

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MIKEISHA BLACKMAN, et al.,

Plaintiffs,

V.

DISTRICT OF COLUMBIA, et al.,

Defendants.

Civil Action No. 97-1629 (PLF)

Consolidated with

Civil Action No. 97-2402 (PLF)

REPORT OF THE MONITOR FOR THE 2012-2013 SCHOOL YEAR

Submitted by:

Clarence J. Sundram
Court Monitor*

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

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EXECUTIVE SUMMARY

On September 6, 2013, the Defendants filed a Notice 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;
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)

As the Defendants have eliminated the initial backlog, this report focuses on compliance with criteria 2 and 3 above. Based on review of over 100 of the 191 HOD/SAs closed as implemented timely during the school year, the Court Monitor concluded that a small number of cases had been wrongly determined to have been timely implemented and that the rate of compliance fell short of the 90% mark. Similarly, based on a review of cases which were open for more than 90 days, the Court Monitor found three that should have been classified as "overdue."

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)

Following a review of a draft of this report, the Defendants expressed disagreement with the Monitor's conclusions in a number of cases cited as being noncompliant, but concede that despite the disputed cases, they are in noncompliance. Both the Monitor and the Defendants agree that the District is very close to achieving compliance with the numerical targets contained in the Consent Decree.

The number of due process complaints and HODs/SAs continues to decline significantly. Due process complaints declined 26% from the previous year. (Report, p. 10) HODs/SAs declined from 625 in the previous school year to 412 in the 2012-13 SY, a decline of 34% (Report, p.42)

Defendants believe these substantial declines are indicators of significant improvements made in the delivery of special education and related services, as well as improved responsiveness to parental concerns. (Report, pp. 9-10) Plaintiffs and the special-education bar emphasized the role of attorney fee payment practices in reducing access of indigent parents to legal representation for filing due process complaints. (Report, pp. 32-37)

The condition of special education and related services in the District of Columbia and the management of due process complaints and the implementation of HODs/SAs unquestionably have improved vastly from the time when the Consent Decree was signed. Performance on critical measures such as timely IEPs, evaluations and re-evaluations has improved steadily and achieved several of the benchmarks of compliance contained in the Action Plan attached to the Consent Decree, although later than originally anticipated. (Report, pp. 28-30)

Despite this progress, the United States Department of Education Office of Special Education Programs had determined that District of Columbia remains a high risk grantee and has continued to impose special conditions on all grant awards as it has since 2006. (Report, pp. 11-19) The OSSE has been implementing and reporting upon Corrective Action Plans. The OSSE has also continued a system of regular monitoring of LEA performance, providing individual performance reports, requiring corrective actions for deficiencies and providing training and technical assistance to LEAs to facilitate their improved level of compliance with the requirements of special education law. (Report, pp. 19-27)

As noted earlier, Defendants are very close to meeting the numerical measures of compliance in the Consent Decree if they remain on this trajectory. It is appropriate for the parties and the Court to anticipate and plan for the conclusion of this action in the near future.

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 2012-13 School Year.

On September 6, 2013, the Defendants filed a Notice 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;
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)

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, the primary focus of this report will be on reviewing the evidence of compliance with the exit criteria. As 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 relied on a diverse array of information sources and data collection methods in reaching the findings contained in this report. 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.⁹
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, DCPS and the OSSE Office of General 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. Regular ongoing meetings, phone and in-person interviews, and e-mail exchanges with DCPS and the OSSE staff throughout the school year relating to a wide range of issues including their management of operations and initiatives in the realm of special education and the Consent Decree.
7. Meetings with Defendants' staff and consultants and participation in web-based conferences with respect to the operation and issues presented by data systems and programs.
8. 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.

B. Structure of the Report

In the sections which follow, the report will provide an overview of special education services focused on the issues that are relevant to the Blackman Jones Consent Decree and the due process complaints filed and HOD/SAs issued during the school year. The report will begin

⁹ ¶ 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.

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. Thereafter, it will summarize information from various sources about issues affecting the District's compliance with special education laws, as well as the efforts being made to address deficiencies that previously have been identified and the progress that has been made. The purpose of this background is to provide a context for the due process complaints and the HOD/SAs that are the subject of the Blackman Jones Consent Decree as well as to identify issues that are likely to be relevant to the sustainability of compliance once it has been achieved. 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. Finally, the report will discuss issues covered by the parties' Alternative Dispute Resolution agreements.

II. GENERAL OVERVIEW

A. Demographics

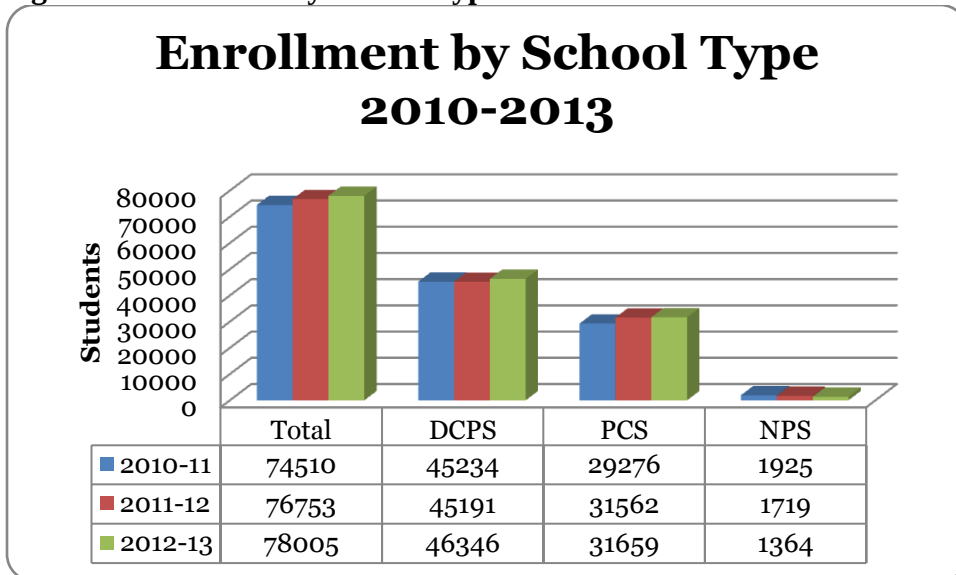
The data provided by the OSSE indicates that for SY 2012-13 there were a total of 78,005 students enrolled in all Local Education Agencies ("LEAs"), including 12,585 students with Individualized Education Plans ("IEPs") (16.13%).¹⁰ Of the total students, 46,346 (59.41%) were enrolled in DCPS schools, including 6,856 students with IEPs (14.79%). DCPS has 54.47% of all students with disabilities enrolled by LEAs. In addition, DCPS also serves as the LEA for 1,136 students in charter schools, and monitors the services to 1,266 students in nonpublic schools. Including these two groups increases the overall percentage of special education students for whom DCPS bears some responsibility to 73.56%. The number of students in non public schools continues to decline significantly.

Charter schools enrolled 31,659 (40.58%) of the total students, of which 4,194 students (13.24%) had IEPs. Charters have 33.32% of all students with disabilities enrolled by LEAs. As referenced above, within the group of charter schools, there are a small number that have elected

¹⁰ These numbers include students in non public schools and students in surrounding counties who are eligible to be receiving services under the IDEA.

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

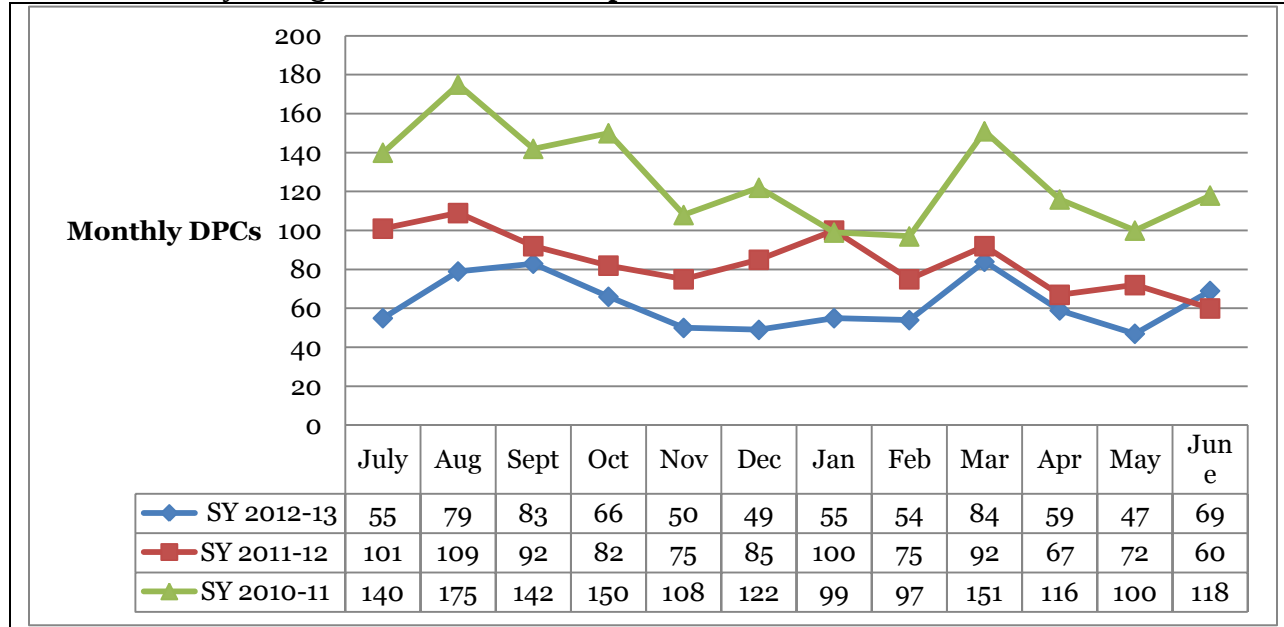


B. Due Process Complaints

As reported by the Student Hearing Office, there were 750 due process complaints (“DPC”) filed during the period July 1, 2012 to June 30, 2013, a decline of approximately 26% from the previous year (1,010 complaints) which was itself a decline of almost a third from the 1,518 complaints filed during the 2010-11 SY. (Figure 2) The vast and disproportionate majority of the due process complaints are filed against DCPS ($687/795^{11} = 86.4\%$) which has 54.47% of students with IEPs, with 88 filed against charter schools (11%) which have 33.32% of the students with IEPs, and the remainder against the OSSE or nonpublic schools.

¹¹ The discrepancy between the number of complaints reported by the Student Hearing Office (750) and the number reported by the Blackman Jones Data Base (“BJDB”) (795), 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.

Figure 2
Monthly Filing of Due Process Complaints SY 2011, 2012 and 2013



The District believes that the overall decline in the number of due process complaints is the product of the vastly improved and more responsive special education system where there is less of a need to file due process complaints to address the concerns of parents. Unquestionably, there have been significant improvements in the functioning of the special education due process system. These include efforts to address parental concerns and avoid their resorting to formal due process complaints. DCPS has also worked to expand and improve the range and quality of the special education programs and resources in its schools. In its Alternative Dispute Resolution report (“ADR Report”), DCPS reports adding 27 new classrooms in the 2012-13 school year, with plans for 31 new classrooms for the next school year.¹²

The kind of chaos and disorganization that were the hallmarks of the Student Hearing Office and the management of the implementation of HOD/SAs at the time the Consent Decree was entered¹³ have largely been eliminated. A significant volume of due process complaints used to be filed simply to complain about the failure to implement previous hearing officer decisions.

¹² Jones August 2011 and May 2013 Alternative Dispute Resolution (ADR) Agreements, Progress Report to the Court, April 1-June 30, 2013, p. 8.

¹³ See, e.g., Report of the Evaluation Team for the 2007/08 SY, Docket #2118, filed 8/28/2008.

Those failures occurred for a variety of reasons including systemic breakdowns in locating students, delays in communicating with schools about the actions required and the deadlines for performance, and a pervasive lack of capacity to deliver the required special education and related services. Most of these systemic deficiencies have been remedied. The implementation and continual improvement of data systems have largely eliminated the problem of identifying the correct location of the student. The electronic docketing system at the Student Hearing Office and the electronic distribution of HOD/SAs have eliminated the delays in communicating with schools and central office staff about the requirements of HOD/SAs. The assignment of responsibility to compliance case managers and the progressive refinement of their management and oversight responsibilities for implementation of HOD/SAs have significantly improved the accountability for carrying out these tasks.

III. BACKGROUND REGARDING SPECIAL EDUCATION COMPLIANCE IN THE DISTRICT OF COLUMBIA

A. OSEP Determination Regarding IDEA compliance

Although the Defendants rightly emphasize the measures of progress and improvement in special education services, 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 continued to impose special conditions on all grant awards, as it has since 2006.¹⁴ In the letter communicating this determination, the OSEP wrote that:

. . . while D.C. has demonstrated progress, the State has not achieved compliance with the requirements related to: timely initial evaluations and reevaluations (IDEA sections 612(a)(7) and 614(a) through (c) and 34 CFR §§300.301(c)(1) and 300.303); timely implementation of hearing officer determinations (IDEA section 615(f) and (i)); timely correction of noncompliance (IDEA sections 612(a)(11) and 616, 34 CFR §§300.149 and 300.600, 20 U.S.C. 1232d(b)(3)(E), and OSEP Memorandum 09-02, dated October 17, 2008); secondary transition requirements (IDEA section 614(d)(1)(A)(i)(VIII) and 34 CFR §§300.320(b) and 300.321(b)); and early childhood transition requirements (IDEA section 612(a) and 34 CFR §300.124(b)).¹⁵

¹⁴ OSEP 2012 Part B Grant Award, July 11, 2012.

¹⁵ *Id.*

OSEP determined that the District “needs intervention” for the sixth consecutive year. It noted that a similar determination in the previous school year resulted in the Department imposing Special Conditions on the FFY 2011 grant award. Because the District did not meet those Special Conditions, the Department once again imposed Special Conditions on the FFY 2012 grant award and directed DC to use a portion of its FFY 2012 state-level funds to address the long-standing noncompliance. It also required a Corrective Action Plan and periodic reports of progress in correcting the noncompliance.¹⁶

As an overall context for the review of data regarding HOD/SAs in the 2012-13 SY, the Court Monitor reviewed the Special Conditions progress reports to OSEP,¹⁷ and progress reports on implementation of Corrective Action Plans. In addition, the Monitor reviewed reports produced by the OSSE as part of its responsibility for monitoring LEAs, and specifically monitoring their compliance with laws and regulations regarding special education. These include reports of onsite visits to LEAs, and Letters of Decision issued by the State Complaint Office of the OSSE.

