closing case pursuant to the 45-day clause in the Settlement Agreements and had resumed compliance with the administrative closure protocol. DCPS also represented that it had resumed adherence to the 2006 case closing protocols (Declaration of Christina Wells, Program Manager for Compliance and Monitoring for the DCPS Office of Special Education in ADR process). As partial evidence of that, on April 29, 2011 it submitted to the ADR Specialist a Declaration of Kara Mitchell, Program Manager for Compliance and Monitoring for the DCPS Office of Special Education. Attachment C to that Declaration, entitled "Plan, Execute and Implement a 'Meeting'" contains a template for a Settlement Agreement dated January 19, 2011 (p. 9). Paragraph 4.a of that template addressing Independent Evaluations provides in part:

> If DCPS is not in receipt of the independent evaluations within 45 calendar days, parent agrees to sign consent to evaluate and agrees to allowed DCPS to complete the above-named evaluations within 45 days.

Similar language was proposed in a template for Settlement Agreements regarding independent compensatory education, authorizing DCPS to choose the vendor if compensatory education services have not begun within 30 day calendar days (*Id*. p. 10). But, as will be described below, cases that should have been administrative closures are still being closed as timely implemented, even though the required actions have not been taken. Moreover, in the sample of cases reviewed, the Monitor has found examples of Settlement Agreements which, rather than providing for DCPS to take responsibility for completing independent evaluations as described above, take the 45 day clause a step farther by explicitly providing for a waiver of all of the benefits of the Settlement Agreement if the parent misses the deadline. Examples of this alternate approach are found in the following language contained in Settlement Agreements reviewed by the Monitor:

> If the OSE Resolution Team does not receive the evaluation by the 46th day following the full execution of the SA, any meetings and/or actions dependent upon receipt of the IEE are hereby waived. (Language in the Settlement Agreement of 1/13/11, #24701)
>
> And
>
> If the OSE Resolution Team does not receive the evaluation by the 46th day following the full execution of the SA the parent's right to the IEE is thereby waived and any meetings and/or actions dependent upon receipt of the IEE per the Settlement Agreement are also waived. (Language in the Settlement Agreement of 9/10/10, #24305)[11]

In a report submitted to the parties on August 8, 2011, as required by ¶ 46 of the Consent Decree, Defendants reported that they had exactly met the 90% timeliness standard contained in ¶ 42. The Consent Decree requires the Monitor and Evaluation Team to monitor Defendants' compliance with its provisions and provide an annual report to the Court (Consent Decree, ¶¶ 83, 101). The Consent Decree provides that the Evaluation Team may perform its monitoring function without relying on statistically significant samples (*Id*. ¶ 101(b)). As they did in the last SY, the Defendants report achieving the compliance standard exactly, with no margin for error.[13] Any percentage of error in the cases claimed to be timely implemented by the Defendants,

[11] Similar language was found in eight other Settlement Agreements in the sample.

[13] Paragraph 43 of the Consent Decree requires Defendants to achieve 100% compliance with the performance standard set forth in paragraph 42, as the Defendants have explicitly waived any right to argue that they are in "substantial compliance" but had not absolutely met the obligation set forth.

however selected by the Monitor, would therefore result in their falling below the standard required by the Consent Decree.

The Monitor conducted a review of cases closed by the Defendants as timely implemented during the period January 1 to June 30, 2011 by examining the documentation contained in the Blackman/Jones database used to manage compliance activities to determine if there was evidence to support the Defendants' decision to classify these cases as timely implemented. The information contained in this database is the same information submitted by the DCPS compliance case manager to demonstrate timely implementation of a case, and is the same information relied upon by the DCPS reviewers who make the final determination that a case has been timely implemented. Cases reviewed were selected by various methods. As part of routine monitoring, the Monitor reviewed four cases in March 2011 and sent the results of the review to DCPS. At the end of the SY, the Monitor obtained from the Defendants a list of all of the cases closed between January 1 and June 30, 2011.

There were a total of 460 cases closed during this period, 134 HODs and 326 Settlement Agreements. One HOD was listed as an administrative closure. From this list of 422 cases that were reported as timely implemented, the Monitor selected and reviewed a sample of 40 such cases. In addition, the Monitor selected a sample of seven cases from a list of compensatory education cases to review the implementation of HOD/SAs requiring the delivery of comp ed services. In total, 51 cases were reviewed.

As a result of this review, the Monitor identified at least 18 cases in which the documentary evidence did not support the Defendants' determination to classify cases as having been implemented timely. These cases fell into several different categories described below, although many of the cases overlap into multiple categories. Some of the same types of problems that had occurred in the previous school year and into the first half of the current school year persisted during the second half as well. At the same time, the Monitor did not find cases in this sample where untimely cases were rolled into a new HOD/SA, with the provisions being re-ordered and the clock started anew to make them timely; nor did the Monitor find cases where the 45 day timeline in a Settlement Agreement was strictly enforced to commence the case closure process upon a missed deadline.

B. Completeness and reliability of available information in the data systems

A significant concern that has surfaced in the course of reviewing case files is the reliability of information that is contained in the Blackman Jones database in accurately capturing the case history. HOD/SA #24642 illustrates the problem. Reviewing the entries in the Blackman Jones database would leave the reader with a completely different understanding of what transpired in this case than is communicated by the documents contained in EasyIEP, the official special education database maintained by the OSSE and used by school personnel in the day-to-day management of special education services.

> **HOD #24642**, a Settlement Agreement executed on 1/12/2011 provided that (1) DCPS will issue a Notice of Placement to High Roads PG County within 10 business days of executing this SA. (2) DCPS will convene a meeting within 30 business days of executing this SA to discuss compensatory education.
>
> The records in the Blackman Jones database contained minutes of an MDT meeting held on 4/11/11, 90 days after the Settlement Agreement, which, due to a reported no-show by the parent and attorney, was attended only by the case manager, who decided that compensatory education was not warranted. The case was closed as timely implemented on that date.
>
> The records in EasyIEP paint an entirely different picture of this case, which in some respects are more favorable to DCPS. EasyIEP indicates that the IEP meeting occurred timely on February 24, 2011 as scheduled, with the parent on the phone and the student present at the meeting. Other members of the MDT team were present, and they as well as the student signed the attendance sheet. So, the issue here is not to question the determination that this case was implemented timely, albeit for different reasons based on information in EasyIEP. However, the information in the Blackman Jones database is entirely inconsistent in material respects with what is in EasyIEP, the database of record regarding special-education.
>
> According to the information in EasyIEP, the IEP team meeting in February 2011 recommended compensatory education. The notes of the meeting state: "Compensatory education was discussed at the IEP meeting. The following compensatory education plan is being requested based on the school year August 2010-December 2010 when [student] attended Transitions. Dr. Marryshaw stated that comp ed is warranted due to the school's failure to provide FAPE to the student. The student was bullied by both teachers and students while he attended Transitions." The proposed compensatory education plan was 70 hours of specialized instruction, 30 hours of psychological counseling, 20 hours of speech and language therapy, all to be independently provided. The notes are signed by the DCPS Progress Monitor, as the LEA representative, with a note that the IEP will be sent home to the parent for signature.
>
> However, the case manager recorded in the Blackman Jones database that no compensatory education was warranted, at the April 2011 meeting that no one else

> attended, while at a previous meeting in February a properly constituted IEP team had recommended extensive compensatory education based on the same history. There is nothing in the notes of the case manager to indicate that he was aware of the prior IEP meeting and discussion regarding comp ed, nor was any reasoning offered for rejecting the recommendation of the MDT team. There is no information in the files about what happened to the recommendation from the IEP team for compensatory education.
>
> In response to the Monitor's inquiry, DCPS expressed the view is that the IEP team's determination of comp ed was not accepted since DCPS never issued a letter authorizing it, as would have been the usual practice. It further argues that the Settlement Agreement did not require the convening of an MDT team to determine comp ed and that the case manager could properly make this determination on his own. If this indeed is the case, the whole rationale in the Settlement Agreement for a separate meeting to determine comp ed within 30 days is unclear as all of the required participants would have been present at the resolution session, and there was no subsequent evaluation or input required to determine comp ed.

A similar disconnect between the actions of the case manager working on closing the case, and the reality of what was transpiring at the school to implement the requirements of a Settlement Agreement is found in HOD# 24305 which was closed on June 1, 2011.

> **HOD# 24305**. The Settlement Agreement had been entered into on September 10, 2010 and provided for independent evaluations to be completed within 45 calendar days, to be followed by an IEP meeting convened within 30 business days of receipt of the independent evaluations. The independent evaluations were submitted to the school on December 1, 2010, five weeks after the deadline in the Settlement Agreement, and an MDT meeting was held timely on December 16, 2010, finding the student ineligible for special education services. No issue raised with counting this case as timely implemented. But the case highlights the gaps in communication between the school and the case manager, who was unaware that the independent evaluations had been completed and the meeting held. This case manager went through the process of making telephone calls to the parent (phone disconnected)), e-mails to the attorney that received no response, sending faxes and certified letters to the parent, including the issuance of closure letters 60 days and again eight months after the Settlement Agreement (offering to have DCPS complete the evaluation) before finally receiving a copy of the independent evaluation on May 27, 2011, almost nine months after the Settlement Agreement and six months after all required actions had been completed.

While these cases point to deficiencies in the information in the Blackman Jones database used to manage the HOD/SA implementation and the case closure process, there are deficiencies as well in the completeness of records in EasyIEP. In the course of reviewing cases in the

sample, the Monitor found several cases where MDT meeting notes and evaluations in the Blackman Jones database were not present in Easy IEP.[14]

> **HOD #24774.** The Settlement Agreement provided that (1) Parent is authorized to obtain an independent Comprehensive Psychological Evaluation and an independent FBA at the expense of DCPS within 45 calendar days of the SA. (2) Within 30 business days of receipt of the final evaluation report, DCPS will convene an IEP meeting to review the IEEs; review and revise the student's IEP, if necessary; discuss placement, if necessary; and discuss compensatory education, if warranted.
>
> The notes in the Blackman Jones database indicate that the independent evaluations were timely done and submitted to DCPS on 4/11/11. MDT had to be convened within 30 business days, by 5/23/11. An initial meeting was confirmed for 5/19/11, and then rescheduled for 5/24/11 (one day late) after the attorney appeared 45 minutes late and the parent had asked them to wait for the attorney. There is an issue regarding whether the IEP meeting properly went forward on 5/24/11 when neither the parent nor her attorney was present, which resulted in a subsequent due process complaint alleging that the meeting should not have gone forward without their presence.
>
> However, EasyIEP contains no documentation regarding the meeting on 5/24/11. The only documents found proximate to that date were a 5/24/11 Prior Written Notice sent out by the case manager to the parent proposing to change the student's placement to the Hamilton Center, and a 5/26/11 Behavior Intervention Plan. There is no documentation of an MDT meeting to review the evaluations or to determine compensatory education. The next document in EasyIEP is a 6/15/11 IEP progress report.[15]

Moreover, in virtually all of the cases for which documentation in EasyIEP was reviewed, HOD/SAs were not found in the student files. Since the Monitor, like the Evaluation Team in previous years, relies heavily upon the documentation contained in the relevant files, these concerns about the reliability and completeness of the documentation have to be considered by the reader as an important limitation on the findings and recommendations contained in this report.[16] These concerns are not new. In the last report of the Evaluation Team, similar issues were raised (Evaluation Team Report for SY 09-10, §III. D)**.**

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[14] *See, also,* OSSE DCPS 2009-10 LEA Compliance Monitoring Report (Oct. 1, 2011), Tracking Additional LEA Corrections to Address LEA Level Citations. *See also,* Fig. 5 below.

