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 2013-2014 SCHOOL YEAR

Submitted by:

Clarence J. Sundram
Court Monitor*

Filed

November 17, 2014

* The assistance of Thomas Harmon in the research and preparation of this report is acknowledged with gratitude.

Contents

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 2013-14 School Year.

On July 30, 2014, the Defendants wrote to the Court Monitor and the Plaintiffs' class counsel asserting that as of June 30, 2013, they had satisfied the three exit criteria in the Consent Decree that are necessary to move for termination of the *Jones* portion of the decree. (Docket #2374) The three requirements are:

1. Defendants must eliminate the Jones initial backlog;[1]

2. During the preceding 12 months, 90% of the Hearing Officer Decisions/Settlement Agreements ("HODs/SAs") were timely implemented during the measurement period; and

3. No case is more than 90 days overdue. (Consent Decree, ¶ 148)

Subsequently, Defendants filed a Motion to Terminate the Consent Decree and to Dismiss the Case. (Doc. #2485, filed September 19, 2014) The Plaintiffs moved for an extension of time to respond to the Defendants' motion (Doc. #2487, filed September 26, 2014), which the Defendants opposed. (Doc. #2488, filed September 30, 2014) The Court granted the motion, extending the Plaintiffs' time for filing a response until 10 business days following the filing of the Court Monitor's Report for the 2013-14 School Year. (Doc. # 2490, filed October 8, 2014)

Since the central issue before the Court and the parties is whether the evidence supports the Defendants' position on the state of compliance with the requirements of the Consent Decree, and there is an obvious interest in providing the parties and the Court with the Monitor's findings on this question as promptly as reasonably possible, this report will focus narrowly upon reviewing the evidence of compliance with the exit criteria.

[1] As recognized in the year-end report filed by the Court Monitor for the previous school year, the Defendants have eliminated the initial backlog; this report focuses on compliance with criteria 2 and 3 above.

A. Evidentiary Foundation for the Findings in this Report

The Monitor has reviewed a diverse array of information and utilized many data collection methods during the school year in monitoring the implementation of the Consent Decree. These include:

1. Visits to a sample of schools; interviews with school principals, special education coordinators, special education teachers, and related services providers; and on-site review of student records.
2. 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 the Special Education Data System ("SEDS" also known as EasyIEP).
3. Review of several cases where the private counsel and the District of Columbia Public Schools ("DCPS") agreed to alter or waive specific provisions of an HOD/SA. The procedure agreed upon by class counsel and the District, and approved by the Court, requires the Court Monitor to review and approve such provision waivers.[2]
4. Interviews with compliance case managers, resolution specialists, their supervisors, DCPS and the Office of State Superintendent of Education ("OSSE") case reviewers, and students' attorneys, and meetings with class counsel, and members of the special education attorneys' roundtable.
5. Ongoing review and analysis of the databases developed to track HOD/SA implementation, related services at charter and nonpublic schools, and compensatory education services.
6. 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, including the quarterly reports produced pursuant to the ADR agreement; and

[2] ¶ 5, ADR Agreement, Docket # 2268, filed August 18, 2011, approved by the Court on November 21, 2011, Docket # 2273. This paragraph provides:

> For HODs/SAs containing IEE or independent compensatory education provisions where a) the parent no longer seeks the relief ordered or agreed to in the provision but seeks a new form of relief in exchange, and where the parent or parent's attorney signs a statement to that effect, and b) the parent no longer seeks the relief ordered or agreed to in the provision and seeks nothing in exchange, and where the parent or parent's attorney signs a statement to that effect, Defendants will submit the case documentation to the Court Monitor and class counsel for a determination of whether the original required action can be considered "timely implemented" even though the independent compensatory education was not received. The Court Monitor will make the decision as to whether the required action can be considered voided, taking into account input from class counsel. If the required action is voided, then the timeliness and implementation status of the remainder of the required actions will determine the case's overall status.

7. Review of case files of cases selected by the parties for the quarterly Quality Assurance Reviews conducted by Defendants and Plaintiffs pursuant to the ADR agreement.

However, in light of the focus of this report, the Monitor has relied primarily upon the review of cases to assess the reported rate of compliance with the Consent Decree's requirements.

B. Structure of the Report

To provide a context for the findings regarding due process complaints, the report will begin with a description of the distribution of students among the District of Columbia schools, including special education students. It will provide data about the due process complaints issued during the school year. The report will then discuss the HOD/SAs issued during the school year and the Monitor's verification of the Defendants' reported rate of compliance with the requirements of the Consent Decree.