B. Special Conditions Reports

These reports pertain to special conditions imposed by the OSEP on OSSE’s FFY 2012 IDEA Part B grant award due to its long history of noncompliance with key elements of the IDEA. Among the special conditions is a requirement to dedicate a portion of the grant award to

¹⁶ U. S. Department of Education, Office of Special Education Programs, IDEA Part B Federal Fiscal Year (FFY) 2012, Corrective Action Plan, Progress Report #2 Reporting Period: October 1, 2012 – December 31, 2012, Submitted January 31, 2013; U. S. Department of Education, Office of Special Education Programs, IDEA Part B Federal Fiscal Year (FFY) 2012, Corrective Action Plan, Progress Report #3, Reporting Period: January 1, 2013 – March 31, 2013, Submitted April 26, 2013; U. S. Department of Education, Office of Special Education Programs, IDEA Part B Federal Fiscal Year (FFY 2012), Corrective Action Plan, Progress Report #4, Reporting Period : April 1, 2013 – June 30, 2013, Submitted August 13, 2013.

¹⁷ U.S. Department of Education, Office of Special Education Programs. *Individuals with Disabilities Education Act (IDEA), Part B Special Conditions, Progress Report #1, Reporting Period: April 1, 2012 – September 30, 2012*. Submitted: November 1, 2012; U.S. Department of Education, Office of Special Education Programs. *Individuals with Disabilities Education Act (IDEA), Part B Special Conditions, Progress Report #2, Reporting Period: October 1, 2012 – December 31, 2012*. Submitted: January 31, 2012; U.S. Department of Education, Office of Special Education Programs. *Individuals with Disabilities Education Act (IDEA), Part B Special Conditions, Progress Report #3, Reporting Period: January 1, 2013 – March 31, 2013*. Submitted: May 1, 2013. Revised: May 28, 2013; U.S. Department of Education, Office of Special Education Programs. *Individuals with Disabilities Education Act (IDEA), Part B Special Conditions, Progress Report #4, Reporting Period: April 1, 2013 – June 30, 2013*. Submitted: August 6, 2013.

remedying the noncompliance. The OSSE reports using \$250,000 to ensure targeted initial evaluation and reevaluation data review, provide technical assistance to identified LEAs with chronic noncompliance, and provide access to a consortium of specialized related service providers to assist LEAs whose reason for delay is lack of provider availability.

This summary reviews OSSE's requirements to submit data on:

- Demonstrated compliance to conduct timely initial evaluations and reevaluations;
- Implement Hearing Officer Determinations (HODs) in a timely manner;
- Demonstrated compliance with secondary transition requirements; and
- Evidence that it has a general supervision system that is reasonably designed to effectively correct noncompliance in a timely manner.

OSSE reported some progress in key performance areas but, as detailed below, there were other areas where it did not meet its targets. OSSE reported that it expected to see improvement in outcomes as it implemented the next phase of its targeted technical assistance (TA) plan, implemented a system of general supervision, strengthened the online tracking system and its use by LEAs, provided issue-specific training to LEAs and offered online resources. From the data reported, it appears that some progress was made but that it was inconsistent.

1. Compliance with the Requirement to Conduct Timely Initial Evaluations

The percentage of students with timely initial evaluations ranged from 89% to 94% and showed improvement in two reporting periods, no change in one period, and a decline in the fourth reporting period. Reasons for delays in conducting initial evaluations were primarily a function of LEA delays. The number of children in the backlog ranged from 26 to 68 over the four reporting periods, an average of 51. (See Table 1.)

Table 1. Summary data pertaining to timeliness of initial evaluations and students in the backlog

Reporting Period	Timeliness of Initial Evaluations		Comparison of Timeliness Current and Prior Reporting Period	Number of Students in the Backlog	Reasons for Delay	
	Current Period	Prior Period			LEA Delay	Parent delay
1. 4/1/12 – 9/30/12	89%	89%	No change	68	NA	NA
2. 10/1/12 – 12/31/12	92%	89%	Improvement	57	94%	6%
3. 1/1/13 – 3/31/13	94%	92%	Improvement	26	81%	19%
4. 4/1/13 – 6/30/13	92%	94%	Slippage	52	88%	12%

OSEP required the District to reduce the backlog of initial evaluations in each reporting period. The targets were not achieved in any of the four reporting periods. (See Table 2.)

Table 2. Summary of progress in reducing the backlog of initial evaluations

Reporting period	Required Reduction of Backlog	Actual Reduction of Backlog
1. 4/1/12 – 9/30/12	25%	Target not met: Current number in backlog 68; targeted number to leave in backlog 29
2. 10/1/12 – 12/31/12	50%	Target not met: Current number in backlog 57; targeted number to leave in backlog 20
3. 1/1/13 – 3/31/13	75%	Target not met: Current number in backlog is 26; targeted number to leave in backlog 9
4. 4/1/13 – 6/30/13	25%	Target not met: Current number in backlog is 52; targeted number to leave in backlog 25

Reasons for delays in conducting evaluations in a timely manner

The report states that OSSE attributes a significant portion of the delays in the first reporting period to the fact that the reporting period spanned SY 2011-12 closure and SY 2012-13 startup and its “significant transition of staff and students during this time.” No explanation

for delays was offered in the report for reporting period 2. Primary reasons for LEA delay in reporting periods 3 and 4 were the same: delayed action taken related to initial referral; delayed action related to accessing records from the previous LEA; and delays in scheduling meetings.

Actions the State is taking to address noncompliance

OSSE launched a targeted technical assistance (“TA”) effort in the reporting period 3 (1/1/13 – 3/31/13). This effort sought to review the student level backlog in order to disaggregate delays due to practice challenges and data system issues (e.g., user errors). The TA effort also included a district-wide targeted TA plan with three tiers of intervention and support offered on the basis of performance review on a set of data elements including U.S. Department of Education special education compliance indicators and results from the District’s first annual Blackman Jones Data Accuracy Audit, which is described in more detail later in this report (Section V. B.). The TA effort can include webinars addressing data quality, half-day consultation sessions and coaching sessions, and access to a related services consortium. Webinars were initiated in March 2013, other TA were to be offered in May and June.¹⁸

Targeted TA reportedly continued in reporting period 4 (4/1/13 – 6/30/13). Webinars on data quality were mandatory. Special education quality review of self-assessment reportedly continued. All LEAs were also required to attend a professional learning unit after taking a quiz at the end of the Webinar. LEAs receiving more intensive TA (Tier II of a three-tiered Training Technical Assistance Approach) were given until August and September to complete a root cause analysis of two to three key indicators and complete a special education improvement plan.¹⁹

OSSE also reported efforts to streamline and enhance its data systems for LEA usage. The centralized data and reporting portal is to be launched at the beginning of the 2013-2014 SY.

¹⁸ U.S. Department of Education, Office of Special Education Programs. Individuals with Disabilities Education Act (IDEA), Part B Special Conditions, Progress Report #3, Reporting Period: January 1, 2013 – March 31, 2013. Submitted: May 1, 2013. Revised: May 28, 2013, p. 5-6.

¹⁹ As explained in Report 3, Tier I, Universal Support, to be delivered in March/April and consists of 3 mandatory Webinars addressing data quality. Tier II, Targeted Support, to be delivered in April/May is Tier I support plus 2 half-day consultation sessions. Tier III, Intensive Support, to be delivered in May/June includes support in the prior Tiers and up to 3 coaching sessions and Access to a related services consortium.

It is anticipated that the data portal “will allow school and LEA staff to more proactively manage student information, identify overdue events, track deadlines, and rectify errors.”²⁰

2. Compliance with the Requirement to Conduct Timely Reevaluations

The percentage of students with timely reevaluations ranged from 89% to 92% over the four reporting periods. There was slight improvement in two reporting periods, no change in one reporting period and slippage another. The number of students in the backlog ranged from 62 to 165. It was notable that the number of students in the backlog dropped by half between the second and third reporting periods. The average number of children in the backlog was 105. (See Table 3.)

Table 3. Summary data pertaining to timeliness of reevaluations and students in the backlog

Reporting Period	Timeliness of Reevaluations		Comparison of Timeliness in Current and Prior Reporting Periods	Number of Students in the backlog	Reasons for Delay	
	Current Period	Prior Period			LEA delay	Parent delay
1. 4/1/12 – 9/30/12	89%	93%	Slippage	165	NA	NA
2. 10/1/12 – 12/31/12	91%	89%	Improvement	122	90.5%	9.5%
3. 1/1/13 – 3/31/13	92%	91%	Improvement	62	87%	13%
4. 4/1/13 – 6/30/13	92%	92%	No change	69	95%	5%

OSEP required the District to reduce the backlog of reevaluations in each reporting period. The targets were not achieved in any of the four reporting periods. (See Table 4.)

²⁰ U.S. Department of Education, Office of Special Education Programs. *Individuals with Disabilities Education Act (IDEA), Part B Special Conditions, Progress Report #4, Reporting Period: April 1, 2013 – June 30, 2013*. Submitted: August 6, 2013, p.4.

Table 4. Summary of progress in reducing the backlog of reevaluations

Reporting Period	Required reduction of Backlog	Actual reduction of Backlog
1. 4/1/12 – 9/30/12	25%	Target not met: Current number in backlog 165; targeted number to be left in backlog 87
2. 10/1/12 – 12/31/12	50%	Target not met: Current number in backlog 122; targeted number to be left in backlog 43
3. 1/1/13 – 3/31/13	75%	Target not met: Current number in backlog is 62; targeted number to be left in the backlog 17
4. 4/1/13 – 6/30/13	25%	Target not met: Current number in backlog is 69; targeted number to be left in backlog 38

The reasons for the delays and the actions taken to address noncompliance were similar to those given for conducting evaluations.

3. Hearing Officer Determinations (HOD)²¹

Summary of the data

Timeliness of HODs ranged from 77% to 80% in the reporting periods covering April 2012 through March 2013. (The *Part B Special Conditions Progress Report* for April 1, 2013-June 30, 2013 was not required to report data on timeliness of HODs or Implementation of Backlog HODs.) A comparison of timeliness between the current and prior reporting periods revealed that there was improvement in two time periods and no change in another. (See Table 5.)

Implementation of Backlog HODs ranged from 0% to 57% in the reporting periods covering April 2012 through March 2013. There was a great deal of improvement between the January – March 2013 period and the prior period—the percentage of HODs implemented rose from 0% to 57%. However, the percentage of backlog HODs implemented in two reporting periods was less than the prior reporting period. (See Table 5.)

²¹ This data pertains only to HODs and does not include Settlement Agreements which OSEP does not require the OSSE to report upon. The Consent Decree, however, requires timely implementation of both HODs and SAs.

Reasons for delays in implementing HODs in a timely manner

The *Part B Special Conditions Progress Reports* indicated that in the three time periods covering April 1012 through March 2013, “The reasons for the delays in implementing HODs in a timely manner were found to be LEA delay and parental consent.” The low percentage of implementation of “a significant number of HODs in the backlog” in the October – December, 2012 period was attributed to “...the result of mandates that could not realistically be implemented during the period due to various extenuating circumstances (e.g. LEAs that have closed, students who left the District, deceased students, or unique administrative issues).” During the SY, the OSSE targeted special efforts to identify these backlogged HODs and identify actions to appropriately close them, including offers of alternative compensatory education where the originally ordered relief could no longer be implemented.

Table 5. Summary data pertaining to timeliness of HODs and implementation of backlog HODs

Reporting Period	Timeliness of HODs*		Comparison of Current and Prior Reporting Period	Number Of Children Whose HODs Had Not Been Implemented in a Timely Manner at the End of the Reporting Period	Implementation of Backlog HODs		Comparison of Current and Prior Reporting Period
	Current Period	Prior Period			% of HODs Implemented in the Current Period	% of HODs Implemented in the Prior Period	
1. 4/1/12 – 9/30/12	77%	26%	Improvement	34	29%	36%	Slippage
2. 10/1/12 – 12/31/12	77%	77%	No change	28	0%	26% ²²	Slippage
3. 1/1/13 – 3/31/13	80%	77%	Improvement	12	57%	0%	Improvement
4. 4/1/13 – 6/30/13	NA	NA	NA	NA	NA	NA	NA

²² The percentage of HODs implemented in reporting period 1 should be the same percentage reported for the prior period in reporting period 2. There is a small discrepancy in the data. Twenty-nine percent of HODs were reported as implemented in reporting period 1 but the report for the following period indicates that the percentage was 26%.

Actions the State is taking to address noncompliance

Report 2 notes that during the reporting period, OSSE conducted an analysis of backlog HODs and took steps to accelerate HOD compliance. OSSE conducted a student-level analysis by LEA and arranged TA sessions for all LEAs having overdue HODs and SAs.

In report 3, it is noted that OSSE continued to provide intensive training and TA to LEAs with HODs. Additionally, OSSE released a “real-time” dashboard in the Blackman Jones Database to assist users in reviewing implementation status, and supporting more effective management of HOD and SA requirements.

4. Compliance with Secondary Transition Requirements

OSSE reviewed samples of 100 IEPs each reporting period to determine whether all secondary transition requirements were met. In three of these reporting periods, the sample was drawn from 11 LEAs and in the last period, the sample was drawn from nine LEAs. The percentage of files with all items compliant ranged from 34% to 45%. Compared to the prior reporting period, slippage was reported in the percentage of files with all items compliant in two reporting periods (1 and 3) and improvement was reported in two periods (2 and 4). (See Table 6.)

Very few LEAs were found to be fully compliant each reporting period—one LEA in two reporting periods, two in one period and four in the other reporting period. (See Table 6.)

OSEP required that the district demonstrate that of student records reviewed for youth aged 16 and above, a specific percentage have IEPs that included the required secondary transition content: 75% for reporting period 1, 85% for reporting period 2, 95% for reporting period 3, and 50% for reporting period 4. If the percentage of files with all items compliant in Table 6 is the target percentages, the rates fall far below expectations.