[15] Other cases where EasyIEP does not have the IEP or the MDT notes or both are found in HOD/SA #s 24701, 24859, 24605, and 24411. See also the discussion in the Related Services and the OSSE monitoring findings below regarding the completeness and accuracy of data entered in SEDS (Section III).

[16] These concerns are not limited to DCPS. In investigating a complaint into a public charter school, the OSSE found the school out of compliance with the requirements of IDEA.

> OSSE's review of student records showed that the LEA is inconsistent in its maintenance and submission

This gulf in the consistency and completeness of documents in the two data systems is symptomatic of a broader operational gap between the work of compliance case managers in the Office of Special Education central office who work on the implementation of HOD/SAs, and personnel at the school level who are engaged in the delivery of special education and related services to students. The former are narrowly focused on the completion of tasks related to HOD/SAs -- which arise from deficiencies in service delivery at the schools. But personnel at the school level do not appear to consistently have knowledge of, or ownership and engagement with these corrective actions. The converse is also true – case managers may know the issues involved in the particular HOD/SA but may be unaware of relevant developments occurring at the school level involving the same student. This gulf, which has existed since the Consent Decree was entered, seems to have widened with recent practices which have placed increased responsibility on parents/attorneys to obtain evaluations and compensatory education, further disengaging the school from these special-education activities. It is further widened when case managers conduct meetings to resolve complaints or to implement HOD/SAs without the presence and involvement of school personnel and IEP team members. These issues have been previously raised by the Evaluation Team, but they persist and have implications for the challenges that the District will face in assuring the sustainability of any gains it makes in the process of complying with the *Jones* requirements of the Consent Decree.

C. General observations

Some of the broad trends identified by the Evaluation Team in its previous report have continued into the 2010-11 SY. DCPS continues to authorize independent evaluations rather than taking responsibility for performing evaluations in the first instance. While this practice may be welcomed by parents and attorneys, it also shifts the responsibility for obtaining the evaluations to parents/attorneys who often experience difficulty in obtaining the evaluations within the typical 45 calendar day time frame. In some cases, their inability to secure an evaluation within 45 days leads to substantial extensions of time which delay progress in the delivery of special education services to a student. One of the compliance metrics in the Consent Decree is that no

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> of signed rosters confirming attendance at IEP meetings, signed copies of letters of invitation acumen thing that the letters were sent and documentation of parental receipt of invitation. . . . Absent in this documentation, OSSE is unable to determine whether valid IEP Team meetings were held and/or whether parents received a timely invitation to the IEP meeting.

State Complaint #010-009, April 19, 2011, p. 6.

case will be more than 90 days overdue (Consent Decree, ¶ 42 (d)). The granting of extensions keeps the case from becoming overdue.

Typically, while compliance case managers ("CCM") have made efforts to follow up with parents and attorneys to inquire into the status of the evaluations, evidence of the types of offers of assistance or resumption of DCPS responsibility for completion of the required evaluations contemplated by the 2006 case closing protocols is rarely found in the files. In the course of the ADR process, DCPS developed new routines to implement the 2006 Case Closing Protocols. In some of the cases in the sample, the "due diligence" efforts amount to little more than going through the motions of sending e-mails, letters and making telephone calls to parents and attorneys, without actually discovering information that is relevant to the status of the case from school personnel, as described above in HOD #s 24642 and 24305. In one case in the sample reviewed, the due diligence efforts included repeatedly making the required telephone contacts over a period of several months by calling a telephone number that was known to have been disconnected (HOD #24246)[17]

Documentation of reasons for extensions, and especially for the duration of the extensions granted, is sparse. The extensions granted were often lengthy, and not accompanied by specific offers of assistance to secure the precursor action or to have DCPS perform them itself. In many cases, there was little or no follow up until close to the end of the period of extension. But reading through a case file often does substantiate the difficulties case managers have had in reaching parents/attorneys or obtaining a response to their inquiries, making the length of an extension an educated guess in many cases. Most of the extensions granted appear to be because a parent/attorney has not yet secured an independent evaluation or independent compensatory education.

When Settlement Agreements impose obligations upon DCPS, there are sometimes no specific deadlines for action, allowing extended delays, seemingly without any consequence.

> **HOD #23253**. The Settlement Agreement entered into on September 22, 2009 contained numerous required actions for this deaf high school student with a high IQ who had

[17] In fairness to the case managers, in some cases that have no clear path to timely implementation due to a lack of response to their telephone calls, e-mails and letters to families and attorneys, this rote behavior is understandable. It is likely that the ADR agreement (Docket #2273) reached by the parties and recently approved by the Court (Docket #2273) will provide a pathway to properly closing such cases in the future, and reduce the frustrating and unproductive use of case managers' time.

planned to attend college and graduate school. She was later identified as multiply handicapped as a result of a diagnosis of Emotional Disturbed (Bipolar). The Settlement Agreement provided compensatory education for the District's failure to deliver a FAPE over two school years. She was scheduled to graduate with a High School Diploma in June 2008, but the student withdrew from school on April 25, 2008.

By the time of the SA over one year later, the student had dropped out as a result of the District's failure to provide her with an appropriate IEP or implement the IEP as written. Due particularly to the failure to provide her with an adequate sign language interpreter for her classes, or provide accommodation for her deafness in class, the student's ability to cope in the classroom declined, and she became overwhelmed and depressed.

However, none of the required actions provided in the SA for compensatory education equipment, services, and reimbursement contained any deadlines. Some of the required actions were carried out in a reasonably timely way; others were not.

In terms of the specific required actions under the SA:

- Provide laptop computer, Dragonspeak and Inspiration software and training on both programs. These were provided to the student on 11/5/09 (approximately six weeks after the Settlement Agreement). However, it was eight months later that DCPS "confirmed" that the student needed no training to use the software on 7/12/10.
- Provide an all in one printer, fax, scanner, and copier. This was first provided to the student on 2/24/10 (five months after the SA). Apparently the document feeder did not work from the outset. However, it was not until more than one year later on 3/25/11 that the parent received the replacement printer. The record shows the case manager attempting to deliver the replacement printer and pick up the original printer without success over a period of months. Sometimes the parent was out of town; another time the case manager did not follow through, etc.
- Provide FM system recommended by student's audiologist and training necessary for student to employ. It is not clear this was ever provided. On 9/27/10 (one year after the SA) an email from the parent to the case manager says they have the specs from the audiologist for the FM system and will submit an invoice.
- Fund GED preparation, including funding for interpreters and all other expenses related to GED test. As of the closing date, the student had not taken the GED preparation or test. This issue remained for implementation.
- Reimburse parent for all therapy expenses incurred during 2006-7 and 2007-8 school years and up to the date the SA was signed. It appears that reimbursement occurred for these services eventually with the parent slow in submitting invoices and the District slow in responding. However, it did not occur until over one year (and longer) after the Settlement Agreement was executed.
- Fund one year of therapy, one time per week (52 weeks). (Funding will discontinue 14 months after SA.) Services were never begun for therapy for this student. The reason was not explained. On 4/4/11, the day before the case was closed, and over 18 months after the SA, a letter was sent to the parent from the case manager regarding "Amended Authorization for Independent Therapy"

providing for 52 hours of "independent tutoring" to be completed by March 31, 2012. No explanation was provided as to the change from therapy to tutoring, nor was the change made by an MDT. There was no indication that this service was ever commenced.

- Fund one year of in-state tuition on student's acceptance and enrollment. It was agreed prior to closure that this offer would remain available for the student without time limitation. However, no progress had been made since the SA toward accomplishing the goal of college admission.

The case manager did attempt to follow up sporadically with email inquiries to the parent and attorney for the student regarding implementation beginning on 4/29/10 (seven months after the Settlement Agreement was executed), and roughly every two to four weeks thereafter for two and one half months until 7/12/10. Beginning again in September 2010, there were emails to and from the case manager and responses from the parent inquiring about the status of the SA tasks that were incomplete. From January 2011 until closure in April 2011, there were sporadic emails back and forth with the case manager inquiring as to incomplete tasks. The emails inquired as to status primarily. There were no real offers for the District to assume responsibility for carrying out the task.

The case was finally closed 18 months after the SA – with 22 extensions for various required actions – with the child not in school, not having received a GED, and not enrolled in college. It was closed as implemented timely in April 2011 although several of the specific provisions of the Settlement Agreement had not been implemented. It was considered timely because there were no deadlines for actions by DCPS.

One cannot help but read this case file and be struck by the scope of the human tragedy that befell this bright student and her ambitions for her life. While there were likely many factors that produced this outcome, the conclusion is inescapable that the school system failed her initially in making education inaccessible to her, and failed her in the remedy as well as there was eventually no accountability or consequence for the failure to help her benefit from the promised remedial measures.

Perhaps because of the difficulty that DCPS has experienced with implementing specific comp ed provisions, Settlement Agreements are more likely to provide that compensatory education will be discussed at an IEP meeting rather than specifying the compensatory education to be provided. In some of these cases, the subsequent IEP provides for compensatory education. Continuing past practices, DCPS usually promptly issues a letter of authorization for independent compensatory education to be secured by the parent/attorney. Cases are closed at this point even before the compensatory education has started or been paid for. The rationale is

that once the meeting has occurred and compensatory education has been ***discussed***, the literal requirement of the Settlement Agreement has been satisfied (*See*, Declaration of Christina Wells submitted to the ADR Specialist).