II. GENERAL OVERVIEW

A. Demographics

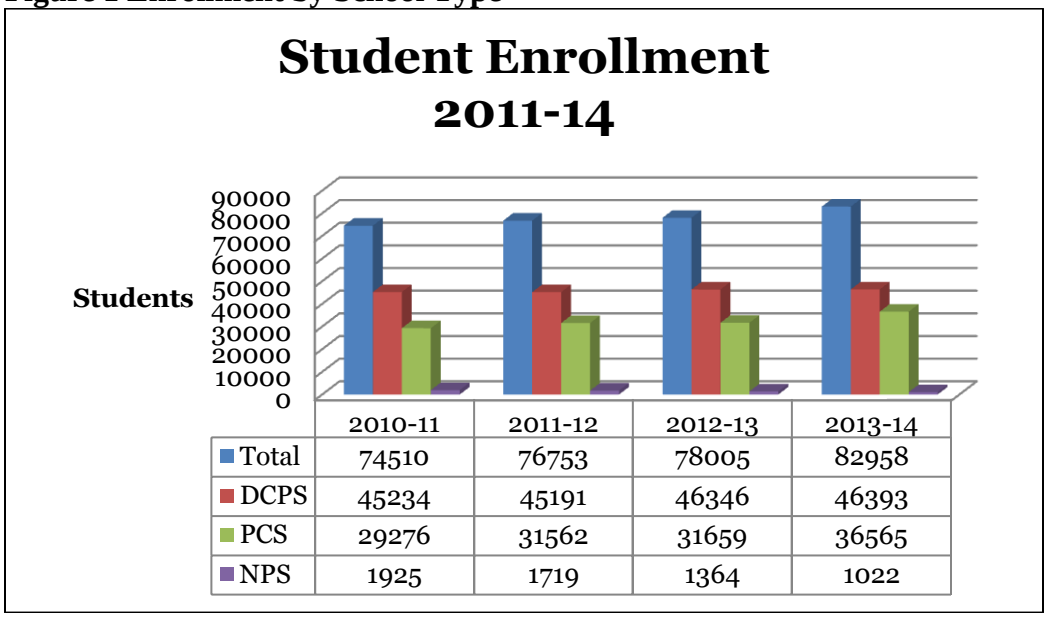
The data provided by the OSSE indicates that for SY 2013-14 there were a total of 82,958 students enrolled in all Local Education Agencies ("LEAs"), including 11,774 students with Individualized Education Plans ("IEPs") (14.19%).[3] Of the total students, 46, 393 (55.92%) were enrolled in DCPS schools, including 6,342 students with IEPs (13.67%). DCPS has 53.86% of all students with disabilities enrolled by LEAs. In addition, DCPS also serves as the LEA for 1,229 students in charter schools, and monitors the services to the vast majority of the 1,022 students in nonpublic schools. While other LEAs also place students in nonpublic school, DCPS accounts for 84.2% of such placements. The number of students in non public schools continues to decline significantly from 1,925 in SY 2010-11 to 1,022 in SY 2013-14. (Fig. 1)

Charter schools enrolled 36,565 (44%) of the total students, of which 3,160 students (8.64%) had IEPs. While the overall independent charter school enrollment increased by over

[3] These numbers include students in non public schools and students in surrounding counties who are eligible to be receiving services under the IDEA.

3.5% over the previous year, their percentage of students with IEPs declined by 4.6% over the same period. Charters have 26.83% of all students with IEPs enrolled by LEAs. As referenced above, within the group of charter schools, there are a small number that have elected to have DCPS serve as their LEA for special education purposes, while other charters serve as their own LEAs.

Figure 1 Enrollment by School Type

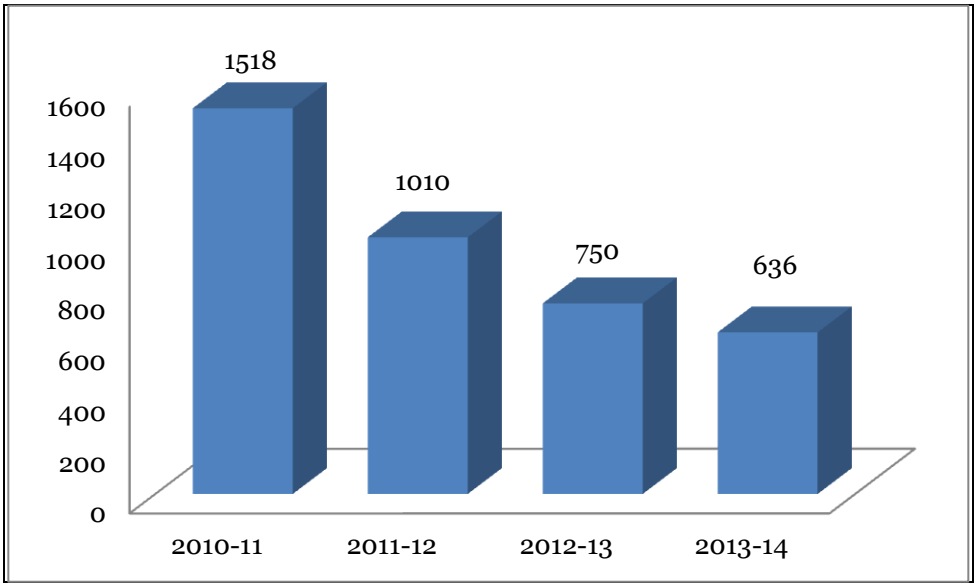


	2010-11	2011-12	2012-13	2013-14
Total	74510	76753	78005	82958
DCPS	45234	45191	46346	46393
PCS	29276	31562	31659	36565
NPS	1925	1719	1364	1022

B. Due Process Complaints

Even as the overall census of the schools has been experiencing a steady growth, the number of due process complaints filed has declined substantially each year. As reported by the Student Hearing Office, there were 636 due process complaints ("DPC") filed during the period July 1, 2013 to June 30, 2014, continuing the trend of a steady decline in the number of complaints filed each year. (Figure 2) The differing theories about the reasons for the decline in the numbers of due process complaints and HOD/SA/SAs were discussed extensively in the Monitor's previous report and do not require repetition. (*Report of the Monitor for the 2012-2013 School Year*, Doc. # 2428, filed February 3, 2014. pp. 9-10, 32-38)