In report 2, OSSE noted that compliance rates were expected to improve “as LEAs recognize that OSSE bases compliance determinations on what is made available in SEDS.” (p. 11)

Table 6. Summary data pertaining to compliance with secondary transition requirements

Reporting Period	Number of Files with All Items Compliant	Percentage of Files with All Items Compliant	Total Number of LEAs Reviewed	Number Of LEAs in Full Compliance
1. 7/1/12 – 9/30/12	38	38%	11	2
2. 10/1/12 –12/31/12	45	45%	11	1
3. 1/1/13 – 3/31/13	34	34%	11	4
4. 4/1/13 – 6/30/13	43	43%	9	1

The following steps were reported as efforts to improve rates of compliance:

- OSSE will release reports in two stages via the District of Columbia Corrective Action Tracking System ("DC CATS") beginning with the report of secondary transition compliance for the period April 1, 2012 – June 30, 2012. The initial report will summarize results of the compliance review. LEAs will have 7 days to upload additional compliance information into SEDS and DC CATS. OSSE will review, adjust determinations and release a final report. LEAs will be expected to correct noncompliance as soon as possible but no later than a year from identification. [Reports 1, 2]
- OSSE disaggregated compliance with secondary transition requirements to identify priority LEAs in need of targeted TA based on noncompliance over multiple reporting periods. LEAs so identified are to be invited to a six-part series to run from November 2012 to March 2013, entitled "*Transition Planning – Ensuring Successful Post-Secondary Outcomes of All Students.*" The series is offered through the State Secondary Transition Community of Practice in cooperation with George Washington University. [Report 1]
- The District reports specific efforts to engage representatives of agencies including the Rehabilitative Services Agency and Office of Disability Rights in developing a comprehensive menu of District services available to students of transition age and their families. [Report 3]

OSSE is developing a new cross-agency series on secondary transition to begin in summer 2013. The core trainings will be available on-line for use during the 2013-14 SY. A toolkit aligned with the training series will also be posted on-line. OSSE is also expanding its

Secondary Transitions Webpage to give stakeholders access to resources to support best practice.
[Report 3]

C. LEA ONSITE MONITORING

The LEA on-site monitoring provides a more detailed picture of the level of compliance with key indicators at the different LEAs in the District. Key findings from the LEA on-site monitoring of LEAs are as follows:

- All LEAs were reported as compliant for the items Extended School Year (item 1), IEP (item 3), and in the Data category, Students Referred to SEDS Entered into SEDS (item 4).
- Two LEAs were reported as noncompliant on two of seven compliance items reviewed for this summary (28%).
- Two LEAs were reported as noncompliant on one of seven compliance items (14%).

Three of 10 LEA's were noncompliant in Least Restrictive Environment (Item 2). One of ten LEAs was noncompliant with regard to Data – LEA Timely Response to Data Requests (Item 5). One of five LEAs for which this item was applicable was noncompliant regarding Dispute Resolution-LEA Provides Information on State Complaints (Item 6). One of four LEAs for which this item was applicable was noncompliant regarding Dispute Resolution- LEA Timely Implements Corrective Actions (Item 7).

Table 7. LEA Compliance

LEA	Extended School Year 1.	Least Restrictive Environment 2.	IEP 3.	Data		Dispute Resolution	
				Students Referred to SEDS Entered into SEDS 4.	LEA Timely Response to Data Requests 5.	LEA Provides Info on State Complaints 6.	LEA Timely Implements Corrective Actions 7.
LEA 1	100%	100%	100%	100%	100%	100%	100%
LEA 2	100%	100%	100%	100%	100%	0%	0%
LEA 3	100%	0%	100%	100%	0%	NA ²³	NA
LEA 4	100%	100%	100%	100%	100%	NA	NA
LEA 5	100%	100%	100%	100%	100%	100%	NA
LEA 6	100%	0%	100%	100%	100%	100%	100%
LEA 7	100%	100%	100%	100%	100%	NA	NA
LEA 8	100%	0%	100%	100%	100%	NA	NA
LEA 9	100%	100%	100%	100%	100%	100%	100%
LEA 10	100%	100%	100%	100%	100%	NA	NA

During the school year, the OSSE developed the DC CATS. This system tracks data and disseminates reports to LEA's and also permits LEA's to use the electronic platform to review their own data. Findings of noncompliance trigger efforts to identify root causes of systemic noncompliance and lead to practice change, and may also trigger the provision of technical assistance to remedy the causes of noncompliance.

Reports generated from DC CATS for 10 LEAs were reviewed for level of compliance on selected compliance items used in the *LEA Onsite Visit: Student Compliance Report*—Initial evaluation and reevaluation, and IEP. Some of the LEAs did not provide information on all compliance items. That is, in some reports item numbers and associated data were missing. The number of items for which findings were presented differed among LEAs and ranged from 21 at

²³ Items marked NA in the table were considered by OSSE to be not applicable to the LEA.

LEA 6 to 31 at LEA 1 and LEA 2. It should be noted that number of cases reviewed for items could be as high as 40 or as small as one.

1. Initial Evaluation and Reevaluation

There were eight compliance items in this category numbered from 12-19. Table 8 displays the data for each LEA by item in the Initial Evaluation and Reevaluation category. Items in Tables 7-9 were shaded in green if the LEA was reported to be 100% compliant, yellow if 90-99% compliant, and maroon if less than 90% compliant.

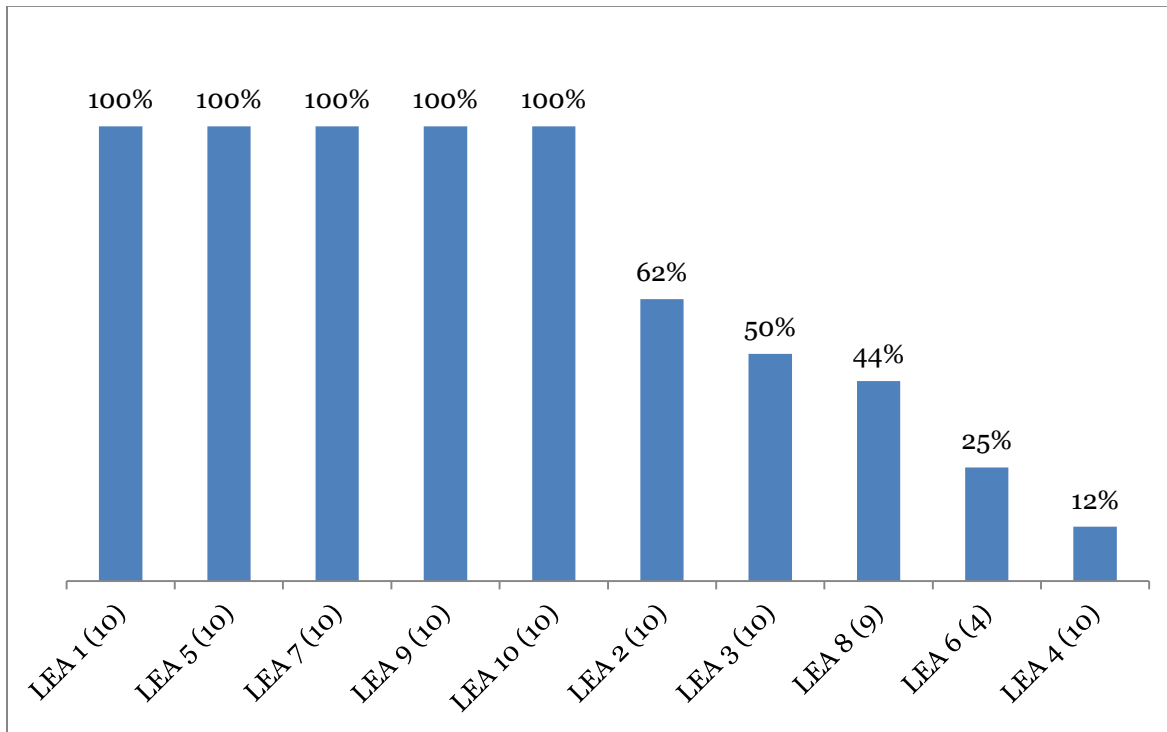
Table 8. Percentage Compliant: Initial Evaluation and Reevaluation²⁴

LEA	12. Parents Provided Procedural Safeguards	13. Parent Consent for Initial Evaluation	14. Consent Form Signature Date Prior to Initial Evaluation	15. Variety of Assessment Tools and Strategies Used	16. Parent Consent for Reevaluation	17. Consent Form Signature Date Prior to Reevaluation	18. IEP Team Review of Existing Data	19. Variety of Sources Used to Determine Continued Eligibility
LEA 1	100%	100%	100%	100%	100%	100%	100%	100%
LEA 2	33%	100%	90%	100%	86%	92%	91%	86%
LEA 3	0%	100%	100%	100%	18%	100%	82%	65%
LEA 4	33%	83%	80%	100%	50%	71%	86%	79%
LEA 5	100%	100%	100%	100%	100%	100%	100%	100%
LEA 6	NA	NA	NA	NA	20%	50%	70%	90%
LEA 7	100%	100%	100%	100%	100%	100%	100%	100%
LEA 8	100%	0%	NA	100%	82%	60%	94%	100%
LEA 9	100%	100%	100%	100%	100%	100%	100%	100%
LEA 10	100%	100%	100%	100%	100%	100%	100%	100%

²⁴ When NA appears in Tables 7-9, it means that this item was missing from the Student Compliance Report.

Figure 3, created from the data in Table 8, summarizes LEA status in achieving $\geq 90\%$ compliance on the Initial Evaluation and Reevaluation compliance items. Five LEAs (#s 1, 5, 7, 9 & 10,) achieved $\geq 90\%$ compliance on all reviewed. Two LEAs (#s 2 & 3) achieved this level of compliance for 50-62% of items. Three LEAs (#s 4, 6 & 8) achieved $\geq 90\%$ compliance on less than 50% of items.

Figure 3. Initial Evaluation and Reevaluation Compliance Items: Percentage of Items for which $\geq 90\%$ Compliance Achieved by LEA



Note: There were 8 compliance items in this category. The number in parentheses is the number of compliance items reviewed in that school; others were not applicable.

2. Individualized Education Programs (IEP)

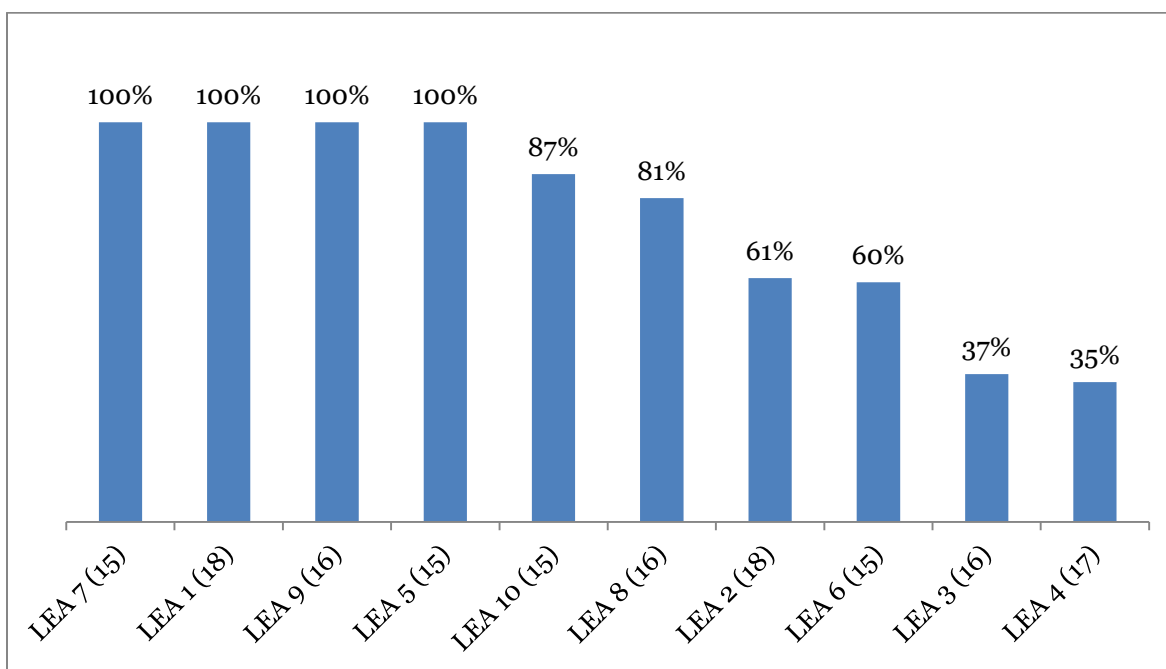
There were 20 compliance items in the IEP category, numbered from 20 to 39 in the report. Table 9 displays the data for each LEA by item number in the IEP category.

Table 9. Percentage Compliant: IEP Compliance Items

LEA	20. Parent/Student Invited to IEP Meeting	21. Parent/Student Notified of Meeting	22. "Parent" Meets Definition in IDEA Regulations	23. General Education Teacher Attended IEP	24. LEA Designee Attended IEP Meeting	25. PLAAFP States Effect of Disability in General Curriculum/Appropriate Activities	26. IEP Contains Measureable Annual Goals	27. IEP Contains Description of How Progress Measured	28. IEP Statement of Measureable Annual Related Services Goal(s)	29. Description & Documentation of Progress Toward Related Services Goals	30. IEP Team Considered Strategies to Address Behavior	31. ESY Determined on Individual Basis	32. Transfer of Rights at Age of Majority	33. 32. Alternate Assessment Statement of Participation	34. IEP Contains Benchmarks or Short-term Objectives	35. IEP Developed within 30 Days of Initial Eligibility Determination	36. Implementation of Related Services	37. Annual IEP Review	38. Student Progress Reports	39. Nonpublic Sends Progress Reports to LEA
LEA 1	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	97%	100%	NA	NA
LEA 2	94%	97%	88%	87%	84%	91%	97%	100%	100%	100%	100%	7%*	86%	0%	100%	100%	63%	100%	NA	NA
LEA 3	75%	80%	53%	70%	70%	85%	100%	95%	89%	100%	100%	10%	0%	NA	NA	100%	15%	95%	NA	NA
LEA 4	85%	71%	76%	60%	75%	95%	100%	100%	82%	100%	100%	50%	NA	NA	NA	50%	75%	95%	0%	0%
LEA 5	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	NA	NA	NA	100%	90%	100%	NA	NA
LEA 6	90%	100%	78%	80%	90%	80%	100%	100%	100%	100%	100%	50%	0%	NA	NA	NA	30%	90%	NA	NA
LEA 7	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	95%	NA	NA	NA	100%	95%	100%	NA	NA
LEA 8	100%	100%	95%	72%	100%	100%	100%	100%	100%	100%	100%	76%	100%	NA	NA	100%	83%	100%	NA	NA
LEA 9	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	NA	NA	100%	100%	100%	NA	NA
LEA 10	100%	100%	89%	100%	100%	100%	100%	100%	75%	100%	100%	100%	NA	NA	NA	100%	90%	100%	NA	NA

Figure 4, created from the data in Table 9, summarizes LEA status in achieving $\geq 90\%$ compliance on the IEP compliance items. Four LEAs (#s 1, 5, 7 & 9) achieved $\geq 90\%$ compliance on all items reviewed. Another four LEAs (#s 2, 6, 8 & 10) achieved this level of compliance for 60-87% of items. Two LEAs (#s 3 & 4) achieved $\geq 90\%$ on slightly more than one-third of items.