A case that illustrates this process follows:

> **HOD #24084.** Settlement Agreement dated July 7, 2010 provided that: 1. Within 20 business days DCPS will convene an IEP meeting to review and revise the IEP, discuss and determine location of services and compensatory education if warranted. 2. DCPS agrees to fund and place the student until his 22nd birthday at a site location able to implement his IEP.
>
> Student was attending Rock Creek Academy. The case manager began scheduling the meeting on July 27 and it was eventually held on September 3, 2010. The student had received a diploma in the interim and was no longer in EasyIEP and finding a suitable program took time. Project Search was offered as an option, and the parent requested data on its success rate which was not available. The meeting was rescheduled to October 22, 2010. At that meeting, which was rescheduled to October 28, parent agreed to Project Search enrollment. Comp ed was discussed. On October 29, 2010 a letter of authorization for compensatory education was issued for 100 hours of independent tutoring to be completed by June 30, 2011. The attorney signed the case closure letter on January 12, 2011 acknowledging that all provisions have been satisfied and that the closure was for Blackman Jones reporting purposes. There is no indication in the file that the compensatory education had begun or was paid for. The implementation date is the date the attorney signed the letter.[18]

However, in a significant number of these cases, the subsequent meeting resulted in a determination that comp ed was not warranted. A total of 27 cases in the sample ordered that a determination of comp ed be made at an MDT/IEP meeting. Fourteen of these resulted in a denial of comp ed. Determining whether the required members of the IEP team were present when these decisions were made was hindered by missing documentation such as a current IEP, MDT meeting notes, signature pages and the like, as discussed earlier in this report.[19]

[18] Other similar cases where comp ed was agreed to that there was no evidence in the Blackman Jones database that services had commenced by the time the case was closed include: HOD #s 24509, 24534, 24577, 24590, and 24750.

[19] Of relevance, in its routine monitoring of LEAs, the OSSE has made findings of noncompliance with respect to IEPs at several LEAs including DCPS. The most frequently cited areas of noncompliance are in failing to invite the required participants to the IEP meeting and in the involvement of parents at such meetings. The OSSE has also cited DCPS for the absence of LEA representatives at the IEP meetings, finding the compliance level at 37%. DCPS 2009-10 LEA Compliance Monitoring Report (Oct. 1, 2010) (Tracking Additional LEA Corrections to Address LEA Level Citations: Additional LEA Corrective Actions). *See, also*, the discussion of the OSSE's monitoring findings in Section III of this report.

Once a case is closed, there is typically no follow up by case managers to determine if the comp ed is actually implemented. In fact, in one case where the case manager attempted to verify payment for the compensatory education from DCPS Financial Services, there was no response and the case manager had to resort to obtaining the case closure letter from the student's attorney, without any evidence of actual payment (HOD# 23650).

D. Sample Case analysis

1. Cases in which specific compensatory education provided for by a Settlement Agreement had not been initiated or paid for before the case was closed as timely implemented, continuing a practice that had previously been criticized by the Evaluation Team (Evaluation Team Report for SY 09-10, §II, B. 6).

HOD #24339. HOD issued September 10, 2010 which provided for compensatory education of 20 hours of independent tutoring at the DCPS approved rates and DCPS shall reimburse the parent for a sports camp program for the student in an amount not to exceed $250.00 upon presentation by the parent to DCPS of adequate documentation of payment and participation in such a program by the student. A letter approving the compensatory education plan was sent to the parent on September 23, 2010 and the tutoring began in October. However, the parents' attorney said that the sports camp award would be used during the summer of 2011.

On November 16, 2010, the case manager wrote again to inquire about the status of the Sports Camp Program, attaching a list of providers and offering assistance. The attorney wrote: "Ms . . . (guardian) doesn't have a camp identified right now. . . .it would beneficial for this family if DCPS funded the camp outright." Nevertheless, attempts to close this case commenced on November 28, 2010. The next day the parent's attorney wrote: "We are in receipt of your case closure letter and believe it to be premature. Please be advised that the HOD provisions have not yet been satisfied. We object to closure at this time."

The final closure letter was sent on March 21, 2011. The parent's attorney protested the proposed closure, writing: "Given our past communication with you regarding this issue and the fact that we advised you that the student plans on utilizing the award during the 2011 summer, I am surprised that you would issue such a letter. It is our position that DCPS has yet to fulfill their obligation to [student] under this HOD." The case manager responded that "the closure is for Blackman/Jones reporting purposes and in no way limits your ability to utilize the educational services awarded pursuant to the above-referenced Hearing Officer's Decision."

At the time this case was closed, there was no evidence that the sports camp had commenced or that DCPS had paid for it. (And, as of November 3, 2011 no invoice had been received for reimbursement.)

HOD #23952. The Settlement Agreement of June 17, 2009 provided that (1) ALTA PCS agrees to fund 69 hours (3 hours/week for 23 weeks) of independent tutoring up to $65 per hour upon receipt of itemized invoice signed by tutor and parent. (2) ALTA PCS pay parent's counsel $1,500 within 30 days of signing SA.

The attorney's fees were paid timely but there is no evidence that the independent tutoring was ever commenced or paid for, or that any due diligence efforts were made to assist the parent in securing tutoring in the ensuing almost two years following the Settlement Agreement.

On 5/5/11, the case manager obtained the parent's signature on a letter stating that "Pursuant to our records, all of the SA provisions have been satisfied. . . . Please note that this SA closure is for Blackman/Jones reporting purposes and in no way limits your client's ability to bring future claims under the Individuals with Disabilities Education Act." In response to an inquiry about the status of implementation of the compensatory education, the case manager wrote "at that time, proof of services commencing was not required."

HOD #23228. An HOD issued on September 13, 2009 required in part, that as compensation for the missed services student incurred in not having been provided an alternative placement, DCPS shall continue to fund 10 hrs of independent tutoring per week to be provided by Newlen Educational Services until the 45 day review of the student's new placement specified above, is completed.

DCPS did not convene a timely meeting within 45 calendar days of the student's placement to review the student's progress. Such a meeting would have occurred around the beginning of November 2009. The review meeting did not occur until 12/11/09. DCPS issued a comp ed plan on 9/8/09 pursuant to the HO Interim Order that was to last until the 45 day review, and issued a comp ed plan again on 3/22/10 that was not timely (coming some five months after the services should have ended) in order to insure language correctly reflected the HOD. It extended the time for obtaining compensatory education until 6/1/10. There is no evidence that the comp ed services were delivered.

On 2/25/11, some 17 months after the issuance of the HOD, the case manager obtained the parent's signature on a letter stating that "Pursuant to our records, all of the Settlement Agreement provisions have been satisfied. . . . Please note that this Settlement Agreement closure is for Blackman/Jones reporting purposes and in no way limits your client's ability to bring future claims under the Individuals with Disabilities Education Act."

2. Cases that should have been administrative closures that were closed as implemented timely although one or more of the required actions under the HOD/SA was not performed.

The practice of administrative closure (which removes a case from the count on which the calculation of timeliness is done) had been virtually abandoned during the period covered by the Evaluation Team's last report. Although DCPS informed the parties and the ADR Specialist that it had resumed this practice in December 2010, in the ensuing sixth month period covered by this report, there was only one case identified as an administrative closure. Yet, several cases in the sample reviewed should have been administrative closures rather than counted as timely implemented.

> **Case #23647**. HOD issued March 1, 2010 which ordered placement of the student at Accotink Academy and ordered that DCPS shall develop and fund a compensatory education plan for the student to compensate the student for special education and related services he failed to receive from December 16, 2007 through December 16, 2009, and the provision and funding of a Reading Specialist for the student, and tutorial services in math and reading. Student was placed, as ordered, at Accotink Academy in March 2010. All required evaluations occurred and were submitted between March 2010 and June 2010. Comp ed plan was developed and issued by CCM on 6/21/2010. Comp ed authorization letter issued and vendor list issued on that date as well. CCM sent email to attorney on 12/28/10 inquiring about status of comp ed. Phone numbers for guardian had been disconnected. CCM received no response from attorney. CCM sent 30 day notice of closure to attorney and guardian on 12/29/10. CCM called numbers for guardian twice, once in the morning and once after 6:00 PM, and no one was ever reached. At first, numbers were disconnected, but CCM obtained new numbers from Accotink. These numbers were tried. Attempts to contact guardian through attorney did not work. CCM sent final closure letter on 2/7/11, indicating case was closed because of failure to respond to the 30 day letter regarding the status of comp ed. The case was closed as implemented timely, although the comp ed provision was closed administratively rather than being implemented.
>
> **Case #23288.** HOD issued 10/8/09. The HOD required DCPS to conduct an evaluation of the student and provide compensatory education in the form of specialized instructions in strict accordance with the findings and terms in the HOD. Within 15 days of the receipt of the evaluations, convene an MDT meeting to consider the evaluation results and develop an IEP for the student. DCPS and the parent agreed to independent evaluations and compensatory education. The case manager regularly followed up with the attorney on the scheduling of the evaluations which were in progress when, on November 8, 2010, the attorney informed the case manager that the student was now attending Imagine Southeast PCS, and the evaluations were being reviewed by his current placement. The

compensatory education had been implemented and invoices received by DCPS. On December 13, 2010, a final notice of closure was issued due to non-attendance at a DCPS school. Case was closed as implemented timely, although the meeting to consider the evaluations and revise the IEP did not occur at DCPS due to circumstances beyond their control. This case is more appropriate to close as an administrative closure.

On January 11, 2011, a new Settlement Agreement was entered (#24639) with DCPS regarding a complaint filed on December 20, 2010 while the student was attending Imagine Southeast PCS. The Settlement Agreement provides that DCPS will fund 12 hours of occupational therapy by an independent provider and two hours of tutoring per week for six weeks. Attorney confirmed that both services had begun and the case was closed as timely implemented.

HOD # 24207. Settlement Agreement entered August 13, 2010. The Settlement Agreement provided for the convening of an IEP meeting to review evaluations, determine eligibility and if eligible to develop an IEP, determine site location and compensatory education.