Fig. 2 Annual due process complaints filed 2011-2014



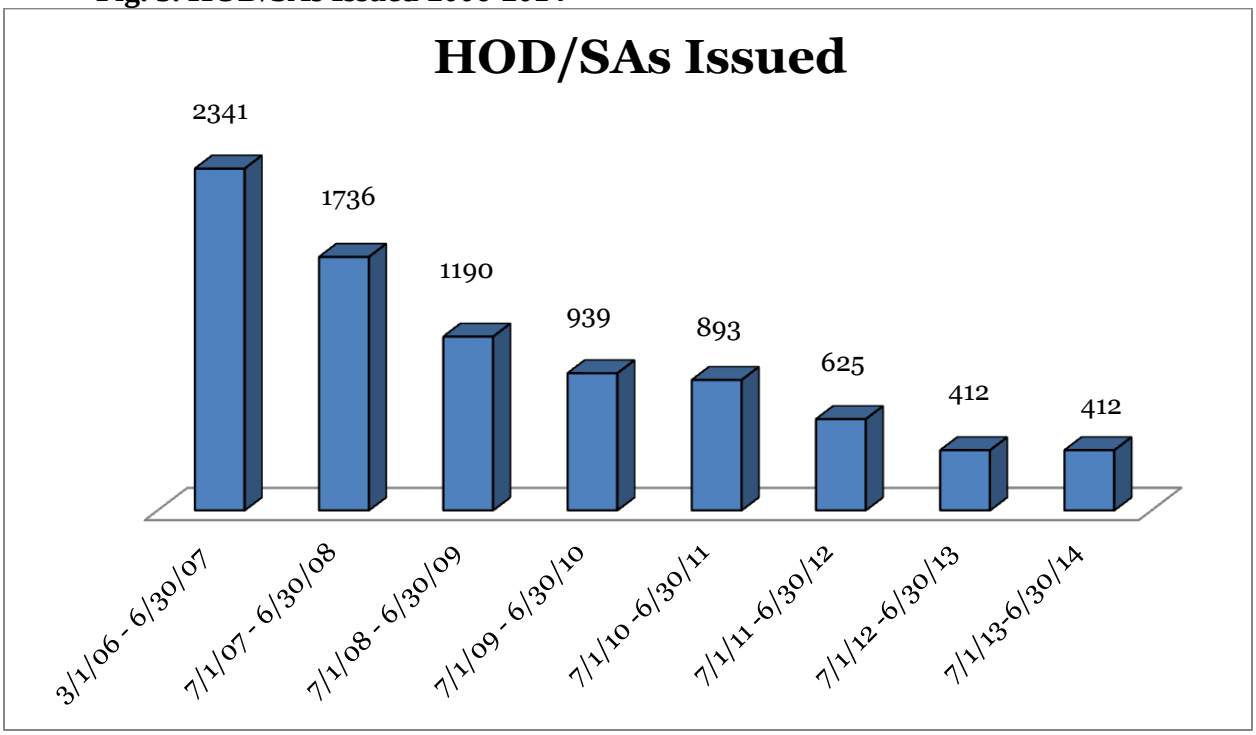
As has been the case in previous years, the vast and disproportionate majority of the due process complaints are filed against DCPS (591/689[4] = 85.77%) which has 53.86% of students with IEPs, with 74 filed against charter schools (10.74%) which have 26.83% of the students with IEPs, and the remainder against the OSSE or nonpublic schools.

III. HOD/SAs Issued during the 2013-14 SY

There were 412 HOD/SAs issued in SY 2013-14. (Figure 3)

[4] The discrepancy between the number of complaints reported by the Student Hearing Office (636) and the number reported by the Blackman Jones Data Base ("BJDB") (689), on which these calculations are based, is that the SHO regards a complaint against multiple parties as a single event, while the BJDB breaks it out into separate complaints for the purpose of tracking resolution, resulting in a slightly higher total number.

Fig. 3. HOD/SAs Issued 2006-2014



IV. VERIFICATION OF TIMELY IMPLEMENTATION OF HOD/SAS

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 July 1, 2009 will be timely implemented (i.e., not "overdue")." (*Id.* ¶ 42 (d)).

In a year-end report submitted to the parties as required by ¶ 46 of the Consent Decree, Defendants reported that there were 412 HOD/SAs issued during the school year, of which 214 were implemented on time, 17 implemented late, 165 open and not overdue, and 4 cases open and overdue. (*See*, Exhibit 1, appended to this report) Of this last group, the Defendants' year-

end report identifies no cases as being overdue more than 90 days. The Defendants report a rate of timely implementation of 91%, which slightly exceeds the threshold for compliance with the Consent Decree standard.

$$\frac{Cases\ Timely\ Implemented}{Total\ Cases - Open\ and\ not\ overdue - Outstanding\ Protocol} = Compliance\ \%$$

$$\frac{214}{(412 - 165 - 12) = 235} = 91.06\ \%$$

Based on the formula in the Consent Decree, Defendants need to timely implement 211-212 cases to achieve the threshold of 90% compliance (89.78% or 90.2%).

The Consent Decree provides:

> For the purposes of determining whether Defendants are in *Jones* compliance for termination, the requirements of paragraph 148 a-c have to be met absolutely. Defendants waive any right they may otherwise have to argue that they are in "substantial compliance" with these requirements if they are close to meeting them but have not absolutely met them. (*Id*. ¶ 149)

The Consent Decree requires the Monitor and Evaluation Team[5] 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)).

B. Case Reviews

Unlike previous years in which the Monitor reviewed samples of varying sizes, for the 2013-14 SY the Monitor conducted a review of ***all*** of the cases closed by the Defendants as timely implemented during the school year 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

[5] The Evaluation Team established by the Consent Decree originally consisted of three persons – the Court Monitor, Amy Totenberg, Rebecca Klemm and Clarence J. Sundram. DCPS retained Rebecca Klemm as a consultant and she resigned from the Evaluation Team. Amy Totenberg was appointed a United States District Judge for the Northern District of Georgia and also resigned. Mr. Sundram was appointed as Court Monitor in her place and is the sole remaining member of the Evaluation Team.

information relied upon by the DCPS supervisors, and by staff at the OSSE who make the final determination that a case has been timely implemented. In addition to reviewing information in the case files maintained by the Defendants, in several cases the Monitor contacted the parent's attorney to seek supplementary information or clarification of events described in these files.