Figure 4. IEP Compliance Items: Percentage of Items for which $\geq 90\%$ Compliance Achieved by LEA



Note: There were 20 compliance items in this category. The number in parentheses is the number of compliance items reviewed in that school; others were not applicable.

3. Compliance with the Requirement to Conduct Timely Initial Evaluations and Reevaluations

Throughout the period covered by Reports 2-4, the OSSE has issued monthly LEA Planning and Performance Reports that include evaluation and reevaluation metrics. They are designed to “assist LEAs in monitoring their own progress and identifying and resolving the root causes of delays.” The OSSE also reportedly “pulls data on these metrics quarterly for the purposes of Special Conditions reporting, and issues LEA findings related to any identified noncompliance.”

Reports 2-4 also indicate that the OSSE is launching an LEA reports framework to provide LEAs with a data dashboard on planning and performance metrics “to assist them in tracking progress, targeting resources, and ensuring continuous improvement.” Report 2,

indicated that OSSE was currently working on incorporating LEA feedback and preparing for release in the next reporting period. In Reports 3 and 4, updating had not occurred and release was scheduled “prior to the upcoming school year.”

Report 2 indicates that as noted in the previous reporting period, “OSSE is combining its review of quarterly monitoring data with data collected via the Jones annual data accuracy audit to create a prioritized list of LEAs for targeted technical assistance over the course of the school year...to support root cause analysis and problem solving.” Report 2 states that the technical assistance is planned for Spring of 2012. In reports 3 and 4, the technical assistance is reported to be underway and on-track.

There are four strategy/action Items associated with OSSE’s detailed action plan, developed to ensure that the State demonstrates LEA compliance with the requirement to conduct timely initial evaluations and reevaluations (IDEA sections 612(a)(7) and 614 (a) through (c) and 34 CFR §§300.301(c)(1) and 300.303:

- Continue quarterly LEA meetings to review obligations and performance data related to timely evaluation, reevaluation, and IEP development.
- Continue issuance of LEA Planning and Performance Reports to assist LEAs with accessing their data related to evaluations and reevaluations to enhance overall management of special education processes.
- Disaggregate evaluation data in May FFY 2011 Special Conditions Report and identify “priority” LEAs. Provide priority LEAs with targeted technical assistance that may include on-site visits, webinars, written resources, and conference calls to ensure they understand their obligations.
- For LEAs with challenges accessing specialized providers, provide access to a consortium of service providers to complete overdue evaluations and reevaluations.

All items were reported as being “on-track” in each of the reporting periods 2-4.

D. State Complaints

Another window into the issues relevant to conditions of special education in the District of Columbia comes from a review of State Complaints reported upon by the OSSE. Some complaints raised multiple issues and one student had multiple state complaints. Among these were:

- Recurrent failure to provide adequate notice to the parent of all attendees at an IEP meeting and failure to ensure that all related service providers attended (012-004, October 22, 2012 – this case also cited DCPS' failure to correct previously identified noncompliance. See also #012-023, April 25, 2013; and 012-029, August 7, 2013).
- Failure to implement a student's IEP for at least seven weeks, and making no arrangement for the student to receive any of the special education services, due to problems with registration. A subsequent review of corrective action found that DCPS had failed to implement the corrective action of enrolling the student in a DCPS school able to implement his IEP (#012-010, November 21, 2012). In another case, DCPS failed to provide specialized instruction to a homebound student from August 27, 2012 to October 15, 2012, and also did not provide the student with hearing and audiology services as required by the last valid IEP. Moreover, physical therapy consultation services were not delivered during September and October (#012-011, November 29, 2012).
- Failure in several cases to provide educational and related services. In one case, there was no full-time special education instructor in the classroom between August 27, 2012 and December 10, 2012. The OSSE letter stated:
 - While the LEA reported that a compensatory education plan was being developed for all students in the classroom, the school staff members were not aware of any such plan, and after multiple requests, the LEA failed to provide OSSE with a copy of the compensatory plan.
 - OSSE required a corrective action plan to compensate for the missed services for all of the students placed in the classroom during the fall semester. (#012-014, January 25, 2013).
- In another similar case, there was no certified special education instructor in the student's classroom between October 25, 2012 and January 7, 2013. As a plan of correction, OSSE required DCPS to review the records of students in the classroom to determine if they were denied FAPE and to create a compensatory education plan on a case-by-case basis (012-018, March 28, 2013).
- In another case, OSSE required DCPS to provide makeup of missed services due to provider unavailability to deliver vision and speech and language services to a student receiving home instruction (#012-017, March 21, 2013).
- Findings of a systemic unavailability of transportation services for non-academic and extracurricular activities for students with disabilities who attend schools that are distant and/or located outside the District of Columbia (#012 – 005, October 26, 2012).
- Failures to provide transportation services in accordance with IEPs for students who transferred from out of district schools to charter schools for which DCPS was the LEA (#012-007, December 14, 2012).
- Failure to provide parental transportation for the purpose of transporting the student to and from a residential facility, as related service in the student's IEP (#012-012, December 14, 2012).
- Failure to make up missed services due to the unavailability of the service provider (012-

008, November 21, 2012).

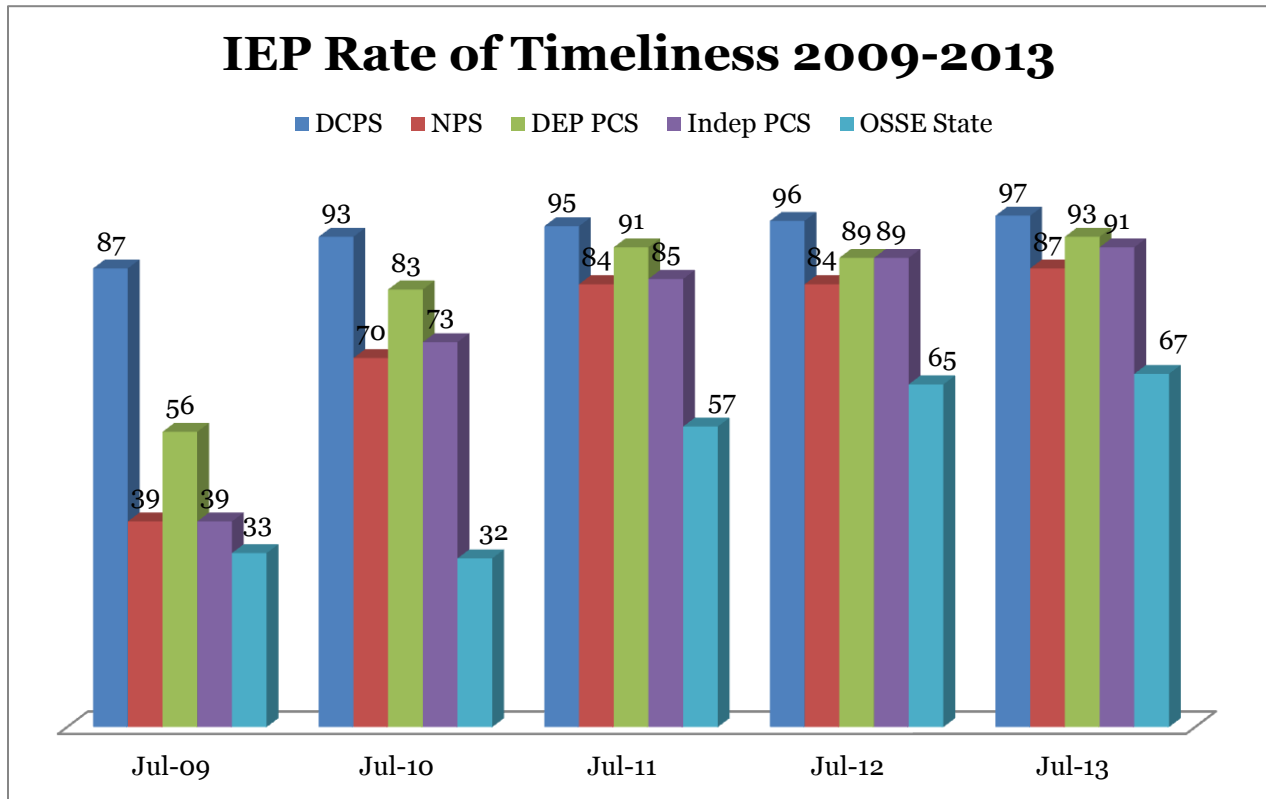
- Failure to provide a student with an assistive technology device. It took three years from the initial assistive technology evaluation to actually provide the student with the assistive technology. Also in this case, the school failed to implement the toileting goal on his IEP because it was developed at the prior school (#012-026, June 13, 2013. See also #012-029, August 7, 2013 where DCPS was found to be out of compliance with respect to physical therapy services for failing to ensure that the IEP revision was based on sufficient current evaluation data, parental input and the child's anticipated needs).

E. Related Services Staffing and Delivery

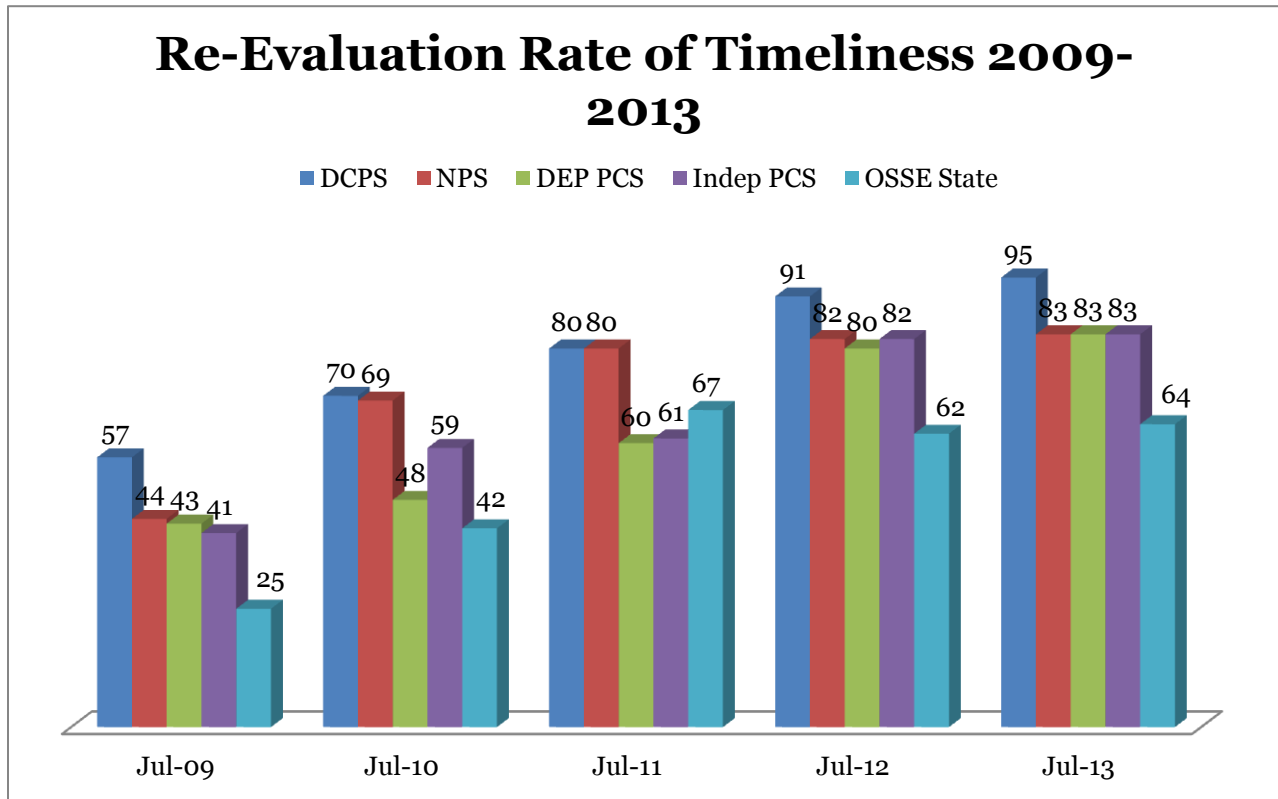
The Consent Decree contains performance measures regarding underlying IDEA legal requirements for the provision of timely IEPs, evaluations and reevaluations. The Blackman/Jones Action Plan attached as Exhibit “A” to the Consent Decree identified performance measure goals for timely assessments at 85-95% by June 30, 2008, and at a 90-100% standard of current IEP timeliness for students with disabilities. The data reported in this section was provided by the OSSE.

1. Rate of Timeliness Reports.

As depicted in Fig. 5, the Rate of Timeliness reports for SY 2012-13 indicates that DCPS has made and maintained steady progress in improving its performance in meeting the timeliness goal of 90-100% for IEPs. Charter schools likewise met the required standard of performance and nonpublic schools are within striking distance. The OSSE State School, operated by Maya Angelou Academy at New Beginnings, with a relatively small number of students, continued to lag behind but made a modest gain in performance.