Two meetings were scheduled, but parent or attorney were either late or did not show up. The third meeting was scheduled in November but again neither the parents nor the attorney was present. The student apparently had been in a group home or at YSC. Attorney advises that the student may have been extradited out-of-state. Student is no longer enrolled or is not attending. Subsequently, on December 20, 2010 the attorney advised that the student has been sent to a residential facility in Iowa. DCPS had sent a December 16, 2010 letter asking for proof of residency and registration for the academic year. The letter states that if the information is not received the case may be considered for administrative closure. On January 20, 2011 a closure letter was sent to the parent based on non-registration our non-attendance stating: "Please note that this closure is strictly for Blackman/Jones purposes and does not preclude the student from bringing future claims against DCPS, nor from having the evaluations reviewed and his eligibility determined at such time that he is registered in a DC public school." This case too is appropriately an administrative closure as originally stated, rather than a timely implementation.[20]

HOD#24246. HOD entered 8/25/2010, with final implementation noted on February 7, 2011. This case was closed as timely implemented. On the date of a Settlement Agreement, an independent comprehensive psychological evaluation and independent vocational II assessment were authorized, with an IEP meeting to

[20] DCPS responded to inquiries regarding this case stating:

> We acknowledge that this is a data input error on the part of the final reviewer. This case was inadvertently entered as a substantive closure instead of an outstanding protocol. In Blackman Jones V3, we believe we have placed safeguards to ensure that required actions submitted for administrative closures can be submitted as a request for an outstanding protocol review, and the final reviewer will only be able to close out as an outstanding protocol case under the administrative closure process or kickback.

> be convened within 30 business days of receipt of the IEEs to review and revise the student's IEP if necessary, discuss site location and comp ed, if warranted. The Settlement Agreement is signed by the student and case manager.
>
> The case manager made several attempts to contact the student, including calling a disconnected number and sending e-mails to the attorney, and telephoning the SEC at Ballou High School for contact information. By October 14, 2010 DCPS was in receipt of the independent comprehensive psychological evaluation but was waiting for the vocational assessment in order to convene a meeting.
>
> DCPS received the independent vocational II assessment from the attorney on December 6, 2010. The IEP meeting should be scheduled within 30 business days. A request for residency letter was sent on January 3, 2011 stating that the case may be considered for administrative closure if DCPS does not receive a timely response. There was no response from the parent.
>
> The case manager noted that the Student is no longer enrolled at Ballou SHS. Case manager wrote the attorney the next day to find out where the student is currently enrolled as he is not at any DCPS school. Similar letter sent on December 13. No response to the e-mails or certified letter sent to the student and the attorney. Several of the due diligence phone calls were made to a phone number that was known to have been disconnected.
>
> On February 7, 2011, the case manager sent out the final closure letter sent to the student and attorney. DCPS was not able to convene a meeting for the student as he was not registered. The closure letter states that the closure was based on failure to comply with the residency requirement in the SA, and is "only for Blackman/Jones reporting purposes."

Other cases that should have been administrative closures that were closed as implemented timely although one or more of the required actions under the HOD/SA was not performed include HOD #s 23262, 23460, 24101, 24351, and 24443**.**

3. Cases which were closed as implemented timely based upon letters from attorneys or parents agreeing to the closure "for Blackman/Jones reporting purposes" although one or more of the required actions had not been implemented or implemented timely.

Another practice that has persisted into the second half of the 2010/11 SY is closing cases as timely implemented “for Blackman Jones reporting purposes" based upon a letter from a parent or attorney, in the absence of other evidence of implementation, and sometimes in the face of evidence clearly indicating that the required actions to implement the HOD/SA have not been done. In one case in the sample, such a letter was relied upon even though the attorney informed the case manager that he no longer represented the student (HOD #23824).

HOD #24160. The Settlement Agreement dated July 30, 2010 authorized independent

evaluations, to be followed by an IEP meeting to discuss the evaluations, eligibility, site location and compensatory education. The student is classified as "in transit school." The evaluations were completed in November. However, despite diligent efforts by the case manager, the meeting could not be scheduled because the student had run away from home. On January 17, 2011 the attorney signed a case closure letter that the Settlement Agreement is timely and all provisions have been satisfied. The letter further states that "this closure is for Blackman/Jones reporting purposes." There is no evidence that the IEP meeting took place. This case is more appropriately classified as an administrative closure rather than a substantive timely implementation.

HOD #23646. Settlement Agreement entered on March 1, 2010. Closed as timely implemented in January 2011. From April 2010, case manager had numerous e-mail contacts with attorney to inquire about the status of independent psychological, FBA and BIP. Also attempted to contact parents whose phone had been disconnected and voice mailbox was full. On August 15, 2010 the attorney stated they are on track to get the psychological assessment completed, but did not respond to an inquiry regarding the other assessments. On September 22, 2010, the case manager spoke with mother who did not understand the need for the FBA or BIP, said her son was not going to school, but was living with a 21-year-old girlfriend. She said the evaluations had not been completed because the student refused to go to school and class work is very hard for him. The case manager offered to help.

Subsequent correspondence with attorney resulted in further extensions for completion of the evaluations in October 2010, and eventually a closure letter that was sent on November 24, 2010 after further correspondence with the attorney and telephone calls to the parent, who was not reached because the phone number was out of order.

On November 29, 2010 there was a kickback from final review requiring that the case manager make further efforts to obtain a working phone number for the parent. This resulted in obtaining a cell phone and contact with the parent who informed case manager that the student has a baby on the way, does not listen to her and she has other things to worry about including problems with another child who had been arrested. The case was also kicked back because DCPS had received one of the independent evaluations – the independent vocational on April 6, 2010, and a meeting must be convened to review that before the case can be closed substantively.

The case manager visited the home on December 21, 2010 and met the parent and the student who said he would not attend school and the parent signed a closure letter on 12/21/10. The letter states in part "pursuant to our records, all of the SA provisions have been satisfied. . . . Please note that this SA closure is for Blackman/Jones reporting purposes and in no way limits your client's ability to bring future claims under IDEA." Case was closed as implemented on January 10, 2011. In this case as well, the case manager made numerous efforts to facilitate implementation, but it did not happen. This case is more appropriately classified as an administrative closure rather than a substantive timely implementation.

Other similar cases include HOD #s 23253, 23228, 24084, and #23952.

4. Cases which were untimely but were nevertheless counted as implemented timely.

HOD #24620. The Settlement Agreement provided that: (1) Parent agrees to register student as "non-attending" at neighborhood school, Raymond Educational Center, within two weeks of the SA. (2) DCPS will conduct the following initial assessments: psychological, educational, speech and language, occupational, physical therapy, and a formal classroom observation, within 60 calendar days of the SA. (3) Early Stages will conduct a vision and hearing screening. (4) Within 20 business days of receipt of the psychological, educational, speech and language, occupational, physical therapy and formal classroom observation report, DCPS agrees to convene an eligibility meeting to review the evaluations and determine if the student qualifies to receive special education services. If determined eligible, DCPS agrees to develop an IEP, discuss location of services, and discuss compensatory education if warranted.

The parent met the obligation to register the student by signing the consent to evaluate on 11/5/10 that automatically registered her in STARS. The DCPS performed the psychological, educational, speech and language, OT and PT evaluations, and Early Stages did the Hearing and Vision within 60 days of the SA. However, there was no formal classroom observation (as provided in the SA) until 2/16/11 (120 days after SA).

The first IEP meeting was held on 12/21/10. At that meeting, the evaluations that had been completed (all but classroom observation) were reviewed, child was determined to be eligible for special education and related services as developmentally delayed, an IEP was developed, and the team discussed placement.

The case manager submitted the case for closure, but the reviewer kicked it back on 1/21/11, with a note "since the SA specifically states that DCPS will conduct a formal classroom observation (and it is not included within or as part of another evaluation), please ask the parent/attorney if they agreed that such an observation was included in either the psychological or OT." Following this, on February 16, 2011, the formal classroom observation occurred. The case was once more submitted for closure. The reviewer again kicked it back on 4/13/11 because the formal classroom observation occurred in February but the meeting was held in December when the meeting was to occur within 20 business days ***after*** the observation.

An MDT meeting was re-convened on 5/13/11 to review the classroom observation evaluation that had been done 90 days earlier in February, reconfirm eligibility, review IEP, all in order to meet the requirements of the SA. Neither the IEP, the placement, nor anything else was changed. It was stated the meeting was necessary to meet the requirements of the SA only.

Plainly, under this chronology, the formal classroom observation did not occur timely within 60 calendar days of the SA, nor was the MDT meeting held within 20 days of the formal classroom observation when it occurred in February 2011.

> On 5/16/11, a different DCPS reviewer (who had earlier served as the case manager who had submitted this case for closure and had it kicked back), accepted the case as a timely implemented closure, writing " Notes indicate that Parent and advocate acknowledge that final eligibility determination could not be made until after classroom observation. Student enrolled on January 20, 2011. Classroom observation completed 2/16/11. Notes also indicate that parent and advocate agreed that DCPS had until the end of the school year to review the classroom observation."
>
> What is left unsaid is that the notes referred to were written on 5/13/11 by the case manager who had inherited this untimely case. There is no explanation of why, if this was the understanding of the parent and attorney all along, this information was not available either to the previous case managers or reviewers during the two previous submissions of this case for closure or why there was no documentation of this understanding until more than six months after the Settlement Agreement was entered.
>
> See also HOD #23228, described above.

5. Cases in which extensions of time were granted to keep them timely without evidence of diligent efforts.

The Monitor recognizes that extensions of time can well be justified when a parent or attorney has been unable to furnish an IEE or agree to a meeting date within the initial time frame or with the parties' agreement. In the period examined, DCPS changed its practice of strictly enforcing time frames in Settlement Agreements against parents and of sometimes closing cases based on their failure to comply with the timelines. Instead, it was more liberal in the granting of extensions of time when the actions required by parent/attorneys had not been completed. Granting an extension of time is beneficial to the parent/attorney in keeping the case open. It is also in the interest of DCPS as it keeps a case from becoming untimely or overdue, and permits it to be considered "outstanding" as long as DCPS is making diligent efforts to obtain the precursor action (Consent Decree, ¶ 7 (a)). The requirement of "diligent efforts" in the Consent Decree keeps the focus on implementing HOD/SA provisions intended to benefit the student.

In several cases in the sample, DCPS granted multiple and lengthy extensions of time to a parent/attorney to complete a precursor action, without much documented evidence of diligent efforts being undertaken to obtain the service for the student or explaining how the duration of the extension was justified.

HOD # 23460. The Settlement Agreement was entered into on December 11, 2009, and closed as implemented timely 13 1/2 months later on January 24, 2011. There were eight extensions granted over a period of 11 months (one for 70 days, three for 60 days, and four for 30 days). The Settlement Agreement authorized three independent evaluations and required an MDT meeting to be held within five business days of receipt. There were delays in receiving the independent evaluations as the student was in detention in August 2010 and had absconded in October 2010. Nevertheless, there were limited efforts by the case manager to follow up.