1. Overall observations

This examination provided a level of confidence that the systems of internal review at DCPS and external review by OSSE of the case closure process are holding case managers accountable for complying with the case closure protocols that have been developed. These review processes require documentation of the case managers' efforts and consequently the quality and consistency of that documentation continues to improve. With the exception of occasional lapses in strict compliance with the "diligent efforts" protocols (discussed below), which usually had no overall adverse effect upon the implementation of the HOD/SA, case managers were usually prompt in commencing the implementation process, offering assistance, issuing authorization letters for independent services, and attempting to schedule required meetings. Nevertheless, they encountered delays, sometimes substantial, especially in obtaining confirmation of payment for independent services and attorneys' fees. In several of these cases, the attorneys had not submitted their invoices and did not respond to repeated requests from case managers to provide an update on the status of their fee payments.[6]

The past school year also saw a change in the practice of offering independent evaluations in Settlement Agreements, with an increasing number of these cases offering evaluations performed by DCPS staff, which were usually performed timely. Also, despite denials by District representatives at a status conference that these practices were occurring,[7] there continue to be Settlement Agreements that do not contain deadlines for actions required of DCPS,[8] and agreements that place deadlines upon parents for completing required actions.[9] In

[6] *See, e.g.,* TM, SA #26364 (over 400 days without a response).

[7] Transcript, Status Conference of March 19, 2014, pp. 60-63.

[8] The Deputy Attorney General said that it "is absolutely not true" that DCPS does not have deadlines in settlement agreements for its own actions. "DCPS always puts a deadline in a SA for its own actions." (transcript, p. 60) *But see, e.g.,* DH, SA #26287, dated 7/24/13 (no deadline for funding independent services); CT, SA #26536 (no deadline for convening an IEP meeting); HB, SA # 26627, dated 4/14/14 (no deadline for placing a student at a nonpublic school).

their response to a draft of this report, the District agreed that there had been failures to include deadlines for DCPS' actions in the cited cases but stated that these were isolated cases of noncompliance rather than a systemic problem. The District also acknowledged that it *does* incorporate deadlines for parent actions in Settlement Agreements, but that they are not tools for Defendants to excuse their obligations. They stated that DCPS conducts "diligent efforts" when parents are experiencing difficulty in completing the required action within the timeline up until the inaction reaches the Outstanding Protocol standard, and that administrative closures are subject to being reopened when the family reengages. (See the discussion of Outstanding Protocol cases *infra*, pp. 14-17)

In last year's report, the Monitor wrote about the disappearance of the term "compensatory education" from Settlement Agreements, a practice that continued into the current school year.

> There is no clear line distinguishing "compensatory education" from "missed services" or any clear, written policy to aid resolution specialists or case managers in determining how to characterize substantial grants of makeup services to a student. In the sample of cases reviewed by the Court Monitor, there are several instances in which the resolution of the due process complaint alleging a Child Find violation or a denial of FAPE resulted in a substantial grant of makeup services which were not characterized as "compensatory education;" rather there were labeled as "missed services" or "interim services" or not characterized at all in the Settlement Agreement. Nevertheless, and illustrative of the lack of clarity of policy, case managers sometimes continue to refer to such post-settlement services as "comp ed" in their authorization letters, in their follow-up correspondence with parents and attorneys, and in their progress notes.
>
> In the sample of 67 Settlement Agreements described above, *none* used the term "compensatory education" although 40 provided for payment for independent tutoring or other services. The elimination of this term from Settlement Agreements is a significant change from the way in which similar provisions were characterized a year earlier, before the Implementation Fee Guidelines were published. In essence, the substance of this ADR Agreement provision has been eviscerated by the change in practice, eliminating

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[9] The Deputy Attorney General said: "We don't set deadlines, period, for parent actions." (Transcript, p. 62-63) The Deputy Chancellor stated: "The practice of having deadlines on parents has been discontinued for several years that Mr. Sundram was bringing up had been a past practice." (*Id*. pp. 63-64 [sic]) *But see, e.g.*, BM, SA #26553, dated 2/4/14 (setting a 45 day deadline for the parent to obtain two independent assessments, and eventually after extensions closing the case administratively without the services having been delivered); KB, SA #26600, dated 3/14/14 (setting a 45 day deadline for parent to obtain independent evaluation, and to complete independent services); DW, SA #26276, dated 7/16/13; MT, SA #26526, dated 1/13/14; AG, SA #26276, dated 7/16/13.

> eligibility for implementation fees to attorneys, while the post-settlement work that needs to be done by the parent/attorney remains.
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> *Report of the Monitor for the 2012-2013 School Year*, Doc. # 2428, filed February 3, 2014, p. 36.

Although the Defendants denied at the status conference that there was any intentional policy to eliminate the use of this term, and stated that parents' attorneys do not ask for compensatory education,[10] subsequent to the status conference, and after the end of the school year, in July 2014 the District issued an undated "Guidance on Compensatory Education, Missed Services, and Independent Services Plans." That document essentially ratifies the practice that had been reported and states, in part, " . . . compensatory awards are equitable in nature, and absent exceptional circumstances, are only awarded by hearing officer decisions or OSSE letters of decisions."[11] In a response to a draft of this report, the Defendants stated that the Deputy Attorney General's representation to the Court that Special Education Attorneys were not asking for compensatory education appears to have resulted from a misunderstanding.[12]

2. Cases closed as Timely Implemented

Overall, the Monitor concluded that the cases that had been closed as Implemented Timely had been correctly categorized. Unlike previous years in which the Monitor identified many questionable and erroneous decisions to classify cases as Timely Implemented, in this

[10] The Deputy Attorney General said: "My understanding from talking with the Office of General Counsel is that the Plaintiff's' attorneys are not asking compensatory education, number one. . . . [W]e are not purposely writing compensatory education out of Settlement Agreements." (Transcript, p. 69) In Declarations appended to Plaintiffs Report on Parents' Attorney Concerns Following the March 19, 2014 Status Conference, Doc. #2474, filed 7/14/14, several individual members of the special education bar took issue with this statement. (see, e.g., Doc. ## 2474-3, 2474-5, 2474-6, 2478-7

[11] Doc. #2478-1, filed 8/11/14.