Fig. 5 IEP Rate of Timeliness

The general trend of improved timely performance of re-evaluations has continued in the 2012-13 SY (Fig. 6). Notably, DCPS continued to improve its compliance with the 2008 Action Plan standard of 85-95% timely re-evaluations and the other schools and LEAs are close to meeting this standard as well. The performance at the “OSSE State School” improved modestly but continues to lag. The relatively small number of students at this school increases the impact of noncompliance of each student and their transience likely affects the ability to complete re-evaluations on a timely basis.

Fig. 6 Re-evaluation Rate of Timeliness

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.

As in previous years, issues pertaining to related services were most frequently the subject of due process complaints, and the relief provided by HOD/SAs. According to data provided by the Defendants, the most frequently prescribed related services were Speech and Language (3,805 students), Behavior Support Services (3,018 students) and Occupational Therapy (1,909 students). The data also indicates that 62% of the prescribed Occupational Therapy services were delivered, and 9% missed due to provider unavailability. Similarly, 57% of the Speech and Language services were delivered, and 13% missed due to provider unavailability, while 46% of the Behavior Support Services were delivered and 33% missed due to provider unavailability.

2. Related Services staffing

During the school year, there were significant periods of time when related services providers were unavailable at various schools to provide the services prescribed in students' IEPs.

- Psychology services. Four schools had capacity gaps of 32 weeks (Cleveland ES, McKinley SHS, Ross ES, and School Without Walls SHS). Other schools with substantial capacity gaps were Ballou SHS (22 weeks), Kramer MS (21), Dunbar SHS and Browne EC (18), and Columbia Heights EC (16).
- Behavior Support Services. Five schools had capacity gaps of 16 weeks (Ballou SHS, Browne EC, Springarn SHS, LaSalle-Backus EC, and Walker-Jones ES), one had a gap for 24 weeks (Hendley ES), two had a gap for 12 weeks (Malcolm X and Randle-Highlands ES) and 10 other schools had gaps of eight or fewer weeks.
- Speech and Language services. Hart MS had a gap of 15 weeks, Garrison ES and Tyler ES had gaps of 12 weeks. Other schools with significant capacity gaps include Hendley ES and Johnson MS (8), Seaton ES and Eaton ES (7), Columbia Heights EC and Dunbar SHS (6) and six other schools with gaps of five weeks or less.
- Occupational Therapy. Two schools had capacity gaps of 12 weeks (Johnson MS, Kimball ES), two had a gap of eight weeks (Lafayette ES and Stanton ES), four had a gap of six weeks (Langley EC, Hardy MS, Thompson ES, and Hyde-Addison ES), and seven others have a gap of four weeks or less.
- Adapted Physical Education. There were seven schools with capacity gaps of 11 weeks at the start of the school year (Barnard ES, Francis-Stevens EC, Langley EC, MacFarland MS, Seaton ES, Truesdell EC and Tubman ES).

In response to a draft of this report, the Defendants noted that there are procedures to track disruption in services based on staffing and protocols to mitigate the effects, including contracting with vendors, using substitute staff and providing makeup sessions. They asserted that provider gaps did not ultimately prevent children from receiving the services to which they were entitled. The Court Monitor requested information to substantiate that these procedures and protocols were actually invoked to mitigate the effects of the service gaps reported above upon students at the schools. The Defendants acknowledged that such information was not available.

F. Attorneys' Fees

In light of the continuing problems in the delivery of special education and related services as described earlier in this report, the members of the special education attorneys roundtable believe that the decline in the number of due process complaints is the result of a concerted effort on the part of the District to limit their representation of parents by refusing to pay reasonable attorneys fees in a timely manner, making it difficult or impossible for them to continue to represent parents who are without the means to pay attorneys' fees themselves. The number of attorneys who represent primarily an indigent clientele has declined over the years and several have communicated with the Court Monitor and attributed their abandonment of the special education practice or the representation of indigent parents to the District's attorney fee payment policies.

Earlier this year, the Court Monitor issued a report on the DCPS fee payment practices.²⁵ The report reiterated the important role that counsel play in assisting parents with the implementation of relief granted in HOD/SAs.

Many if not most of these families, because of their life circumstances, rely upon their attorneys to navigate a complex bureaucratic process defined in the range for the special education and related services that have been delegated right back to them. . . . [T]he application of these guidelines take on a heightened importance because the District has intentionally shifted considerable responsibility to parents to accomplish many critical tasks associated with the implementation of HOD/SAs, especially arranging independent evaluations and independent compensatory education which can be both time-consuming and protracted.²⁶

That report found inconsistent and seemingly arbitrary decision-making in attorney fee payment practices, and the lack of a reviewable system for assuring consistent application of the existing fee payment guidelines, including the fees to be paid for the work done by attorneys to implement HOD/SAs as required by the parties' 2011 ADR agreement.²⁷ It should be noted that

²⁵ *A Review of the District of Columbia Public Schools' Process for Reimbursing Attorney Fees in IDEA Cases*, Docket #2322, filed 4/23/13.

²⁶ *Id.* pp. 4-5.

²⁷ To make explicit the obligation of DCPS to compensate attorneys for the time expended in these implementation efforts, the ADR agreement entered into by the parties provided as follows:

DCPS shall continue compensating parents' attorneys for work in securing and submitting IEEs and for securing independent compensatory education as required by and within the timelines required by

the ADR Agreement is binding on the parties and as enforceable as any provision of the Blackman Jones Consent Decree. [Consent Decree, ¶ 113] Shortly after receiving a draft of the Court Monitor's report, DCPS entirely rescinded the then existing fee payment guidelines and replaced them with a fee settlement negotiation.²⁸ Paragraph 3 of the Revised IDEA Administrative Fee Process provided that:

OGC will only negotiate a full and final settlement amount representing all past, present, and future attorney's fees claimed pursuant to work related to obtaining substantive relief through Hearing Officer Determination. If the parties are unable to reach a settlement OGC will close out the invoices and the attorney will be advised to pursue recovery of his/her fees consistent with the process set forth in IDEA.

The Court Monitor's report had noted the conflict of interest created by the fee negotiation process.

The recent practice, which is becoming increasingly prevalent, of negotiating the attorneys' fees at the same time as substantively negotiating a resolution of the merits of the parents' due process complaint has the risk of creating an ethical conundrum for the parents' attorney. It creates a risk of pitting the student's educational interests against the financial interests of the parents' attorney in being adequately compensated for time and effort.²⁹

HODs/SAs. Compensation for hours reasonably expended will be at the same billable rate the attorney receives for other case-related work for a prevailing parent under the Guidelines for reimbursing private attorneys, as reviewed.

(*Agreement of the Parties Regarding Jones Compliance*, ¶ 11, Docket #2268-1, filed 8/18/11, approved by the Court 11/22/11, Docket #2273)

²⁸ See, Appendix A to *A Review of the District of Columbia Public Schools' Process for Reimbursing Attorney Fees in IDEA Cases*, Docket #2322, filed 4/23/13, pp. 41-42.

²⁹ Note 31, p. 38.

The current system of negotiation appears to exploit an ethical dilemma faced by parents' attorneys. Their ethical obligation requires them to subordinate their own financial interests to the legal interests of their clients. When settlement agreements are proffered that provide all or most of the relief sought in a due process complaint, but are accompanied by an unreasonably low offer of attorney's fees, attorneys report that they often have no choice but to accept the offer. They do so both because it provides immediate benefit to their client, but also because they have no realistic option to pursue the complaint to a hearing, as DCPS is likely to seek dismissal of the complaint based on mootness. DCPS regards the high rate of acceptance of its fee offers as evidence that the settlement system is working well. (*Id.* P. 35)

This court has previously recognized the risks created by combining the student's educational interests and the attorney's financial interest into a single negotiation and the potential interference with the parent's legal representation (*Johnson v. District of Columbia*, 190 F. Supp. 34 [D.D.C. 2002]).

Although the parties conducted extensive negotiations in the 2013 ADR process which culminated in DCPS adoption of the Implementation Fee Guidelines, these guidelines were rendered virtually irrelevant almost immediately. The new system of fee negotiation exacerbated the conflict of interest problem, and by folding implementation fees into the new settlement negotiation process they rendered those payment practices essentially unreviewable as well.

DCPS has asserted that attorneys are free to submit separate invoices for implementation fees. However, after the 2011 ADR Agreement was adopted, DCPS amended the attorney fee payment guidelines on June 1, 2012 and explicitly stated that supplemental invoices would not be considered.³⁰ When those guidelines were rescinded on March 25, 2013, and replaced with the new fee negotiation process, paragraph 5 states: "All settlement agreements will contain a sum certain for the full and final settlement of all attorney's fees, past, present, and future, related to the matter being settled."

Perhaps most telling, in response to an inquiry by the Court Monitor, DCPS reported that *no* implementation fees have been paid since the Implementation Fee Guidelines were published.³¹ DCPS attributes this to the lack of requests for payment by parents' attorneys for implementation work. However, in light of the consistent communication from DCPS that there would be only a single "full and final" fee negotiation, and no consideration of supplemental invoices, it is disingenuous to assert that the responsibility lies with the parents' attorneys. It is hard to fathom that attorneys who regularly and vociferously complain about the meager amount of attorney's fees offered in settlement negotiations would knowingly forgo the opportunity to submit additional bills for their implementation work.

Anecdotal information as well as reports from members of the special education bar suggests that under the new fee payment system, there has been a substantial decrease in the amount of attorney's fees paid in individual cases. In a review of 67 Settlement Agreements entered into between July 15, 2013 (shortly after the Implementation Fee Guidelines were

³⁰ ¶ 5 (a) of the June 1, 2012 DCPS Guidelines for the Payment of Attorney Fees in IDEA Cases stated:
We request that all submissions for reimbursement of reasonable attorney's fees by parents who have prevailed against DCPS in actions brought under the IDEA be submitted after all permissible actions for reimbursement have been concluded. **DCPS will no longer accept supplemental invoices.** (Emphasis in the original)

³¹ DCPS also reports that it cannot identify the amounts of such fees included in settlements entered into after the 2011 ADR Agreement because they were not separately identified.

published) and November 30, 2013 involving 27 attorneys, 50 specified a maximum fee and involved 15 attorneys. The remaining 17 cases involving 14 attorneys did not specify attorney's fees. The fees ranged from \$500-\$2000, with an average of \$883. Although attorneys have the option of filing a petition in court for their fees, the cost in filing fees, time and effort apparently does not make this a viable option in many cases.³²

Among the concerns expressed by attorneys was a trend in Settlement Agreements towards granting students make up services but not denominating them as "compensatory education" in an attempt to avoid the obligation to pay the attorneys "implementation fees" as required by the parties ADR Agreement.³³ Class counsel and the Defendants have debated whether this practice is in fact occurring and the extent of it. The Monitor has come across cases which raise questions about whether such fees are in fact being included in the settlement amounts and paid.

HOD/SA #25868 issued on 8/29/12 provided that the parent is authorized to receive an independent Psychological (including cognitive, educational, clinical, and autism scale components, as well as social history) and DCPS will complete a Functional Behavioral Analysis (FBA). It also provided that within 20 business days of receipt of the aforementioned evaluations, DCPS will convene a meeting to review the evaluations, review and/or revise the student's IEP, and develop a Behavioral Intervention Plan (BIP). Further, DCPS will fund 100 hours of tutoring and 50 hours of counseling by an independent provider of the parent's choice to be completed by December 23, 2013. The Settlement Agreement provided that DCPS will pay reasonable attorney fees, not to exceed seven hundred and fifty dollars (\$750.00) in full satisfaction of all of claims by said Petitioner. The Implementation Fee Guidelines later adopted, provide for a maximum payment of 2.5 hours of compensable time for 2 or fewer independent assessments and two hours for two or fewer compensatory education services. In this case, Implementation Fees would have been up to 4.5 hours. However, the fee offer of \$750 covers the attorney's fees for the work leading up to the settlement and hardly seems to have considered the future implementation work involved post-settlement. Under the then-existing fee guidelines, no supplemental invoices were permitted. In this case, the client reportedly paid the attorney for attending a post-settlement IEP meeting but the attorney absorbed the cost of arranging the evaluation and reviewing the reports, and also arranging the independent tutoring and counseling services, which were not denominated as "compensatory education." The attorney informed the Monitor that

³² Court have recognized that the lengthy delays in providing reasonable attorneys fees to prevailing parties in IDEA cases can have "serious chilling effects on the availability of competent, experienced attorneys to serve this clientele." *Holbrook v. District of Columbia*, 305 F. Supp. 41 (D.D.C. 2004) *See also*, *Kaseman v. District of Columbia*, 329 F. Supp. 2d 20 (D.D.C. 2004).

³³ *Implementation Fee Guidelines*, July 10, 2013.

experiences like this have resulted in a decision to stop accepting IDEA cases for indigent clients.

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 eligibility for implementation fees to attorneys, while the post-settlement work that needs to be done by the parent/attorney remains. Attorneys have continued to report to the Monitor that there is virtually no fee negotiation. The resolution specialist informs them of what the offer is, and they can take it or leave it. Resolution specialists themselves are unaware of the rationale for the fee offer which originates in the DCPS Office of General Counsel. In some cases, attorneys report that if they push back, offers are reduced or rescinded entirely. Some attorneys report not receiving an offer of any fees along with proposed settlements that grant their clients substantial relief.