- A 70 day extension was issued from January 22 to March 22, 2010, without explanation for the duration. Shortly before the period ended, case manager attempted to close the case due to the failure to complete two of the three independent evaluations, but was rebuffed due to the lack of a timeline for the parent's production of the evaluations in the Settlement Agreement.
- A second extension of 60 days to May 9, 2010 was granted even though there was no intervening contact with the parent or attorney during the first extension. During this extension there were two e-mails to the attorney and a call to the parent, leaving a voicemail seeking updates. Based on these three contacts, the third 60 day extension to July 5, 2010 was granted during which two e-mails were sent to the attorney inquiring about the case status.
- The two e-mails in June served as a justification for the next 30 day extension to July 30, 2010. Another e-mail in July inquiring about the status justified an additional 30 day extension to August 31, 2010.
- The same pattern continued until a final 30 day extension was granted after an LOI was issued on the next-to-last day of the prior extension to December 24, 2010. An MDT meeting was confirmed for December 10, 2010 after the attorney said that he no longer represents the student, and the meeting went forward, with the student in jail and the parent not attending.

HOD #23824. HOD issued on April 21, 2010, closed as timely implemented 10 months later on February 28, 2011. In the interim, DCPS granted itself six separate 30 and 60 day extensions for the completion of the FBA after the expiration of the 45 days within which the independent evaluations were to be completed. The other independent evaluation was completed. The file contains very little evidence of diligent efforts by DCPS offering to perform the evaluation itself or offering any specific assistance to the parent. A 60 day extension from June to August was based on a single e-mail to the attorney inquiring about the case status. Another 60 day extension to October was justified based on sending a provider list and letter two months prior to the beginning of the extension. Additional 30 day extensions were granted with little support. The FBA was never performed, and the case was closed as timely implemented based on an attorney letter acknowledging the case was closed.

See also, HOD #s 23253 (22 extensions over 18 months); 23826 (eight extensions over nine months); 24305 (five extensions totaling eight months); and 23228 (17.5 months).

E. Conclusions regarding the case closure process

In the second half of the 2010-11 SY, DCPS appears to have made modifications in its case closure process to end some of the practices that had been criticized by the Evaluation Team in its previous report, such as the practice of using rigid 45 day timelines in Settlement Agreements to close cases regardless of actual implementation. In the sample of cases reviewed, the Monitor found no instance of rolling untimely cases into new Settlement Agreements and re-starting the timeline to make them timely. Although DCPS expressed an intent to resume the proper use of administrative closures for cases which remained unimplemented despite diligent efforts, there was only one such case during this period, while many more were found in the sample which *should have been* administrative closures rather than counted as timely implemented.

DCPS also reinforced with CCMs the need to make and document diligent efforts to move the cases towards closure by offering assistance to parents/attorneys in securing services they were unable to obtain through their own efforts. While the case files reflect more regular contacts or attempted contacts with parents and attorneys by CCMs, in the sample of cases reviewed these efforts often did not produce actual implementation of the requirements of HOD/SAs. To some extent, this results from the difficulty CCMs experienced in making actual contact with parents/attorneys or getting responses to their inquiries. Perhaps as a consequence, the required contacts as documented in the case files were sometimes formulaic attempts to go through the motions required even when this strategy was known to be futile. But these efforts provided the justification for extensions of time, sometimes lengthy and repeated, before cases were eventually closed. As described above, in a significant number of cases in the sample, the required actions had not been implemented at the time of closure although the cases were counted as timely implemented. Under the rules in effect during the period evaluated, the alternative available to the Defendants in such cases was to keep the cases open and outstanding, perhaps indefinitely. However, under the ADR agreement reached by the parties and approved by the Court on November 21, 2011 (after the end of the school year under review), there is a

new option for Defendants to use in such cases in an attempt to properly and finally close such cases within a reasonable time frame.[21]

Based on the findings discussed at length in this section, the Monitor finds that the evidence reviewed does not support the District's data submission that 90% of HOD/SAs issued in the 2010/11 SY were implemented on a timely basis, pursuant to the calculation provisions of the Consent Decree. *See* Consent Decree ¶ 7, 42d, 43, 44, 46, 52.

First, the Evaluation Team's previous report, which covered an early part of the 2010/11 SY as well, disagreed with several "counting rules" used by the District to classify cases as timely implemented. It should be noted that in the wake of the that report challenging the inclusion of numerous cases and classes of cases in the count of timely implemented closures,[22] the Defendants did not make any changes in the reports of their rate of compliance and have continued to include those cases as timely implemented in the calculation of the rate of compliance which is reported to the parties. Thus, without reference to any of the cases closed subsequent to October 15, 2010, which are addressed in this report, there is a basis to question the accuracy of the Defendants' calculation of the rate of compliance for SY 2010-11. The year-end report contains an undetermined number of cases from the first half of the school year which were closed using counting rules that have been determined to be inconsistent with the requirements of the Consent Decree by both the Evaluation Team and the ADR Specialist.

Second, as this report makes clear, some of the disapproved counting practices continued into the second half of the 2010/11 SY as well and the year-end report also includes an undetermined number of such cases. The precise number of cases improperly included in the

[21] ADR Agreement (Docket # 2268, filed August 18, 2011); approved by the Court (Docket # 2273, filed November 21, 2011).

[22] The seven classes of cases identified by the Evaluation Team were: (1) Cases closed as timely implemented, after DCPS authorized independent evaluations, without supporting evidence of actual timely implementation; (2) Cases closed by a subsequent Settlement Agreement which asserts that the case is timely implemented while substantially re-ordering its provisions in a new Settlement Agreement; (3) Cases in which a subsequent HOD/SA finds that the previous HOD/SA was either not timely or not implemented but continues to be counted by DC as "timely implemented;" (4) Miscellaneous cases where the Evaluation Team finds that the determination of timely or full implementation is not supported by the record and attorney "waivers" were liberally misconstrued; (5) Cases in which improper extensions of time were granted to make them timely; (6) Cases closed as timely implemented, after DCPS authorized compensatory services, without supporting evidence of actual substantive initiation of services; and (7) DCPS' convening of IEP/MDT Teams for meetings required by HOD/SAs where the teams are not legally constituted teams under IDEA

count of timely implemented cases is undetermined, but it is clear that out of the sample of 51 cases closed in the period from January 1-June 30, 2011, at least 18 should not have been counted as timely implemented. Since the Defendant's report asserts exactly a 90% compliance rate, even a small number of cases improperly included in the count would result in noncompliance.

Third, there are an undetermined number of DPCs which were resolved at a resolution meeting but no written and enforceable agreement was executed, in violation of IDEA. In a sample of 50 DPCs out of 243 filed during the 2010/11 SY which did not result in an HOD/SA, the OSSE found at least 10% that should have resulted in a written and enforceable agreement. Such cases would be added to the denominator in performing the calculation of Timely Implementation under the Consent Decree formula, and likely further reducing the percentage of Timely Implementation.

The focus on complying with the numerical targets of the Consent Decree has continued to overshadow the purpose of compliance – the actual delivery of special education and related services to students who filed DPCs resulting in HOD/SAs. As the challenge of delivering the required services to these students seems out of reach in a number of cases, the school system has resorted to changing the rules and processes to absolve themselves of responsibility for obtaining services for the students and, where they have obligations, to have no timelines for which they can be held accountable. As an example, after the Evaluation Team, and eventually the ADR Specialist, rejected the practice of closing cases which had ordered compensatory education upon the issuance of a letter of authorization alone, the District has once again changed practices to agree only to a ***discussion*** of compensatory education at a meeting rather than any substantive obligation to ***provide*** compensatory education, and to continue the practice of closing the case once the discussion has occurred and before any evidence that the student has received the required service. Such cases result in literal compliance with the Settlement Agreement but no assurance that the student has received any educational benefit.

The current practice of DCPS having the case closure process reviewed and approved by its own staff needs to be reconsidered. Initially, this function was performed by a former member of the Evaluation Team, Rebecca Klemm, in order to provide the parties and the Court with a level of confidence that these judgments would be made independently, without the perception or

the reality of undue pressures upon the reviewer to accept a closed case as timely implemented. As DCPS developed greater internal capacity to manage the case closure process, this review function was taken back and assigned to staff within the Office of Special Education.

Over the past two years there have been numerous cases and classes of cases in which the Plaintiffs, the Monitor and the Evaluation Team have disagreed with the decision of case managers, their supervisors and the DCPS Final Reviewer to count cases as timely implemented for the purpose of determining compliance with the Consent Decree standards. The ADR Specialist also rejected these decisions. The experience with this year-end report demonstrates that despite representations made to the parties, the Monitor, and the ADR Specialist that these disapproved practices would end, some of them persist as described in this report. Such experiences cannot help but undermine the confidence of the parties and the Court in the quality and the correctness of the current internal decision-making process and in the reported levels of compliance.

The Monitor therefore recommends that the final review of the decision to count a case as timely implemented be transitioned from DCPS to the OSSE which has a greater distance from the daily work of implementing HOD/SAs. Such a shift would also be consistent with the OSSE's independent monitoring role over all LEAs and is a model that is more likely to be sustainable once the court's supervisory jurisdiction over the implementation process terminates.

III. RELATED SERVICES AND ASSOCIATED ISSUES

The Consent Decree contains performance measures regarding underlying IDEA legal requirements for the provision of timely IEPs, evaluations and reevaluations.[23] As has been discussed earlier in this report, the genesis of a substantial number of due process complaints lies in the delivery of related services that are needed to enable students in special education to access the educational curriculum, and HOD/SAs often order related services as well. The Consent Decree itself recognized that approximately one third of all hearing requests involve allegations of untimely assessments and IEPs (Consent Decree, p. 9). The timely delivery of adequate and appropriate related services is essential to Consent Decree compliance.

[23] Consent Decree ¶ 29, 41, 42; IEP, evaluation and reevaluation rate timeliness, as referenced in the Consent Decree (pages 9-10, 24) and Attachment A to the Consent Decree; 20 U.S.C. § 1414-1415.

The demand for assessments continues to increase, rising from 3,015 in the 2009/10 SY to 4,889 (excluding Head Start) in the 2010/11 SY, a 62.15% jump. There were a total of 7,163 related services prescribed for DCPS students (a student may have more than one service prescribed). Speech and language services (2,869 or 40%), behavioral support services (2,620 or 36.5%) and occupational therapy (1,256 or 17.5%) were the most commonly prescribed services.