[12] The response states:

> The information provided by DCPS's General Counsel's Office to the Deputy Attorney General appears to have been predicated on DCPS's position that virtually all requests for compensatory education in due process complaints are, in fact, simply boilerplate requests and therefore inconsistent with the Circuit's definition of compensatory education announced in *Reid*. [*Reid v. District of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005) Defendants do not deny that some Special Education attorneys will, regardless of the nature of his or her client's complaint include a request that a Hearing Officer ordered DCPS to provide compensatory education; however, that default request is typically unsupported in complaints with any specific demand of services. As such, DCPS is often left to propose services to resolve the complaint without specific input from the parent and/or their attorney or an evidentiary record establishing any denial of FAPE, any educational deficit and any indication of how the requested relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA. [Footnote omitted]

school year the Monitor found significant improvement in the process and that the case managers, their supervisors and the individuals performing the review functions at DCPS and the OSSE were following the protocols in implementing HOD/SAs and that the determinations that cases were implemented in a timely fashion were supported by documentary evidence in the case files. Out of the 214 case files reviewed, there were only two instances in which the Monitor disagreed with the conclusion that a case had been timely implemented.

MB, HOD #26555, issued on 2/6/14. This hearing officer decision required that within 15 school days of entry of the order, DCPS shall convene an IEP meeting to develop an IEP for the student. It was closed as timely implemented on April 23, 2014. The IEP meeting was held on February 28, 2014 but there was no general education teacher, a required participant, present. After the deadline for holding the meeting had passed, on March 14, 2014 the case manager who had convened the meeting sent an e-mail to the attorney requesting an excusal of the presence of the general education teacher from the previously convened meeting. The case manager's note states: "however, parent and atty declined to agree to that request."

The IEP meeting was subsequently reconvened on April 23 with a general education teacher present and the IEP adopted. The notes of this meeting mischaracterize the previous IEP meeting by stating: "At the previous meeting, there was not a general education teacher present and all parties agreed to move forward with the meeting without the gen ed teacher." If this was true, why was there a need for the case manager who convened the meeting to ask on 3/14 for the parent to waive the presence of the general ed teacher? And how does one reconcile this with the case manager's note which explicitly contradicts this statement?

When the case was submitted for final review, two DCPS reviewers deemed the implementation untimely due to the absence of the general education teacher at the February 28 meeting. Nevertheless, the case was closed as timely implemented. The final reviewer's note inexplicably states: "4/13/14- MDT Notes: 2/28/14 meeting recapped and parent agreed to excuse gen ed teacher from that meeting."

This case should have been determined to be untimely.

GF. HOD #26429, issued 11/4/13. This interim order required DCPS to provide educational services, including bus transportation, to the student at a private school during the pendency of the litigation. On November 15, 2013, the case manager placed a call to the transportation helpdesk but was unable to get through. On December 3, 2013 the case was reassigned to a different case manager. Two days later, the case manager e-mailed the student's attorney to confirm that the HOD was being implemented, including bus transportation.

On December 6, the attorney informed the case manager that DCPS has not provided transportation and expressed willingness to submit attendance and mileage data for reimbursement. Eventually, a provision waiver was signed by the parties and submitted to

> the Court Monitor on January 30, 2014 and approved on February 5, 2014. In approving the provision waiver, the Court Monitor marked it untimely, as the implementation of the HOD was already untimely when the process of developing the provision waiver began in mid-December. Nevertheless, this case was closed as timely implemented.[13]

Even with these two cases removed from the count of timely implemented cases, the remaining 212 cases are sufficient to meet the 90% compliance threshold, as discussed earlier.

3. Outstanding Protocol cases

In addition to reviewing all cases closed as timely implemented, the Monitor also reviewed ***all*** of the 12 "Outstanding Protocol" cases that were closed administratively, while one or more provision remained "outstanding."

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 such HOD/SAs and to reach an agreement with the Plaintiffs on the content of the protocol (*Id.* ¶ 44). An HOD may also be "overdue" when any one of its provisions has not been implemented within the times specified in the HOD, and that provision is not outstanding as defined above.[14]

The ADR Agreement entered into by the parties in 2011 further elaborated on the obligation to make "diligent efforts." (Agreement of the Parties Regarding *Jones* Compliance,

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[13] The District's response to a draft of this report agreed that **MB** should have been determined to be untimely but argued that the provision waiver in **GF** voided the untimely action. This latter argument is a reprise of the argument made by the Defendants in similar circumstances last year. In rejecting that argument, the Court Monitor wrote:

> A provision waiver cannot resurrect and make timely a case that is already untimely. Were that practice to be permitted, it would essentially be re-creating the discredited past practice of rolling over old and untimely cases into new settlement agreements and restarting the clock to make them timely.

Report of the Monitor for the 2012-2013 School Year, Doc. # 2428, filed February 3, 2014, p. 52.

[14] These provisions apply equally to Settlement Agreements (Consent Decree, ¶ 8).