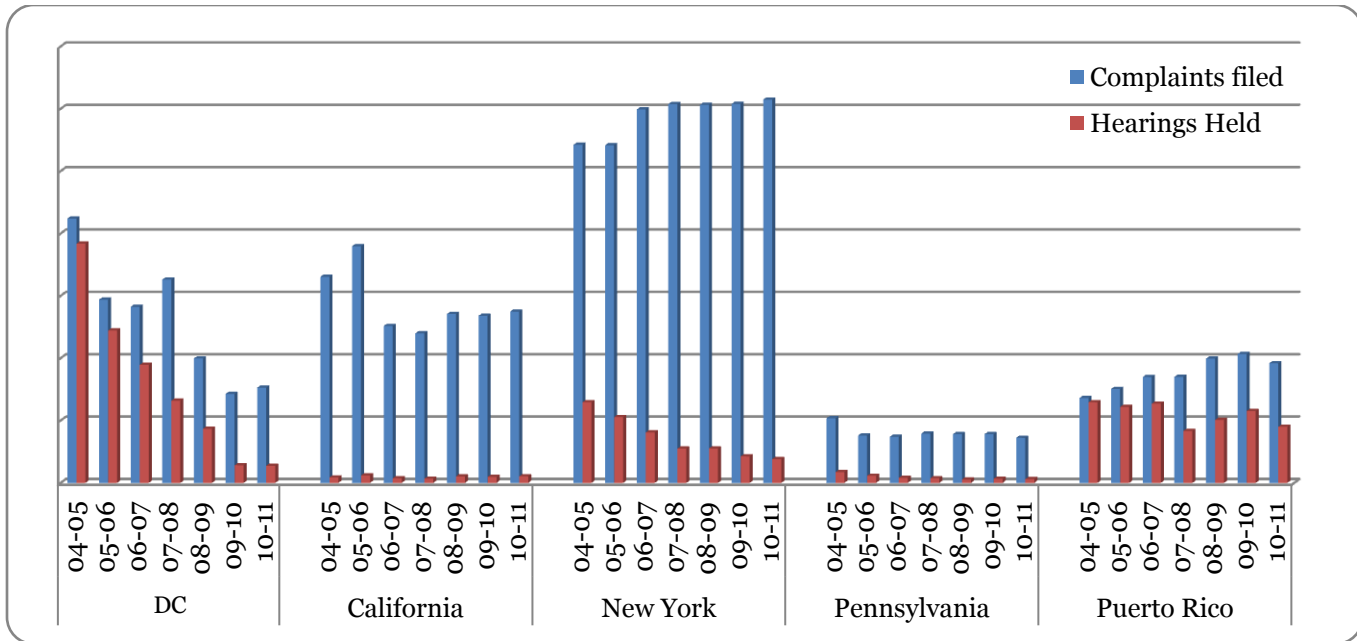
National Dispute Resolution Data

Whatever the specific causes are for the lower number of due process complaints, the fact remains that even with the decline, the District remains one of the jurisdictions in the country with the highest rate of filing due process complaints and resolving them with HODs.³⁴ Figure 7

³⁴ The Center for Appropriate Dispute Resolution in Special Education , Six Year State and National Summaries of

displays the complaint data from five jurisdictions in the country with the largest volume of due process complaints and hearings held over a seven year period.³⁵

**Fig. 7. Due Process Complaints & Hearings in Selected Jurisdictions
2005-2011**



Moreover, if the numbers are adjusted for the relative population of the District, these numbers dwarf all of the other jurisdictions with a high volume of complaints and hearings (Fig. 8).

While these data clearly demonstrate the extent to which the District of Columbia is an outlier in the volume of special education due process complaints and hearings, the District is also one of the rare jurisdictions in which indigent and low income families have had access to private counsel to enforce the provisions of the IDEA in a school system which has repeatedly been determined by the OSEP to be a “high risk” grantee and which has had increasingly severe sanctions and special conditions imposed in an attempt to rectify long-standing noncompliance with basic requirements of special education law.³⁶ The availability of counsel to these parents

Dispute Resolution Data, February 14, 2012

(<http://www.directionservice.org/cadre/pdf/National%20Part%20B%20Tables%2004-05%20thru%2009-10%20Summary%2021March%202012.pdf>, accessed 11/16/13)

³⁵ The cited report contains data from 2005-2010. The Monitor has updated the data to include the most recent school year for which data is available for each jurisdiction, using the same methodology and source data.

³⁶ Ruth Colker, *DISABLED EDUCATION: A Critical Analysis of the Individuals with Disabilities Education Act*

has also enabled them to prevail in the majority of due process complaints filed, an experience that stands in contrast to that in most other jurisdictions where success with the filing of due process complaints is much less prevalent.³⁷

Another national report on special education due process complaint resolution depicts the cost of legal representation and reports high levels of legal fees that are in stark contrast to the typical fees awarded in settlement agreements in the District of Columbia.

The average legal fees for a district involved in a due process hearing were \$10,512.50. Districts compelled to compensate parents for their attorney's fees averaged \$19,241.38. The expenditures associated with the verdict of the due process hearing averaged districts \$15,924.14. For districts that chose to settle with a parent prior to the adjudication of the due process hearing, the settlement costs averaged \$23,827.34 (It should be noted that the Council of School Attorneys estimates much higher average costs for all of these categories)³⁸

To the extent that attorney fee payment practices are having an impact in diminishing the availability of private counsel to low income families in the District of Columbia, they remove one source of pressure for compliance with the special education law at a student specific level. This is a matter of concern as one considers the durability of the progress made by the District towards compliance with the Blackman Jones Consent Decree while under court supervision.

(New York University press, 2013), pp. 207-215.

³⁷ *Id.*

³⁸ AASA, Rethinking Special Education Due Process, April 2013, p. 3

Fig. 8. Rates of Due Process Complaints & Hearings in Selected Jurisdictions 2005-2011

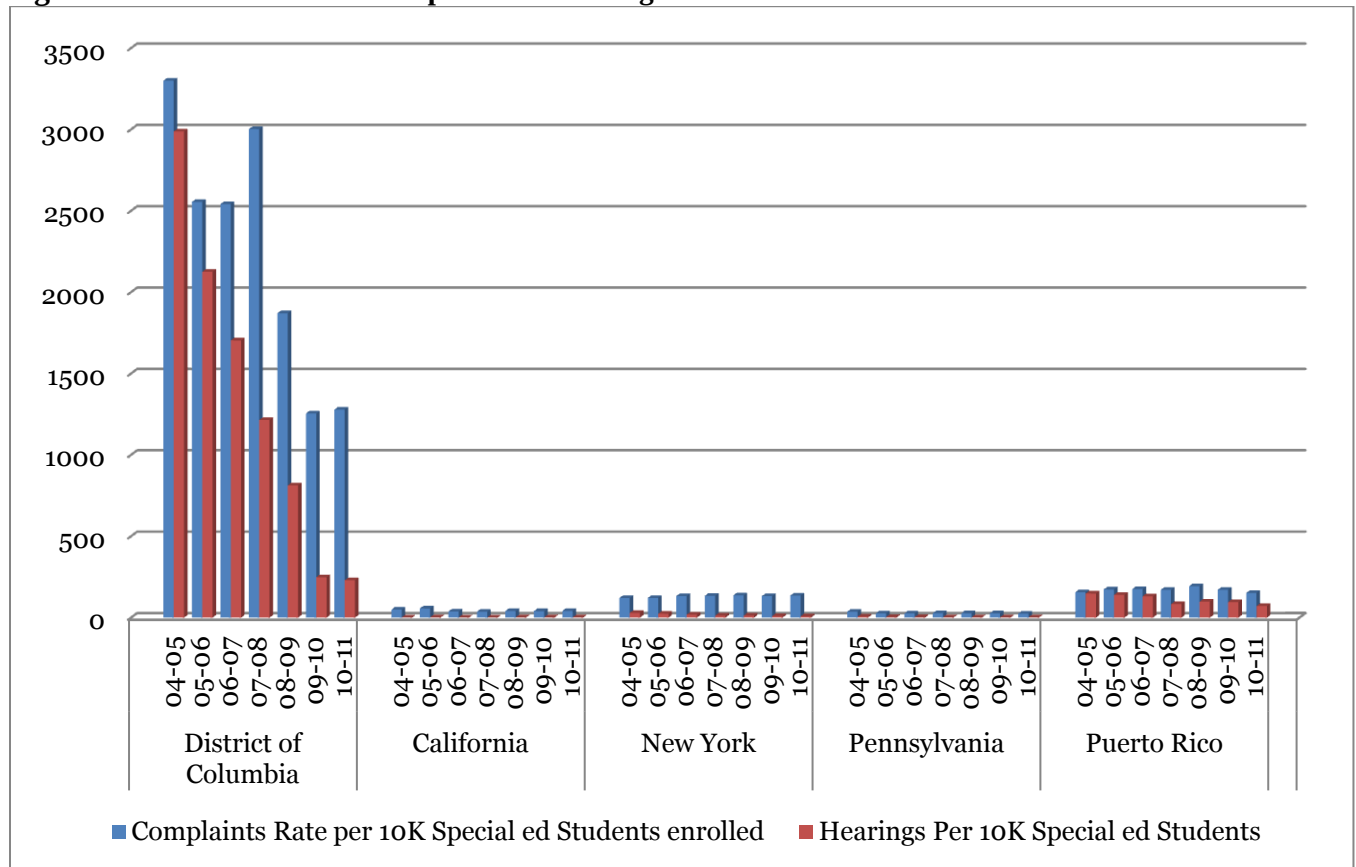


Table 10 below displays the data in more detail.

Table 10. Summary of National Dispute Resolution Data--Due process Complaints in Selected Jurisdictions (2005-2011)

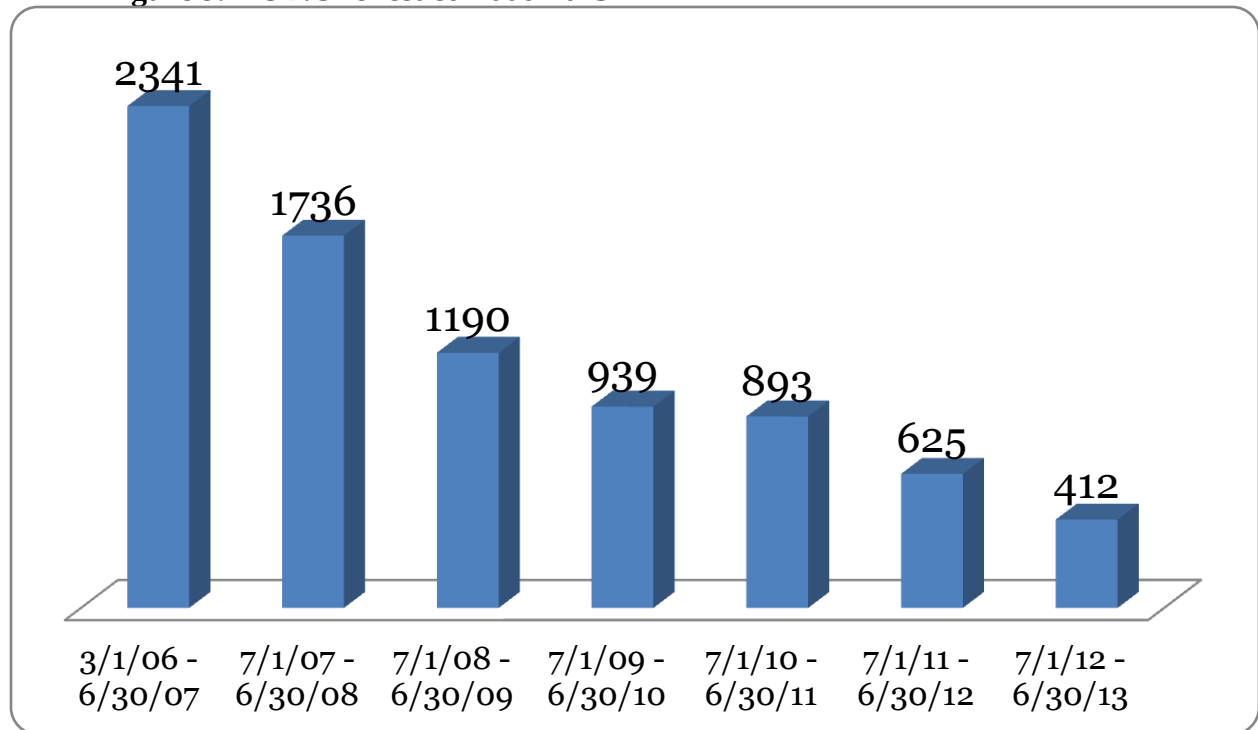
Jurisdiction	School Year	Complaints per 10K Special ed Students	Hearings Per 10K
DC			
	04-05	3300.1	2987.2
	05-06	2554.5	2125.2
	06-07	2541.2	1703.4
	07-08	3001.9	1214.2
	08-09	1870.5	812.5
	09-10	1254.1	248
	10-11	1278.1	229.3
CA			
	04-05	48.9	1.3
	05-06	56.1	1.8
	06-07	37.4	1.1
	07-08	35.7	1
	08-09	40.4	1.5
	09-10	39.8	1.4
	10-11	40.9	1.6
NY			
	04-05	119.9	28.6
	05-06	121	23.6
	06-07	132.5	17.9
	07-08	133.9	12.1
	08-09	136.5	12.4
	09-10	131.7	9.2
	10-11	135.2	8.4
PA			
	04-05	36.7	6.1
	05-06	26.3	3.9
	06-07	25.2	2.8
	07-08	26.9	2.6
	08-09	26.5	1.8
	09-10	26.5	2.2
	10-11	24.5	2.1
PR			
	04-05	155.7	147.8
	05-06	172.9	139.9
	06-07	174.8	130.9

07-08	170.5	83.6
08-09	193.3	97.9
09-10	170.7	95.1
10-11	151.5	71.1

IV. HOD/SAs Issued during the 2012-13 SY

There were 412 HOD/SAs issued in SY 2012-13, continuing a general trend towards a lower number of HOD/SAs each year since the Consent Decree was entered. (Fig. 9)

Figure 9. HOD/SAs Issued 2006-2013



V. 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 191 were reported implemented on time, 11 implemented late, 192 open and not overdue, and 8 cases open and overdue. 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.

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

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

Based on the formula in the Consent Decree, Defendants need to timely implement 189 cases to achieve the threshold of 90% compliance.

Subsequent to the filing of the Exhibit 1 data, the Monitor commenced reviewing individual cases. In the course of this review, the Monitor noticed inconsistent data in the files pertaining to the State Final Review (“SFR”) conducted by the OSSE. This SFR, implemented in response to a recommendation by the Monitor in a previous report, is intended to provide an independent check on the determination of timely implementation of HOD/SAs. It appeared that some cases in the Blackman Jones database had not received the required SFR.

In response to questions from the Monitor in September 2013, the OSSE reviewed the specific cases about which questions had been raised and determined that a broader review of the data set was warranted. This review determined that there were data errors in merging information from separate databases into the Blackman Jones database from which the Exhibit 1 data is drawn. Essentially, when the OSSE commenced implementation of the State Final Review process on July 1, 2012, the Blackman Jones database did not have the required functionality to support this review process. As a temporary measure, the OSSE developed a separate Quickbase system to import data and manage the SFR process. As the Blackman Jones database was updated to incorporate additional functionality, in January 2013 the data from the

Quickbase system was merged into the Blackman Jones database and the SFR process was integrated into the Blackman Jones database. However, as the OSSE reported back to the Monitor and the parties on October 15, 2013, the OSSE review of the data indicated that a number of cases had in fact not received a SFR and that 127 cases were potentially affected due to data processing and manual data uploading practices.