The Blackman/Jones Action Plan attached as Exhibit "A" to the Consent Decree identified performance measure goals for timely assessments at 85-95% by June 30, 2008,[24] and at a 90-100% standard of current IEP timeliness for students with disabilities. The OSSE produces monthly reports drawn from SEDS that reports on the Rate of Timeliness for IEPS, assessments and re-evaluations.

A. Rate of Timeliness Reports.

As depicted in Fig. 3, the Rate of Timeliness reports for SY 2010-11 drawn from SEDS indicates across the board improvement in meeting the timeliness performance goal of 90-100% for IEPs. In the 2009-10 SY, DCPS met the 2008 standard for timely IEPs as contained in the Action Plan and has further improved its performance in the 2010/11 SY. Charters schools which elected to have DCPS as their LEA achieved the timeliness standard as well, while independent charters and nonpublic schools made substantial gains but fell short of the required standard of performance. The OSSE state school, with a relatively small number of students, continued to lag behind although here as well there was a significant improvement in performance.

[24] The Action Plan assumed achievement of these measures by the 2008 SY and therefore did not contain goals for school years past June 2008.

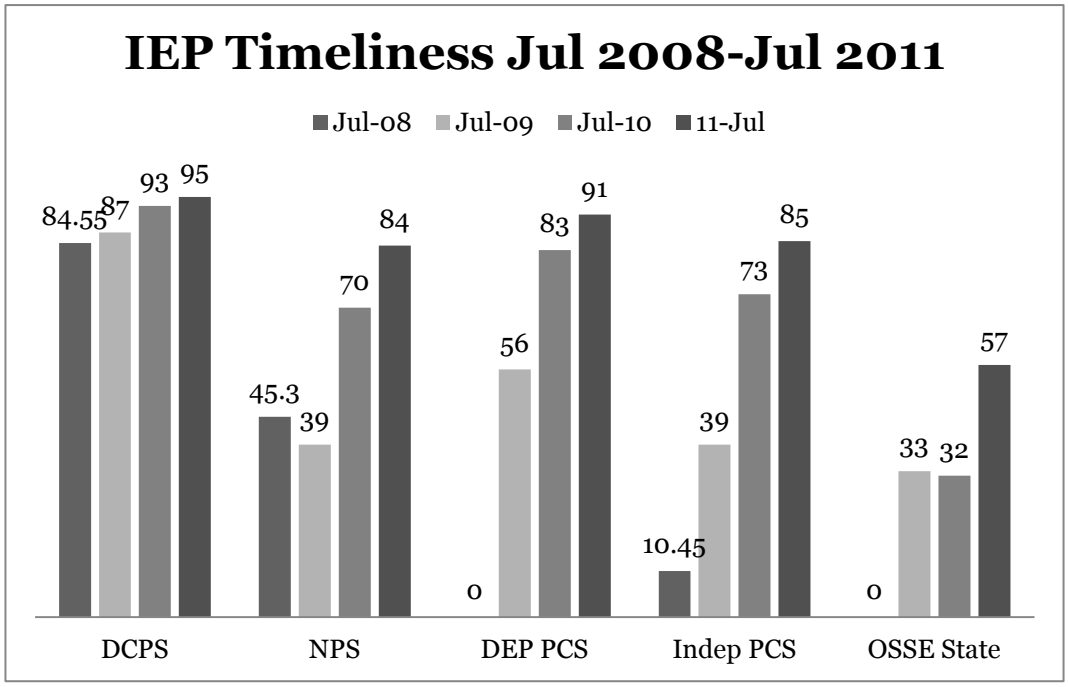

Fig. 3 IEP Rate of Timeliness

With respect to timely assessments, DCPS made a modest improvement in its performance in the 2010/11 SY but has not yet reached the Action Plan standard of 85-95% timeliness.[25] Significant gains were reported for charters which elected to have DCPS as their LEA, rising from 10% the previous year to 53% in the 2010/11 SY. Nonpublic schools remained far behind at substantially the same level as they have been for the past three years, while independent charters (40%) continued to report declines from their performance in 2009, and data is essentially unavailable for the OSSE state school.

[25] In a November 30, 2010 Corrective Action Plan for Evaluation Backlog Reduction in response to the OSSE's FFY 2008 Determination, DCPS acknowledged that "progress in the elimination of the initial evaluation backlog has stalled or regressed" and projected that they will not hit the 95% benchmark until March 1, 2011. According to the OSSE data, this goal was not met.

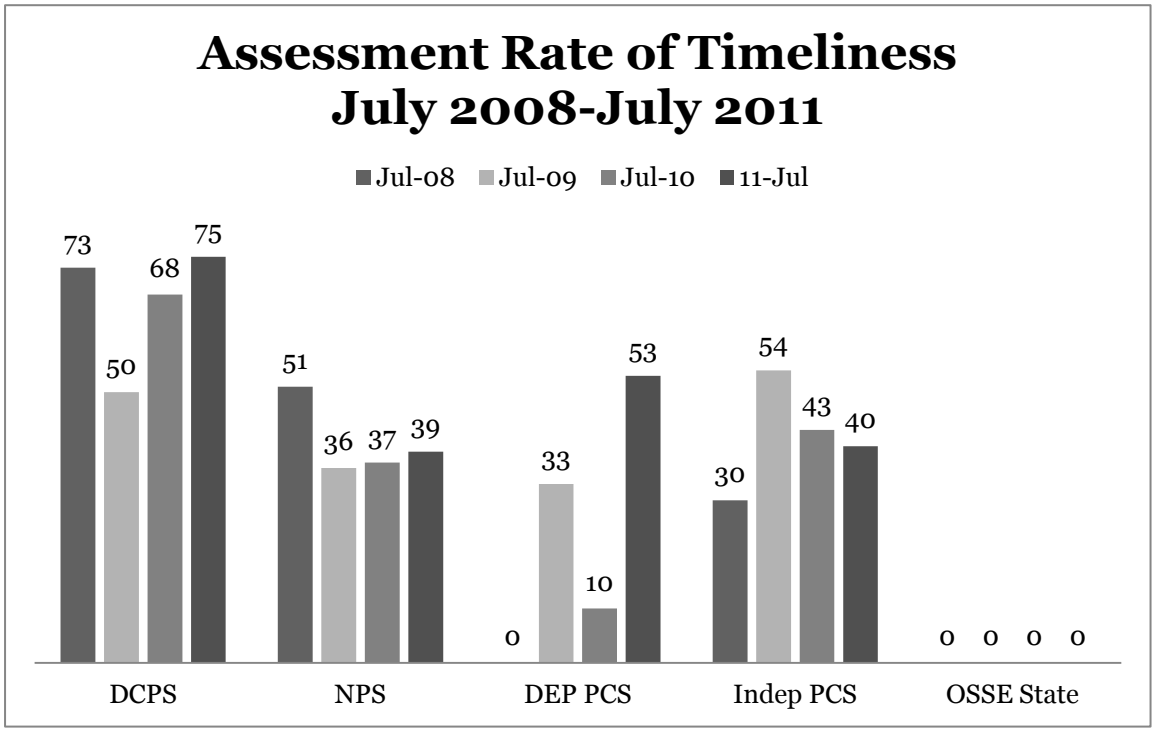

Fig. 4 Assessment Rate of Timeliness

In prior reports, the Evaluation Team had raised questions about the reliability of these data as to non-DCPS schools. Initially, it was thought that the data may not be reliable due to the uneven entry of data by these schools into SEDS from which these reports are drawn. However, the OSSE proposed a new rule in June 2009 requiring charter and nonpublic schools to utilize SEDS.[26] This rule was adopted as an emergency rule on August 7, 2009 and later superseded by a substantially similar final rule on December 4, 2009.[27] The OSSE required all LEAs to participate in training it offered in the SEDS. Since then, on-going monitoring of the usage of SEDS by the OSSE indicates that, with a few exceptions, the vast majority of LEAs demonstrate strong practices in usage of the SEDS. The OSSE has raised the possibility that the lower rates of performance as to assessments reported by non-DCPS schools may be explained by the fact that

[26] Section E-3019.3 (g) of Chapter 30 of Title 5-E of the DCMR provides:

> *Special Education Data System (SEDS).* An LEA Charter shall fully utilize, implement, and enter accurate and complete data into the state-designated District-wide special education data system for all aspects of special education practice, and ensure that an accurate, complete and up-to-date record exists in the SEDS for every child with an IEP enrolled in the LEA, including those placed in a nonpublic school.

[27] D.C. Register, Vol. 56, No. 49.

the metrics measured by this report are largely internal to DCPS management processes rather than those required by IDEA.

With respect to DCPS, the OSSE monitoring report stated:

> DCPS acknowledged that although all special education data is mandated to be entered in the state Special Education Data System (SEDS), some schools maybe behind in entering all data. Notwithstanding this assertion, during OSSE'S review of 60 randomly selected files, OSSE found that all 60 files were entered into SEDS. In order to ensure that all data entered into SEDS are valid and reliable, DCPS reported that it uses the SEDS internal 'red flag' system to alert the user of an error. Although a number of LEA personnel indicated that spot checks are conducted to ensure that data entry is valid and reliable or described a team approach to reviewing data for timeliness and accuracy, no interviews revealed a clear, cogent system for insuring the validity and reliability of entered data.[28]

SCHOOL	Sample Files Reviewed	Initial Evaluation Date same as reported in SEDS (% Compliant)	Reevaluation date same as reported in SEDS (% Compliant)	IEP Development Date same as reported in SEDS (% Compliant)	IEP Implementation date same as reported in SEDS (% Compliant)	Date of Birth same as reported in SEDS (% Compliant)	Primary Disability same as reported in SEDS (% Compliant)	Placement same as reported in SEDS (% Compliant)
DCPS	60	30%	47%	53%	47%	67%	66%	67%

Fig. 5 OSSE Monitoring Findings re SEDS Data accuracy at DCPS schools[29]

As depicted in Fig. 5 above, the data collected by the OSSE show significant problems with consistency of data in the school files with that entered into SEDS.

For the second year in a row, as depicted in Fig. 6 below, there was across-the-board improvement in the rate of timely re-evaluations required at least once every three years, although these as well have not yet reached the 2008 Action Plan performance goal of 85-95% timeliness.

[28] OSSE DCPS 2009-10 LEA Compliance Monitoring Report (Oct. 1, 2011), Tracking Additional LEA Corrections to Address LEA Level Citations (OSSE Comments).