Docket #2268-1, filed August 18, 2011) It required the Defendants to finalize a communication protocol, with input from the Plaintiffs, which gives case managers detailed practical guidance on when and how to follow up with parents and attorneys on the status of IEEs and independent compensatory education.[15] This protocol requires case managers to maintain regular contact with parents/attorneys to check on progress and see if additional assistance is required, generally at least every 14 days, until documentation is received that the IEE has been obtained or the independent compensatory education services have begun. If no such documentation is received within 90 days after the issuance of the HOD/SA, the follow-up offer of assistance should include an offer by DCPS to provide any outstanding evaluation, and offer advice regarding appropriate independent compensatory education providers. Also filed with the ADR Agreement was a set of minimum guidelines established by the OSSE for all LEAs entitled "Supporting Documentation for HOD/SA Implementation" (Docket #2268-4). These guidelines were later modified and superseded by a version issued on March 23, 2012, which eased some of the documentation requirements that had proven to be impracticable.

In the course of the case review, the Monitor has found that case managers have made a significant improvement in documenting their contacts with the parents/attorneys, and offering assistance. In the majority of cases, they have complied with the expectation that contacts are maintained approximately every 14 days. In general, these administrative case closures were warranted, usually due to a prolonged period of non-responsiveness by the parent/student/attorney to repeated efforts by the case manager to contact them about the implementation of the HOD/SA. In a few cases, the student had moved out of the jurisdiction or was no longer enrolled. Perhaps as a result of this non-responsiveness, in several cases the diligent efforts guidelines were not followed strictly.[16] In a small number of cases, there were documentation gaps of several weeks. Sometimes, these occurred when there was a change in the case manager assigned to the case. It was also not apparent that strict adherence to the diligent efforts protocols would have made any difference in the outcome.

[15] Exhibit A to the ADR Agreement, Draft Protocol for Communications with Parent/Guardians Re Assistance with IEEs/Services, Docket #2268-2, filed August 18, 2011.

[16] E.g., AO, HOD #26270, dated 7/5/13, (no contacts during the months of September and November 2013); KG, HOD #26308, dated 8/4/13; DA, SA #26332, dated 8/28/13.

However, there were also instances where the case manager went through the motions of documenting contacts while substantively ignoring what was actually going on in the student's life. Although technically complying with the case closure protocols, the focus remained on closing the case, not assisting the student, notwithstanding the ADR protocols intended to achieve the latter outcome.

> **TM, SA #26364**, entered September 19, 2013. This settlement agreement required the adult student to provide Ballou STAY a copy of her previous IEP from a charter school, following which DCPS had 45 calendar days to complete a comprehensive psychological evaluation, to be followed by an IEP meeting to review the evaluation, revise the IEP if necessary, and discuss missed services if necessary. DCPS also agreed to pay the attorney reasonable fees not to exceed $750.
>
> Shortly after receiving the IEP, on October 24, 2013 the Ballou assistant principal informed the case manager that the student had been referred to the Least Restrictive Environment committee because ***Ballou was unable to implement 20 hours of specialized instruction***. The psychological evaluation was completed on November 15, 2013. There were difficulties in finding a mutually agreeable date for the IEP meeting. On November 26, 2013, the case manager proposed December 18, 19 or 20. The student's attorney proposed December 11, for which the case manager was not available. The attorney then proposed January 8 or 15, 2014. When the case manager checked with the school on December 13, 2013 to see if they were available on those dates, the school responded that the student was no longer enrolled. The student told the case manager that she would like to attend Luke C. Moore PCS. The case manager followed up but learned that there were no special education slots available at that school.
>
> On December 23, 2013, the case manager sent the initial case closure letter requesting the student's current school of attendance and proof of residency, and informing her that if DCPS does not receive the requested information within 30 calendar days, the student may be referred for truancy and/or "DCPS will administratively close this case (the HOD/SA will not be implemented)." On the same day the case manager spoke to the student who informed her that she is not currently enrolled because she has no childcare in place.
>
> On January 7, 2014, the case manager contacted the student regarding the status of her childcare assistance and school enrollment. The student informed her that she had childcare and she will re-enroll in Ballou STAY on January 13, 2014. On January 14, the case manager followed up with the student, who said that she had called the school but did not get an answer, and would visit the school that week to enroll. ***On neither occasion did the case manager inform the student that Ballou STAY had already determined that it could not implement her IEP,*** nor did the case manager assist her in finding a school that could. The case manager next called the student on January 24 to inquire about the status of her school

> enrollment, but received no answer and left a voice message. The same day, she then sent a final administrative closure letter to the student and attorney.
>
> As this report is being written, it has been over 400 days since the settlement agreement was signed. This settlement agreement remains unimplemented, the student is apparently out of school, and the case is administratively closed.

The administrative closure process is intended to remove inactive cases from the calculation of timely implementation under the Consent Decree, but not to extinguish the underlying right to the benefit conferred by the HOD/SA. DCPS has consistently represented that if the student, for example, subsequently submits a long-delayed evaluation report, the case will be re-opened and implementation of the remaining dependent required actions will resume.[17] However, the case closure letter currently in use communicates the opposite policy by stating that if the student does not respond to the initial case closure notice, "the HOD/SA will not be implemented."[18]

At present, these administrative closures are not subject to the State Final Review ("SFR") process administered by the OSSE, which was instituted in response to a recommendation from the Monitor. In practical terms, cases may remain in this administratively closed status for years, without any further review. Since the Consent Decree was entered in 2006, there are cumulatively 390 cases in this Outstanding Protocol status, over half of which were administratively closed in the first two years. (*See*, Exhibit 1, appended to this report) The Monitor recommends that the SFR process be extended to cases closed under the Outstanding Protocol, to provide an additional safeguard before the student's right to services granted pursuant to an HOD/SA is suspended, often indefinitely. The Monitor further recommends that the District consider implementing a process for periodic review of the status of these cases with a view to determining the current needs and circumstances of the affected students and whether implementation of the HOD/SA is now feasible and desired, or if there are alternate services that may be of assistance to the student. It is likely that a significant subset of these cases may warrant final closure because the students have left the jurisdiction, cannot be located or have