The OSSE conducted a SFR for the 127 cases. Nineteen cases were identified that would not have passed the SFR at OSSE for a variety of reasons. These cases were “kicked back” to DCPS for further action, with the understanding that their final timeliness status may alter the percentage of compliance initially reported on Exhibit 1. Subsequent to the October 15, 2013 memo, the OSSE informed the Monitor that three additional cases were identified and kicked back to DCPS.

Following a review of the 22 cases kicked back to DCPS, the District reported that they had no impact upon the number of timely implemented cases or the rate of compliance. They also reported that a few of the cases had not in fact been issued during the 2012-13 SY but were from the prior SY and therefore should not be considered.

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 Team³⁹ 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)).

³⁹ 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.

B. Case Reviews

As has been done in previous years, the Monitor conducted a review of a sample of 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 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. Out of the 191 cases reported as having been implemented on time, the Monitor reviewed a sample of over 100 cases. This sample of more than 50% of the timely implemented cases is a substantially larger sample than has been reviewed in previous years both because of the Defendants' report that they had met the compliance levels required by the Consent Decree, and to assess the effectiveness of the State Final Review process implemented by the OSSE.

As an overall observation, the case closure process is being implemented and overseen in a more consistent way than has been the case in previous years, and has progressively improved. Case managers are generally assigned to cases promptly, and generally follow clear protocols to aggressively follow up on the requirements of HOD/SAs to assure their timely implementation. They maintain regular contact with parents/attorneys and school personnel to check on the progress in implementing actions required by the HOD/SAs, and routinely offer the assistance required by protocols adopted pursuant to the parties' ADR agreements, usually through notices appended to their signature blocks on e-mail messages. Infrequently, a parent or attorney takes advantage of an offer of transportation to an evaluation or a compensatory education session. The trend of entering into SAs which shift responsibility for arranging for evaluations or compensatory education to parents and their attorneys has continued for most of the SY, as has the trend to having less specific obligations placed upon LEAs (e.g., agreements to have a meeting to discuss comp ed, rather than an agreement to provide a specific type of compensatory education, agreements with no specific due dates against which to measure timeliness). If the parent/attorney fails to obtain an Independent Educational Evaluation ("IEE") or compensatory education within the specified time, case managers generally follow the protocols for granting

extensions and offering assistance. Partly because of the rigor of the SFR process in insisting upon documentation to support the implementation of the required actions, the quality and amount of the documentation has improved noticeably. All of these factors played a part in the Monitor usually agreeing with the determination that a case had been implemented timely and properly included in the count.

Nevertheless, there were a few cases in the sample reviewed, which are discussed below, where the Monitor disagrees with the decision to count a case as timely implemented.

1. Cases closed as Timely Implemented

a. Cases closed as timely implemented despite formal findings to the contrary

There were cases in the sample where there had been a formal finding or acknowledgment outside the case closure process that a case had not been timely implemented. Nevertheless, the case continued to be included in the count of timely implemented cases.

HOD #25835. This HOD was closed as timely implemented on 10/31/12. However, in a related motion for a preliminary injunction, the Special Master found that implementation was not timely (Docket #2298, December 11, 2012). Neither party filed objections to the Special Master's report, which the court approved (Docket #2305, January 9, 2013). Despite this judicial finding of a lack of timely implementation of the HOD, DCPS did not change the determination of timely implementation nor, apparently, did it notify the OSSE that there was any reason to re-review its prior State Final Review approval of the status.⁴⁰

⁴⁰The Monitor has recommended to the OSSE that it develop additional procedures to ensure that it is kept informed of subsequent developments in a case that reasonably call into question a previous determination of timely implementation.

Another case with similar concerns is HOD/SA #26053 which is reported as open and not overdue for the 2012-13 SY, and was later closed on 7/2/13 as timely implemented. The approval history notes state that the May 5, 2013 HOD stated that DCPS has implemented Required Actions on 1-26-13. However, this is contradicted by the Special Masters' statement in the preliminary injunction process that the HOD/SA had not been implemented, which eventually led to a settlement of that proceeding. Moreover, the hearing officer merely ruled that the petitioner had not established a denial of FAPE, not that the prior hearing officer decision regarding the provision of art therapy to the student had been implemented. In this case as well, it does not appear that the OSSE was informed of the Special Master's conclusion regarding timely implementation.

In their response to a draft of this report, Defendants disagreed that these cases should be considered untimely based on the rulings of the Special Master.

b. "Diligent Efforts" cases

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.⁴¹

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*, 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.⁴² 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.

These guidelines specify:

⁴¹ These provisions apply equally to Settlement Agreements (Consent Decree, ¶ 8).

⁴² 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.

In no case shall an LEA seek to extend timelines while waiting for the parent to complete a precursor event (i.e., provide an independent evaluation), unless that extension accurately reflects the amount of time during which the LEA was both 1) waiting for the precursor event, and 2) making diligent efforts to obtain the precursor. (p. 4)

In the course of the case review, the Monitor has found that while the case managers' diligence in documenting their contacts with the parents/attorneys unquestionable has improved greatly over the years, there are still instances in which there are long gaps with no documented contacts. While in most such cases, the underlying service is eventually implemented, the timeliness of this action is delayed while waiting for the precursor action without adequate evidence of "diligent efforts" as set forth in the Consent Decree and related documents. Nevertheless, these cases are classified as "Implemented Timely."

HOD #25929. The Settlement Agreement entered on 10/3/12 required that within 20 business days (November 1) DCPS will convene a meeting to review/revise the student's IEP if warranted and discussed placement/location of services. The case manager did not begin the process of scheduling the IEP meeting until an e-mail on 10/25/12 to the parent's attorney requesting dates. The case manager explained that due to some technical difficulties,⁴³ his dashboard was not updated with this case until 10/23/12 and the IEP meeting needs to convene by November 1, 2012 to review the IEP and discuss placement. He requested an extension, or alternatively proposed a meeting date of November 1, 2012. The attorney granted the request of the extension and the meeting was eventually confirmed for November 9, 2012, beyond the 20 business days specified in the Settlement Agreement. The case was closed as Timely Implemented.

The Supporting Documentation for HOD/SA Implementation, issued by the OSSE on March 23, 2012, pursuant to an ADR agreement of the parties, requires documentation of diligent efforts prior to granting an extension of a timeline. In cases where a settlement agreement requires a meeting to be held 15 or more days after the settlement agreement, there must be documentation of correspondence from the LEA to the parent or parent's counsel within three business days of the settlement agreement (p.5), which did not occur here, making the meeting untimely.⁴⁴

⁴³ The Monitor consulted with the OSSE to determine the nature of the technical glitch and its potential scope and effect upon other cases, but was informed there was no such problem but rather a human error in timely action on this case.

⁴⁴ In response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion on the basis that the parent's attorney consented to the extension. However, the request for the extension was made long after the scheduling of the meeting was required to begin under the ADR protocols. The OSSE Supporting Documentation for HOD/SA Implementation Issued: March 23, 2012 specifically states regarding Extension of Timelines: "In no case shall an LEA seek to extend timelines based solely on the LEA's failure to timely begin or continue implementation of any provision of the SA or HOD." (p. 4) In this case, there was a clear failure to "timely begin" implementation.

c. Miscellaneous errors

HOD #25829. The settlement agreement issued on 7/16/12 was closed as timely implemented on 3/20/13. It authorized independent psychological and vocational evaluations to be completed within 45 calendar days of the settlement agreement. However, due to an error by the case manager, the authorization for the independent vocational evaluation was not given until September 24, 2012, well after the deadline for completing the evaluation. The subsequent IEP meeting was scheduled and confirmed within 30 business days of both evaluations being in the possession of DCPS, although it had to be rescheduled due to non-attendance by the student and attorney. There is no indication in the approval history that the delay in authorizing the vocational evaluation was noted at any level of the approval process. This case should have been untimely due to the delay in authorizing the vocational evaluation.⁴⁵

HOD #25825. This HOD on 7/12/12 was closed as timely implemented on 11/7/12. The case manager did not follow due diligence guidelines. The case manager is supposed to make contact every 14 calendar days. There were sporadic contacts. After issuing the independent evaluation authorizations on 7/11, the next contacts were on 8/20, 9/28 and 10/17. (There is no evidence of the 9/12 e-mail which is listed on the 30-60-90 day checklist.) There was also confusion about who was in charge of this case, with multiple case managers conducting separate correspondence about compliance, without being aware of one another's actions.

Regarding the determination of timeliness, there is no explanation to support the DCPS statement that the speech and language evaluation was received on October 24, which is used as the date from which the timeliness of the MDT meeting is calculated. (It was to occur within 20 business days of receipt of the completed evaluation.) There is a bill in the file from Parker Diagnostics which performed the speech and language evaluation and seems to indicate that the bill was sent on 8/6/12. This is the bill that is cited as the proof of payment justifying the closure of the case. The speech and language evaluation itself is dated 7/27/12. Supporting the view that the S&L evaluation was received earlier than October 24, there is an e-mail from an educational advocate, stating that they proposed a meeting date of August 30, apparently after the required evaluations had been submitted, but did not hear anything back from DCPS until September 21. On September 25, a school representative wrote that they are still waiting for the speech and language evaluation. On 10/18, DCPS proposed meeting dates – presumably at this point they had the required evaluations in hand. It seems likely that the speech and language evaluation was transmitted to someone in DCPS in early August and got lost somewhere in the bureaucracy.⁴⁶

⁴⁵ In response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion, contending that despite the case manager's error, there was a clear intention to authorize the correct evaluation, and there was diligent follow up.

⁴⁶ In response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion, and assert that the 10/24/12 date of receipt of the evaluation is correct, making the case timely.

HOD #25903. The Settlement Agreement of 9/27/12 provided in part that "Upon receipt of medical documentation from petitioner that indicates a dedicated aide is warranted for School Transportation to and from school, DCPS will provide a Dedicated Aide for DCPS school bus transportation to and from school." The student in question has brittle bone disease and had previously suffered an injury due to mishandling by an aide on the bus. The student was missing school while the issue of providing him with a dedicated aide on the bus was resolved. This case is reported as timely implemented as of 12/11/12 based upon a determination that the medical documentation was received on 10/10/12, a few days before a nurse's aide was provided on the bus. However, the medical documentation in the file has a fax date of 9/26/12, and the initial reviewer's note acknowledges that this information was provided to DCPS on 9/27/12, the date of the settlement agreement. DCPS did not provide a dedicated aide for school bus transportation to and from school "upon receipt of medical documentation." There is no explanation in the approval history why the fax date or the initial reviewer's note was disregarded in concluding that the documentation was first transmitted on 10/10/12. This case should not be considered as timely implemented.⁴⁷

HOD #25906. In this case, the complaint sought among other relief a full Auditory Processing Evaluation by a speech and language pathologist or Audiologist. In the HOD issued on 10/1/12, the hearing officer ordered extensive relief, including in part, "additional cognitive testing including nonverbal, social-emotional, executive functioning, and auditory and phonological processing." When the required testing was referred to the school psychologist to complete, she asked:

As part of my original Data Evaluation Review I completed two subtests of the Woodcock-Johnson Tests of Cognitive Abilities. Has an auditory processing evaluation been ordered in addition to that? I will be including the following in my assessment battery: non-verbal cognitive, social-emotional, executive functioning and phonological processing. If the HOD requires an additional Auditory Processing assessment, I would recommend having a Speech-language therapist administer the Test of Auditory Processing.

There is no response to this question or any evidence that this recommendation was followed. On 11/16/12, the case manager forwarded all completed assessments to the parent's attorney, but no reference is made to psychologist's recommendation regarding the auditory processing assessment or follow-up to the recommendation to have a speech and language therapist perform the assessment. An IEP meeting was subsequently held to review the evaluations. The case was later closed as timely implemented on 2/1/13.

In the approval process, the DCPS Final Reviewer wrote regarding the ordered auditory processing evaluation: "This is a component on the comp psychological evaluation that was completed. Please see comp psychological completed on 11.15.12. Page 7 of the

⁴⁷ In response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion contending that there was no due date for commencement of the service.

evaluation refers to two test of auditory processing and the Woodcock Johnson tests of cognitive abilities, with scores.” The OSSE final review accepted this determination. No rationale is advanced for disregarding the recommendation of the psychologist, whose assessment is relied upon, that the auditory processing evaluation should have been done by a Speech and language therapist (as requested by the complaint) or an Audiologist, nor was this omission disclosed to the parent's attorney or at the IEP meeting.⁴⁸

HOD # 25870. The HOD entered on 8/29/12 required DCPS to provide a one-to-one aide/tutor for the student within 10 school days to assist the student in mastering short-term goals in a post secondary transition plan, and also for one hour per week for the school year during the student's Learning Lab class. Within 15 school days, DCPS was required to identify and provide an expert to assist the school SEC and teachers develop appropriate accommodations and modifications for the student to address her visual and auditory processing deficits and low memory functioning. The student's teachers and the SEC must consult with the expert for three (3) hours during the month of September 2012, two (2) hours during the month of November 2012 and one (1) hour during the month of January 2013. Within ten (10) school days following the September 2012 consultation, DCPS must hold an IEP Team meeting to discuss any modifications and accommodations recommended by the expert and, if necessary, revise the student's IEP to include the accommodations and modifications the student needs to address her visual and auditory processing deficits and low memory functioning.

Within the time frames required by the HOD, DCPS retained the required aide/tutor and an expert; however, the student was not attending school. The case manager inquired of the student's attorney when the student plans to enroll at the school. In response, the attorney sought more detailed information on the qualifications of the aide and expert. After receiving no response to subsequent e-mails to the attorney, on 9/25 the case manager proposed three dates for an IEP meeting via e-mail. Having received no response, on 10/3, the case manager informed the attorney that DCPS would proceed with the meeting if they do not receive a response. The next day, the attorney responded that the student had enrolled at a charter school for which DCPS was the LEA, and proposed a meeting date for October 9, 2012 at the new school.