[29] The OSSE also made findings regarding the failure to maintain complete and accurate records in a complaint investigation involving a public charter school. In that case, the OSSE found that the school did not promptly enter acknowledgments of referrals for initial evaluation into SEDS or consistently upload documentation of parental referrals. These practices affect the accuracy of the OSSE reports regarding timely completion of initial evaluations and re-evaluations because the affected students will not appear on OSSE's list for review if the acknowledgment of referrals is not entered into SEDS. State Complaint #010-009, April 19, 2011, p. 6.

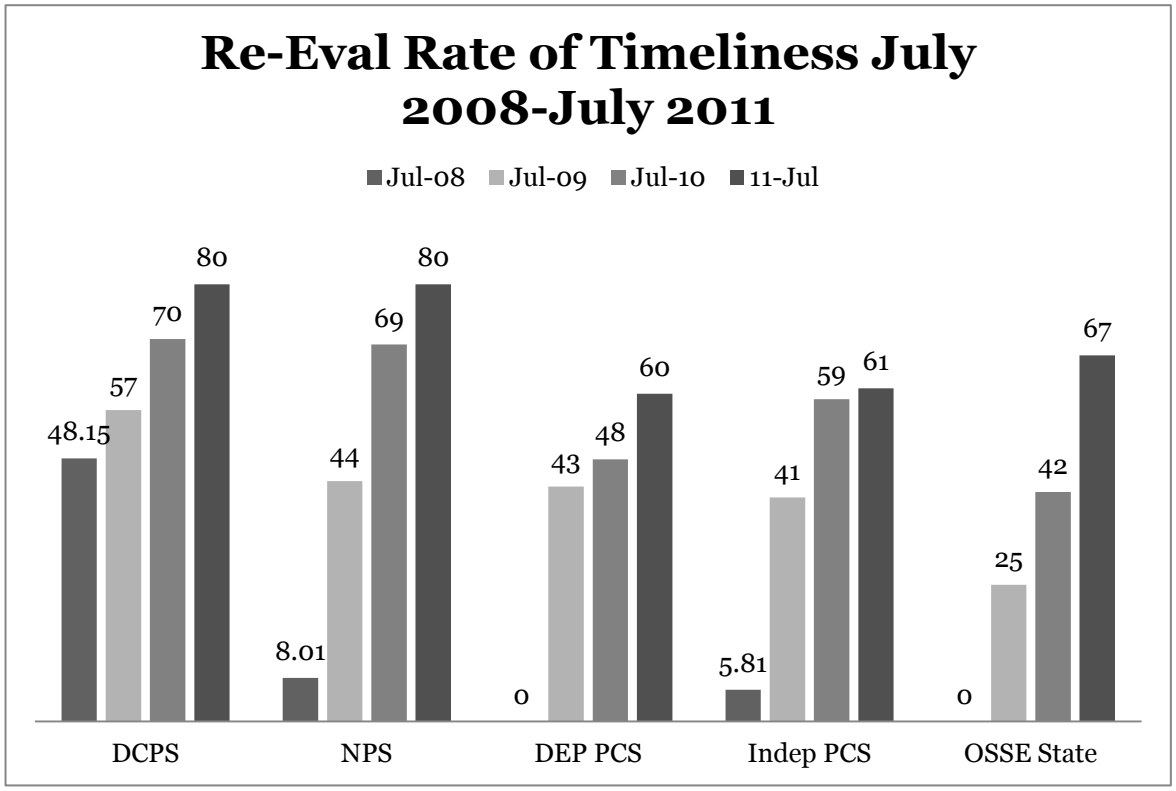

Fig. 6 Re-Evaluation Rate of timeliness

All of these data are as reported to the Monitor, who has not conducted an audit to verify the accuracy of the numbers reported by the OSSE. Nevertheless, during the course of the school year, it was evident that DCPS had undertaken a number of initiatives with the purpose of improving its level of performance. Among these were progressively improved data collection practices, closer monitoring of the delivery of related services, and the more effective use of data in management of the providers at the school level (*See*, section D below). As a result of these efforts, DCPS was better able to identify missed services and to ensure that the missed services were either made up or that plans were developed for their delivery. DCPS also increased the accountability of contractors for delivery of related services, in part through the inclusion of penalty clauses in contracts. Notwithstanding the substantial increase in the numbers of assessment ordered, DCPS continued to improve upon the level of timeliness of the assessments.

B. OSEP Determination Regarding IDEA compliance

Despite the overall trend of improved performance in the rate of timeliness, it is evident that the school system continues to fall short in complying with its legal obligations. Once again, the United States Department of Education Office of Special Education Programs ("OSEP") has determined that the District of Columbia remains a high-risk grantee and has imposed special

conditions on all grant awards to the District.[30] In the letter communicating this determination, the OSEP wrote that it had:

> determined that DC has continued to demonstrate noncompliance related to: timely initial evaluations and re-evaluations; timely implementation of due process hearing decisions; timely correction of noncompliance; secondary transition requirements; and early childhood transition requirements.[31]

OSEP determined that the District needs intervention for the fifth consecutive year. It noted that a similar determination in the previous school year resulted in the Department imposing Special Conditions on the FFY 2010 grant award. Because the District did not meet those Special Conditions, the Department once again imposed Special Conditions on the FFY 2011 grant award and directed DC to use $500,000 of its FFY 2011 state-level funds to address the long-standing noncompliance with the requirements to conduct timely initial evaluations and re-evaluations.

Following a similar imposition of Special Conditions in the previous school year, the OSSE entered into a Memorandum of Agreement with OSEP pursuant to which it monitored LEA compliance with IDEA requirements and produced regular reports to the LEAs and required the development of corrective action plans as warranted by its findings.

C. Monitoring Findings from the OSSE

With respect to IEP meetings at DCPS Schools, the OSSE's monitoring report found LEA attendance at transition planning conferences reflected compliance in only 50% of the 60 cases sampled.[32] The OSSE file review revealed that in only 78% of files were all of the required IEP Team participants invited to the most recent IEP Team meeting. Further, in only 36.67% of files did an LEA representative attend the most recent IEP Team meeting. In only 80% of files did a general education teacher attend the most recent IEP Team meeting; and in 95% of files a special education teacher attended the most recent IEP meetings.

In a monitoring report to DCPS dated December 9, 2010 regarding timeliness of evaluations and re-evaluations at DCPS, the OSSE found 97 initial evaluations noncompliant in its September 30, 2010 review of SEDS data, of which 30% were corrected; 92 re-evaluations

[30] OSEP 2011 Part B Grant Award, July 14, 2011.

[31] *Id.*

[32] DCPS 2009-10 LEA Compliance Monitoring Report, Part 2, p.1 (Oct. 1, 1010).

were noncompliant, of which 25% were corrected.[33] In a similar report dated March 29, 2011, regarding a January 7, 2011 review of SEDS data, 101 initial evaluations were found noncompliant, of which 48% were corrected; 109 re-evaluations were noncompliant, of which 62% were corrected.[34]

The OSSE's October 1, 2010 LEA Compliance Monitoring Report made the following findings regarding noncompliance with the timeliness of evaluations and re-evaluations for DCPS:

> *DCPS described processes for ensuring that initial evaluations and reevaluation timelines are met. However processes described within DCPS were inconsistent.* One DCPS administrator described a "five-step process." Another DCPS administrator described a "three-step process." School administrators and teachers described Student Support Team (SST) processes, processes within SEDS, and individualized time management processes. DCPS reported that SEDS records a warning when an evaluation is due. DCPS also reported that SEDS does not allow evaluations to be scheduled outside of the appropriate timeframe without an override to justify the noncompliance. *Notwithstanding this internal control and the various processes described by DCPS, OSSE's record review revealed noncompliance with evaluation requirements. Specifically, the record review revealed noncompliance with parental notification for evaluations and using a variety of sources to determine eligibility.*
>
> * * *As a result of a determination by the U.S. Department of Education that the District of Columbia "needs intervention" for the third consecutive year based in part of the District's noncompliance in the area of evaluation timeliness, OSSE is required to report on the State's compliance with initial evaluation and reevaluation timelines for five quarterly reporting periods. For the December 5, 2009 through March 5, 2010 quarterly reporting period, DCPS conducted 84 initial evaluations and 157 reevaluations outside of the State established timeline. Identification of this noncompliance was issued to DCPS on June 7, 2010 and corrective actions were due to OSSE by August 27, 2010. Although DCPS submitted documentation of correction of student-level findings of noncompliance by August 27, 2010, to date, only 53 evaluations have been verified by OSSE as having been completed.[35]
>
> *(Emphasis added)*

[33] Letter from OSSE Tameria J. Lewis, Assistant Superintendent of Special Education to Dr. Richard Nyankori, Deputy Chancellor of District of Columbia Public Schools dated December 9, 2010 (with attachments, including Initial Evaluation Findings of Noncompliance, June 7, 2010 to September 7, 2010).

[34] Letter from OSSE Tameria J. Lewis, Assistant Superintendent of Special Education to Dr. Richard Nyankori, Deputy Chancellor of District of Columbia Public Schools dated March 29, 2011 (with attachments, including Initial Evaluation Findings of Noncompliance, September 2, 2010 – December 1, 2010).

[35] OSSE 2009-10 LEA Compliance Monitoring Report on DCPS, Tracking Additional LEA Corrections to Address LEA Level Citations (Oct. 1, 2010).

Although the results reflected above are for a 2009-10 SY, the corrections were supposed to occur in 2010-11 and mostly had not occurred (53 verified as done out of 241 = 22%).

Similarly, the OSSE's follow-up monitoring reports regarding the timeliness of evaluations and re-evaluations for the 2010/11 SY at public charter schools that had previously found to be noncompliant found that the overall rate of correction of deficiencies was low.

For initial evaluations, 11 reports on 11 schools reflected that no corrections had been made (0%). Three schools effected corrections on 33% of noncompliant evaluations. Two schools achieved 50% corrected cases. One school reached 67% correction, and six achieved 100% correction of their noncompliant cases. Fewer than 32% of the schools reviewed for correction of noncompliant initial evaluations achieved 100% correction of noncompliant cases.

The result was similar for correction of re-evaluations that were untimely. Nine schools effected no corrections in at least one reporting period. One achieved corrections in 25% of cases, one in 33% of cases, and two in 50% of cases. Eight schools achieved 100% correction of noncompliant cases. Forty four percent of schools reviewed for correction of noncompliant revaluations achieved 100% correction of noncompliant cases.