[17] The 2006 Protocols for Closing Hearing Officers Decisions (HOD's) and Settlement Agreements (SAs) requires DCPS to inform parents and their representatives with respect to independent evaluations that have been administratively closed: "Once the evaluations are available (either DCPS evaluations . . .or the IEE), the case will be reopened and the issue will be reactivated." (§ II. B. 4)

[18] See also, AO, HOD #26270, dated 7/5/13; KG, HOD #26308, dated 8/4/13.

aged out. The District has indicated that this recommendation is under discussion between the OSSE and District LEAs.

4. Review of Open Cases

The language of the Consent Decree defining the calculation to be made of compliance states:

> The rate of timely implementation will be determined as follows: (a) the number of HODs and SAs issued during the measurement period that have been timely implemented will be divided by (b) the total number of HODs and SAs issued during the same measurement period, minus (c) the number of HODs and SAs issued during the same measurement period that are "outstanding" and not overdue. (Consent Decree, ¶ 46)

The Defendants' reports have consistently used this methodology for reporting their rate of timely implementation of HOD/SAs issued and implemented during the school year, without objection from the Plaintiffs, the Court Monitor and the Evaluation Team. For most of the life of this Consent Decree, when the rate of compliance was so far below the threshold established in the Decree, it is likely that this calculation did not receive careful consideration of what it included and excluded. As the data from the 2013-14SY illustrates, this method of calculation does not consider what happens to the HOD/SAs that are not implemented during the school year, which accounts for 40% of all the HOD/SAs issued during the school year. There were 412 HOD/SAs issued. Of these, 214 were implemented on time and 165 were not implemented by the end of the school year. When these open HOD/SAs are implemented after the end of the school year, they effectively evade scrutiny because the subsequent year's review typically has also only looked at cases issued ***and*** implemented during that school year. Some of these are likely to eventually be closed as untimely, but under the current practice they will never be counted as such. Since the District requires proof of payment of attorneys' fees and invoices for the delivery of independent services as elements of the case closure process, there are a significant number of cases that remain open simply awaiting proof of payment. Others have more substantive reasons for remaining open including the long time it sometimes takes parents to arrange for independent services. There were also 12 administrative closures which are removed from the count. So, as the calculations have been done, Defendants are at 91% compliance.

One can readily see the potential for leaving troublesome cases open past the end of the school year when, in the normal course of business, they will not receive the type of scrutiny that closed and implemented cases receive.

To assess whether such a risk of data manipulation is real rather than purely hypothetical, the Monitor undertook two methods of examination. First, the Monitor went back to the 192 cases that remained open at the end of the 2012-13 SY, to assess whether there were patterns of case closures after the end of the school year that would have changed the percentage of reported compliance. To refresh the readers' memory, the rate of compliance reported by the District for the 2012-13 SY was as follows:[19]

$$\frac{Cases\ Timely\ Implemented}{Total\ Cases - Open\ and\ not\ overdue - Outstanding\ Protocol} = Compliance\ \%$$

$$\frac{191}{210\ (412 - 192 - 10)} = 90.95\ \%$$

The Monitor followed up on the closure status as of the end of October 2014 of the 192 cases that were open and not overdue at the end of the previous school year. This review revealed the following:

158 cases were closed as implemented timely;
15 cases were closed as implemented untimely;
9 cases were in the Outstanding Protocol;
9 cases were Open and not overdue;
1 case was a duplicate entry
192 Total cases

Inserting these updated numbers into the compliance calculation would yield the following:

$$\frac{(191 + 158)\ 349}{(412 - 9 - 19)\ 384} = 90.88\ \%$$

[19] *Report of the Monitor for the 2012-2013 School Year*, Doc. # 2428, filed February 3, 2014, p. 42.

It is readily apparent that the result of reviewing the larger data set is virtually indistinguishable from that reported by the District in its year-end report. [20]

The second method of examination was to review cases that remained open at the end of the 2013-14 SY. The Defendants reported that there were 165 cases that were open and not overdue at the end of the 2013-14 SY. The Monitor conducted a review of a sample of 85 such cases. For the remaining cases, the HOD/SA had been issued within 90 days of the end of the school year. No cases were reported to be overdue more than 90 days. Most of these cases were found to be appropriately categorized. Delays were generally caused by the inability to implement the HOD/SA due to student unavailability, sometimes due to incarceration; provider delays in submitting invoices for independent evaluations or other services provided, or in responding to inquiries from case managers about whether payment had been received; and parents' and attorneys' non-responsiveness to case manager inquiries regarding progress in obtaining independent services or confirmation of receipt of payment of attorneys' fees.

For all such cases, the implementation process continued after the end of the school year and some cases had been closed as implemented. As with the 2012-13 cases discussed above, a few were determined to have been implemented untimely and a few were closed administratively pursuant to the Outstanding Protocol. For three of the cases reviewed, their untimeliness had occurred during the school year and was unlikely to change due to subsequent events. (AT, HOD #26366, issued 9/19/13; DB, HOD #26637, issued 4/26/14; KB, SA #26595, dated 3/18/14) Nevertheless, because other required actions were not completed during the school year, they were not considered implemented during the school year, they were not included in the calculation of timely implementation. Other cases became untimely due to events that occurred after the end of the school year. There were also many cases that were implemented timely during the school year but not closed until after the end of the school year due to similar delays, and also not included in the calculation. Each of these cases had a legitimate reason for remaining open past the end of the school year, usually to provide evidence of payment for

[20] The Monitor's case review last year found several cases in which he disagreed with the District's determination of timely implementation. While the District took issue with the Monitor regarding some of these cases, they ultimately agreed that they had not met the compliance threshold in the Consent Decree in that year. The Monitor has not performed the same type of detailed review of the 192 cases discussed above as was done for the closed cases during that school year.

services -- which is governed by the behavior of independent third parties who are not under the control of the District.