D. Related Services capacity[37]

The DCPS data also reports capacity gaps at each of the schools by month and discipline. Due to provider coverage problems, 203 students at 14 DCPS schools missed occupational therapy services for two weeks or more. Another 220 students at five DCPS schools missed speech and language pathology services for two or more weeks for similar reasons. In all cases, DCPS reported that the missed services were being made up or there were plans in place for makeup.

Dunbar High School had capacity gaps for occupational therapy starting in September and continuing through June with the exception of two months in which the gap was for three weeks rather than the entire month. Patterson Elementary School had a significant service capacity gap for speech and language services for four months. Davis Elementary School had gaps for physical therapy for more than two months. (Physical therapy assessments increased from 56 to 141 from the 2009/10 SY.)

[37] Data regarding vacancies for special education teachers, class room aides and related services providers was requested from DCPS but was unavailable in time for the completion and filing of this report.

Overall, 94% of all prescribed related services were documented, and 57% were delivered. Students were absent 10% of the time and unavailable 7% of the time, while school closures (13%) and provider unavailability (7%) were responsible for other failures.

IV. MISCELLANEOUS ISSUES

A. Data Systems and Accuracy Audit

The Consent Decree requires the District to maintain "an accurate and reliable" special education tracking system to ensure schools' appropriate management and timely provision of special education services, compliance with IEP meeting and evaluation requirements under IDEA, and implementation of HOD/SAs. (Consent Decree ¶¶ 60-66). The Decree also provides for the data system to be used as a specific prophylactic remedial tool so as to provide early identification and remedy for lapses in related service delivery.

As discussed above in the section on related services, the District made progress in the development and usage of data systems to manage the delivery of special education services. District regulations require LEAs to use SEDS and the OSSE has required all LEAs to participate in training in its usage. On-going monitoring data indicates that the vast majority of LEAs are using SEDS regularly. DCPS, the largest LEA, uses SEDS data to identify lapses in related services, and to develop and implement plans to make up missed services. At the start of the school year, 19% of the services prescribed in SEDS had incorrect service dates that did not correspond with IEP dates. As the school year progressed, DCPS reported that this rate was reduced to 5% with plans to continue efforts over the summer and into the current school year to correct the remaining erroneous dates. All of these developments are indicators of an improved data system, and one that is made more accurate and reliable due to its regular usage in carrying out core special education functions.

Despite these measures of progress and improvement, there remain concerns about the completeness and therefore accuracy of data, especially for students who have filed DPCs and have had HOD/SAs entered into the BJDB. As discussed in section II of this report, for some of these students who fell into the sample reviewed by the Monitor, there were gaps in the records that ought to have been in SEDS, including the absence of current IEPs, MDT meeting notes and other documents that should be readily accessible to school personnel who are responsible for the

delivery of special education and related services. There were also inconsistencies between the records maintained in SEDS and the documents contained in the BJDB regarding the status of the delivery of special education and related services to the students.[38] Moreover, OSSE's monitoring and complaint investigations have identified other gaps and inaccuracies in the records that are required to be maintained. It is, in part, to avoid such conditions that the Consent Decree requires that the District conduct an accuracy audit of its special education data systems and achieve a 96% accuracy standard with respect to key special education and HOD/SA elements. (Consent Decree ¶ 62-64).

In the previous report, the Evaluation Team recounted the history of fits and starts regarding an accuracy audit and why one had not yet materialized. One of the concerns of the Evaluation Team then and of the Monitor now is that any audit must examine the consistency and correctness of data across the different data systems in use for special education students. As the 2010/11 SY ended, no audit was done. However, as a result of on-going discussions between the parties and the Monitor, there is an evolving consensus about how to execute the requirement of an accuracy audit in the current school year, and to integrate it into regular functions of the school system – the enrollment audit and child count – where it would add value and utility separate and apart from the requirements of the Consent Decree.[39] Building the accuracy audit into the normal cycle of major systems checks has the advantage of sustainability as well, an important consideration as the parties and the Court can envision the disengagement of the school system from ongoing judicial supervision in the near future.

In the meantime, work has proceeded on better integration and communication between the various data systems. These included activities such as completing an agreement with the Public Charter School Board with respect to the integration of its student data system into the BJDB, which was facilitated in part by the planned transfer of responsibility for managing this system from DCPS to the OSSE; improving the accurate integration of the student docketing system with other student data systems; capturing charter school settlements that charter schools

[38] These observations are further supported by the OSSE's monitoring findings with respect to the records reviewed at DCPS schools which indicate that, despite the efforts that have been undertaken to improve data entry, substantial problems remain with the completeness and accuracy of the information in SEDS. *See*, Fig. 5 above.

[39] This requirement is also incorporated into the parties' ADR agreement approved by the Court (Docket #2273).

had not previously reported into the Blackman/Jones database; and implementing additional training and other measures to address problems of accurate data entry in SEDS.

B. Attorney's Fees

In the previous report, the Evaluation team reported on the continuing conflicts over payment of attorney's fees to members of the private bar who represent students in due process complaints. We noted that the payment process established by DCPS, which is administered by the General Counsel's office, creates a more streamlined and generally quicker alternative than litigating the entitlement to attorneys' fees in federal court. Despite this beneficial aspect, the Monitor, like the Evaluation Team last year, has continued to hear complaints from attorneys about seemingly arbitrary or poorly explained decisions about payment rates to particular attorneys, work that was deemed non-compensable, inconsistent decision-making and prolonged delays in making free payments to prevailing attorneys.

The Evaluation Team also noted that significant changes have taken place in the extent of reliance that is placed upon students' attorneys to seek and obtain evaluations and compensatory education services needed to implement provisions of HOD/SAs. The Evaluation Team recommended that the DCPS guidelines for approval of attorney fee applications, originally adopted on October 1, 2006 at a time when implementation responsibilities largely remained with DCPS personnel, be reconsidered and revised to reflect contemporary practices and the substantially increased reliance upon the private bar to perform functions that were previously the responsibility of DCPS employees. Although the General Counsel made a commitment to conduct such a review, it was not completed before the 2010/11 SY ended. As this report is being written, there are plans for a meeting and discussion with the private bar on December 14, 2011 prior to revising the attorney fee guidelines.

C. Closure of Rock Creek Academy

On April 27, 2011, the OSSE issued a Quality Assurance and Monitoring Unit Report on Rock Creek Academy as a result of which it made a determination to revoke the Certificate of Approval issued pursuant to the Placement of Students with Disabilities in Nonpublic Schools Amendment Act.[40] The report cited 12 specifications of violations including the failure to

[40] D.C. Official Code §38-2561 et seq.

maintain a six-hour instructional day, failure to demonstrate the provision of services specified in each child's IEP, improper use of restraints and seclusion of students, failure to provide incident reports, and failure to provide true and complete information regarding absenteeism and truancy.[41]

In the aftermath of the report and prior to a scheduled hearing on the notice of revocation, Rock Creek Academy made a decision to close the school. Unlike the "reintegration" efforts in prior years which were criticized by the Evaluation Team for preemptive and unilateral decision-making, in this case there was a more orderly process to determine an alternate placement for the students. Of the 123 DCPS students at Rock Creek, nine either graduated (5), aged out (2), left the jurisdiction (1) or exited special-education (1). All of the remaining students had IEP meetings and were assigned new placements. By the time the school closed at the end of the school year, there were 116 students left. According to information provided by the OSSE, 44 received placements to other non-public schools; three were placed at independent public charter schools, and 51 were enrolled in DCPS or a dependent charter school. Six students were assigned a placement but did not complete enrollment. Of the remainder, six moved to another jurisdiction, three were incarcerated, two were with DYRS and one was withdrawn by a parent.

V. CONCLUSION

As this report indicates, the District has achieved a relatively high level of compliance with the timeliness measures specified in the Consent Decree, although it has not yet hit the mark. Some of the case closing and counting practices that were disapproved of in the previous school year have been discontinued, while others continue. From a review of the case files in the sample, the Monitor can appreciate the frustration of case managers who make repeated efforts to contact parents and attorneys, without success. As a result, precursor actions are long-delayed and keep cases in an indeterminate state of uncertainty, with no clear pathway to closure. As cases in this state must be removed from the count on which the calculation of timely implementation is performed pursuant to the Consent Decree, a substantial number of "outstanding" cases makes the Defendants' challenge of achieving compliance that much harder. It is likely that this frustration and its impact upon the compliance determination is the root cause

[41] Division of Special Education, Quality Assurance & Monitoring Unit Report, ROCK CREEK ACADEMY, April 27, 2011.

of some of the questionable case closing practices that have been discussed in this report and the previous one.

As a result of the ADR agreement reached between the parties, there will now be a clearer pathway to definitively closing such cases involving compensatory education awards within a reasonable time after diligent efforts have been made to secure the precursor action. The agreement creates a process for offering an alternate award, with a time limited period within which a choice must be exercised, following which the case can be referred to the Court Monitor, with notice to class counsel, for a final determination regarding substantive closure of the case.[53] As a consequence, there will be a reduced likelihood that cases will remain indefinitely in an outstanding category, where they cannot be included in the formula upon which the calculation of timeliness is made. With clarity having been achieved in the applicable rules for closing cases, the considerable gains that the Defendants have made over the past two years in particular make it probable that the Defendants can properly achieve compliance with the numerical targets in the Consent Decree in the near future.

The prospect of reaching that milestone should prompt the Defendants to plan carefully for how they will sustain the gains that have been made and demonstrate to the Plaintiffs and the Court that the system for assuring timely implementation of HOD/SAs is indeed durable and can be trusted to perform with fidelity to the law and in the best interests of students. In that vein, the Defendants should give serious consideration to the recommendation made earlier in this report to transition the Final Review function in the case closure process from DCPS to the OSSE to provide a greater measure of both distance and independence to this function.

The Monitor's disagreement with the decisions made to classify some cases as timely implemented –which necessarily occupies the bulk of this report -- should not overshadow the considerable and continuing progress that the Defendants have made during the school year as described in this report. That they have been able to continue to progress even as the demands for services have increased, and in an environment of greater fiscal constraint than in previous years as well as legal uncertainty during the ADR process, is a tribute to the professionalism and dedication of the public servants who are entrusted with this important work on behalf of students in special education. Their efforts deserve an acknowledgment.

[53] ADR Agreement, Paragraph I (1)(b)(iii) and (5); and Exhibit B, Agreement of the Parties Regarding Closure of Independent Compensatory Education Cases (Docket #2268).