The Monitor's review does not provide any support for the notion that there is any manipulation in the case closure practice to improperly push any cases past the end of the school year.

This review has also brought home how much of the case manager's time and energy is being spent (and wasted) on unproductive efforts to obtain documentary confirmation of payment of attorneys' fees and invoices of independent service providers. There are cases that have been left open for weeks, months and occasionally over a year simply for such documentary confirmation, with endless efforts by the case manager to prod a response from a recalcitrant provider. In some of these cases, there have been acknowledgments by a parent or attorney that the independent services are being provided. The Monitor suggests that the District re-examine its protocols to determine alternative methods of confirming within a reasonable time whether the required service actions have been initiated or completed, and simpler methods for confirming payment for services. Parents and students would be better served by investing the time freed up from these unproductive efforts into providing actual substantive assistance when they are struggling with obtaining required services, in place of the rote offers of assistance that rarely yield any benefit.

The Monitor finds that the Defendants have met the Consent Decree standard that "No case is more than 90 days overdue." (Consent Decree, ¶ 148).

V. CONCLUSION

Although the District has been asserting its compliance with the *Jones* requirements as early as the 2009-10 SY, when the Consent Decree required them to meet the 90% timely implementation standard, (¶ 42) this is the first time that the Monitor's independent review has confirmed the claim. It is also heartening that the retrospective examination of cases going back to the 2012-13 SY demonstrates a level of stability and consistency in the management and supervision of the implementation process, and provides a high level of reliability of the

conclusions reached regarding individual case status. These are accomplishments of which the District can justly be proud, as they reflect a sustained effort to meet the compliance standards of the Consent Decree.

As significant as this accomplishment is, its limits must also be kept in mind. As previous reports of the Monitor and the Evaluation Team have demonstrated, this case which began with an ambitious agenda to reform special education in the District of Columbia –with such initiatives as the SAM Schools and Full Service Schools-- has devolved into a narrower focus on protocols, templates and documentation, and a series of shortcuts to get to the finish line. Now that the case is at that point, as a result of the efforts of the Defendants, the constant pressure of the Consent Decree and the oversight of the Court, the question is how does the District and the whole range of stakeholders sustain the momentum that has brought us here, once judicial oversight ends. While this may no longer be a legal obligation in this action, it remains very much a central challenge for the students who rely on access to special education and related services to equip them to navigate life as productive citizens.

June Exhibit I - Blackman Jones Database

Description: This standard report shows key performance calculations for HOD/SA implementation through the month of June 30, 2014 (Jones Reporting).

HOD / SA Implementation Status as of June 30, 2014

Reporting Period	1	2	3	4	5	6 [2]	7	8	Cumulative
Time Period Covered	**3/1/06 - 6/30/07**	**7/1/07 - 6/30/08**	**7/1/08 - 6/30/09**	**7/1/09 - 6/30/10**	**7/1/10 - 6/30/11**	**7/1/11 - 6/30/12**	**7/1/12 - 6/30/13**	**7/1/13 - 6/30/14**	**3/1/06 - 6/30/14**
A. Total HOD/SAs Issued During The Period	**2341**	**1735**	**1190**	**939**	**894**	**626**	**422**	**412**	**8559**
B. Total HOD/SAs Implemented During Period	**2,249**	**1,616**	**1,143**	**930**	**843**	**581**	**389**	**231**	**7,982**
i. Implemented on Time	567	574	708	861	782	485	356	214	**4547**
ii. Implemented Late	1583	975	435	69	61	96	33	17	**3269**
iii. No Due Date	99	67	0	0	0	0	0	0	**166**
C. HOD/SAs Open and Not Overdue	**0**	**0**	**0**	**0**	**1**	**3**	**14**	**165**	**183**
D. HOD/SAs Open and Overdue	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**4**	**4**
i. Open and overdue < =90 days	0	0	0	0	0	0	0	4	**4**
ii. Open and overdue 90+ days	0	0	0	0	0	0	0	0	**0**
E. Total HOD/SAs with Outstanding Protocol [1]	**92**	**119**	**47**	**9**	**50**	**42**	**19**	**12**	**390**
i. Outstanding Protocol Timely	3	8	11	8	47	37	17	11	**142**
ii. Outstanding Protocol Untimely	5	5	12	1	3	5	2	1	**34**
iii. Outstanding Protocol - Timeliness Unknown	84	106	24	0	0	0	0	0	**214**
Rate of Timely Implementation	**25.2%**	**35.5%**	**61.9%**	**92.6%**	**92.8%**	**83.5%**	**91.5%**	**91.1%**	**56.9%**
i. Numerator (Bi)	567	574	708	861	782	485	356	214	4,547
ii. Denominator (A - C - E)	2,249	1,616	1,143	930	843	581	389	235	7,986

Notes:

[1] Outstanding Protocol refers to those cases that cannot be completed without participation from the parent and/or student per the 2011 ADR agreement, often called "Closed Administratively". Includes some HOD/SAs from reporting periods 1 and 2 for which timeliness could not be determined for other reasons.

[2] OSSE implemented HOD/SA guidelines effective September 1, 2011