According to notes of the extension history, because the student was unilaterally moved to a different school, the HOD implementation process must start over. On 10/17/12, a new expert was assigned to the case who was out of the office for two weeks but would consult with the charter school upon her return to discuss auditory and visual impairment concerns. The case manager informed the new expert of this assignment on 10/31/12. Subsequently the expert met with the school team on 11/28, 12/7 and 12/20. A final expert consultation was held with the school on 1/31/13. There are no specific notes of the consultations to indicate how many hours were provided as specified in the HOD.

Regarding the aide/tutor, on 11/5/12, one month after being informed of the student's enrollment at the charter school, the case manager contacted a private agency to set up

⁴⁸ In response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion, on the basis that the HOD/SA did not specifically require a separate evaluation by a Speech & Language therapist and the OSSE could not require this as part of the SFR process.

tutorial services for the student pursuant to the HOD. On 12/5/12 the agency informed the case manager regarding the person being assigned as the tutor. There are no records of the days or times that the aide/tutor was assigned to the student, but the aide attended the 12/20/12 IEP meeting. This case was determined to be timely implemented.

Under the circumstances of this case, it is reasonable to view the implementation clock as restarting once DCPS became aware of the unilateral change in enrollment of the student. However, even with that, the required actions were not taken within the time frame specified in the HOD. Arguably, an expert was *assigned* within 15 school days from 10/4, the date DCPS became aware of the change in enrollment, but this expert was unavailable and not informed of the assignment until 10/31, and did not actually meet with the school until 11/28/12. Similarly, arrangements for the one-to-one aide/tutor were not begun until a month after DCPS became aware of the change in enrollment, and an aide was not assigned until about another month later. These actions are not consistent with the timeframes specified in the HOD, and the case cannot be considered as timely implemented.

DCPS tacitly admits to the noncompliance with this HOD in a subsequent Settlement Agreement on 4/10/13 where it agrees, in part, that: “DCPS will provide ten (10) hours of transition tutoring and ten (10) hours of academic tutoring during the school day as required by the 8.29.12 Hearing Officer Decision (HOD).”⁴⁹

HOD #26074. This case has an HOD date of February 4, 2013 and was closed as timely implemented. It required that within 45 days of the execution of the settlement agreement, DCPS will conduct a psychological evaluation and occupational therapy evaluation. Thereafter, within 15 business days of receiving the evaluations, DCPS will convene a meeting to review the evaluations, review and revise the IEP if warranted and discuss location of services. However, the HOD date is in error as the Settlement Agreement was actually signed on December 4, 2012 but was not uploaded into the Blackman Jones database until February 4, 2013. Meanwhile, on January 8, 2013 the case manager wrote the attorney stating that there was an error in the settlement agreement which should have provided for 45 *business* days to complete the evaluations, and that with the winter break it would be impossible to complete the evaluations.⁵⁰ She therefore proposed either extending the deadline or allowing DCPS to authorize independent evaluations. The parent’s attorney selected the latter option, and a provision waiver was sent on January 16, 2013 converting the DCPS evaluations to independent evaluations. The provision waiver was signed by DCPS on February 13, 2013, and submitted to the Court Monitor on March 14, 2013. After providing the plaintiffs an opportunity to review and comment on the provision waiver, the Monitor approved it on March 25, 2013.

⁴⁹ In response to a draft of this report, Defendants disagreed with the Court Monitor’s conclusion, contending that the services were timely in light of the student’s unilateral move to a charter school and the District’s readiness to timely implement the required services at the original school.

⁵⁰ This “error” likely occurred because when settlement agreements authorize *independent* evaluations to be obtained by the parent/attorney, typically, they require the submission of the evaluations within 45 *calendar* days.

The independent evaluations were submitted to DCPS by February 14, 2013 and the MDT/IEP meeting was held on February 28, 2013. If timeliness is measured as of February 4, 2013, the date the settlement agreement was uploaded into the Blackman Jones database, this case is timely implemented. However, if timeliness is measured as of the date of the settlement agreement (December 4, 2012), it is plainly untimely. The evaluations would have had to be completed by January 26, 2013. Although a provision waiver was created and approved,⁵¹ by its terms a provision waiver is not valid until approved by the Court Monitor. The provision waiver was not fully executed by the parties until February 13, 2013 and not approved by the Court Monitor until March 25, 2013. The case was already untimely when both those events occurred. 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.⁵²

HOD #26099. This Settlement Agreement required an IEP meeting to be held by 4/8/13, but it did not occur until 4/16/13. The case manager and the reviewers all correctly categorized it as untimely. However, due to an apparent transcription error, it was closed as Implemented Timely. The State Final Reviewer acknowledged the mistake and agreed to correct it.

HOD #26106. This SA was entered into on 1/10/13. It required Mary McLeod Bethune PCS to complete a comprehensive evaluation within 45 days and to forward it to Petitioner upon receipt. It also required a MDT/IEP meeting within 10 school days after receipt of the evaluation.

The psychological evaluation in the BJ data base is dated 2/20/13, but this version contains subsequent revised language from the psychologist (who works for DCPS) who alerted the school of the revision in an e-mail of 3/13/13. While the initial completion date for the evaluation of 2/20/13 would be within the SA order of 45 days (41 days), the revision by 3/13/13 would be 62 days. The notes indicate that the evaluation was given to petitioner on 3/17/13 or 3/21/13, which are arguably within an "upon receipt" timeline if the evaluation date is 3/13/13, but the evaluation itself would be untimely using this calculation. If the evaluation is viewed as being timely as of its initial completion on 2/20/13, then waiting until 3/17/13 or 3/21/13, just prior to the IEP meeting to provide it to the petitioner is not consistent with the "upon receipt" requirement. "Upon receipt" means "promptly." Delivery to the parent is intended to give the parent time to review and consider the contents of the evaluation. If this evaluation was given to the parent around when it was first completed, the clock started running and the IEP meeting did not occur within the 10 school days as specified in the HOD. Timeliness has to be measured

⁵¹ ADR Agreement, Docket #2268-1, ¶ 5, filed 8/18/2011.

⁵² See, Report of the Evaluation Team for the 2009-10 SY, Docket #2243, filed December 10, 2010, pp.17-22. In response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion, and argue that the provision waiver voided the original deadlines and reset the clock, making the case timely.

from when the parent receives the final evaluation that is going to be discussed at the IEP meeting. This case should have been classified as Untimely.⁵³

The Monitor's review concludes that the Defendants have not yet met the Consent Decree standard of timely implementation of 90% of the HOD/SAs in the reporting period. In the review of the sample cases, 9 cases were determined to not be timely implemented which would reduce the compliance level to 86%, without reference to the approximately 90 remaining cases which the Monitor did not review.

$$\frac{182 (191 - 9)}{210 (412 - 192 - 10)} = 86.66 \%$$

Although, as indicated above, the Defendants disagree with the Court Monitor's conclusions in a number of the cases reviewed, they concede that they have not met the Consent Decree standard of timely implementation of 90% of the HOD/SAs in the reporting period.

2. Cases Open More than 90 days but reported as not overdue

The Defendants report that there were 192 cases that were open and not overdue at the end of the 2012-13 SY. The Monitor selected a sample of 34 cases (17.7%) that had been open for more than 90 days to determine whether they were appropriately categorized as "not overdue." 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 compensatory education services provided or in responding to inquiries from case managers about whether payment had been received; and parent and attorneys non-responsiveness to case manager inquiries regarding progress in obtaining independent services or confirmation of receipt of payment of attorneys' fees provided for in addenda to Settlement Agreements.⁵⁴ In a

⁵³ In response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion, citing the non specific timeframes in the Settlement Agreement.

⁵⁴ The delays that occur while case managers try to obtain confirmation of payment from private providers and parents/attorneys are baffling. Presumably in these cases either DCPS or the OSSE has made the payment and ought to have evidence of having done so, but there seems to be no simply and reliable internal process to provide this information to case managers. Rather than attempting to get this information from co-workers within the District government, case managers expend a lot of time and energy chasing down confirmation of payment from the recipients, creating more work for themselves as well as for the recipients. These practices do not reflect well upon the responsiveness of government employees in some parts of District agencies to requests for assistance.

few of the cases reviewed, the Monitor disagrees with the decision to categorize a case as “not overdue” for more than 90 days.

HOD/SA # 25860. This HOD issued on 8/20/12 required the student to be placed at the Foundations School for the 2012-13 SY with transportation. It required the student’s IEP to be revised no later than September 21, 2012 to address the services recommended in the HOD/SA, and specified minimum requirements for the parties who should be present at the IEP meeting. The placement and transportation were arranged timely, and the IEP meeting was held on September 14, 2012. The case was submitted for closure, but was kicked back because the student and the regular education teacher did not attend the IEP meeting, as specified in the HOD. The case was determined to be unimplemented on September 24, 2012. The State Final Reviewer entered a note: "Please upload documentation indicating all required attendees were present at the IEP Revision meeting or hold a meeting and revise IEP compliance with this requirement." There is no evidence of any further action to implement the HOD. This case has been overdue for well over 90 days but is not reported as such.

HOD/SA #25887. This HOD issued on 9/14/12 was reported as open and not overdue for more than 90 days during the 2012-13 SY, and was closed as timely implemented and reported on 10/1/2013. It required DCPS to provide a Dyna Vox Maestro with software to the student and to provide at least four hours of training to the student's parents, teachers and related services providers, as well as to provide the student training within assistive technology specialist for 60 minutes per week for four weeks to assure proper implementation of the Dyna Vox Maestro. It also required DCPS to provide the student with compensatory education for 30 minutes per day, three days per week for 15 weeks in the form of one-to-one tutoring, to be completed within six months of the date of the order (March 14, 2013). The equipment was received timely, and with appropriate extensions, the training for the parents and school personnel was also completed timely. The student received only three of the four hours of training required.

The case manager issued a letter authorizing independent compensatory education on October 4, 2012 but only began following up on implementation of compensatory education on 12/27/12. As of 3/15/13 compensatory education had not yet begun. There is no evidence of prior attempts by the case manager to assist the family with compensatory education, which by the terms of the HOD would have needed to begin shortly after the HOD was issued in order to be delivered over 15 weeks as prescribed. On 3/15/13, the case manager extended the deadline for compensatory education for another six months. The contacts in this case do not satisfy the due diligence guidelines to support the extensions to keep the case timely.

For the 2012-13 SY, this case should have been considered open and unimplemented for more than 90 days and eventually closed as implemented untimely.⁵⁵

⁵⁵ In response to a draft of this report, Defendants disagreed with the Court Monitor’s conclusion, stating that the extensions granted were proper, and that identifying this case as greater than 90 days overdue encourages LEAs to engage in rote communication with nonresponsive attorneys rather than taking the student-centered approach by contacting the parent and providing the student additional time to access the services.

HOD/SA # 25914. The HOD was issued on October 6, 2012 and among other things ordered an independent clinical psychological evaluation. The evaluation was eventually completed 298 days later on July 30, 2013, and the IEP meeting, which was to happen within 15 days, eventually occurred after the start of the new school year in September 2013. The follow-up on the clinical evaluation was sporadic, and did not begin with any regularity until January 28, 2013. The first offer to have DCPS takeover responsibility for the evaluation seems to have come on 4/15/13, over 180 days after the HOD and coincided with the beginning of the administrative closure process. This case is considered open and timely on the basis of diligent efforts; however, there were lengthy gaps in following up on the obligations of the HOD and the case has been open and overdue for more than 90 days.⁵⁶

HOD/SA #25969 issued 11/25/12. The HOD/SA in this case provided for DCPS to reimburse Petitioners for all costs of tuition and any related services they have incurred for the student at a private school for the 2012-13 SY to date, and to place and fund the student at private school for the remainder of 2012-13 SY, with transportation. Within 30 days of the date of this Order (i.e., by no later than December 24, 2012), DCPS was required to convene a meeting of the Student's MDT/IEP Team (including Petitioners) at the private school for the purpose of developing an Individualized Education Program for the student for the 2012-13 school year.

On December 10, 2012, the Deputy Chief of Compliance at DCPS sent an e-mail to the OGC attorney stating that they would like to appeal this decision. "In light of our Jones obligations, we really need to have the original HOD stayed until the appeal goes through. Is there any way to do that before the case goes untimely on 12/24/12?"

There is no response to this inquiry in the Blackman Jones database. However, on 12/19/12 the compliance case manager documented: "CCM was told that the Case is being appealed and not to implement the RA's [Required Actions]." No further actions were taken to implement the HOD/SA since that time and all RA's are recorded as Not Yet Implemented but timely, although the required actions are overdue by 11 months. As best as can be determined, there was no application for a stay.⁵⁷

⁵⁶ In response to communication from the Court Monitor, the DCPS program director indicated that a review of this case had prompted changes in business practices to address non-receipt of independent evaluations, and to offer DCPS evaluations at a much earlier point if there is no indication that independent testing has begun. Nevertheless, in response to a draft of this report, Defendants disagreed with the Court Monitor's conclusion, because DCPS remained in contact with the parent while awaiting the evaluation.

⁵⁷ While the appeal was pending, the parents applied for a preliminary injunction to invoke the "stay put" provisions of the IDEA to continue the placement and funding of the student at the private school in the face of the school district's refusal to comply with the portion of the order requiring development of an IEP by December 24, 2012 and refusal to fund the placement of the student for the 2013-14 SY until the appeal was decided. Judge Howell granted the motion for a preliminary injunction. (*District of Columbia v. Oliver*, Civ. Action 13-215 [D.D.C, November 13, 2013]) There were other cases in the sample which also involved substantial delays in implementation while legal proceedings were pending which are also considered not to be overdue. (e.g., HOD/SA #25988, issued 12/4/12) The OSSE also identified another case from the 2011-12 SY that is under appeal without a stay having been granted, and which has not yet been implemented (#25802).

Defendants have informed the Court Monitor that they will be issuing a policy clarification regarding the use of extensions while a case is under appeal. Subsequent to the submission of the draft report to the parties, the Court has also addressed this issue in *District of Columbia v. Masucci*, Civ.13-1008 [Dkt. #2424, January 30, 2014] stating: “[T]he District had an obligation to comply with the HOD . . . unless and until the District was granted a stay by this Court.” (slip op. at 2)

The Monitor finds that the Defendants have not met the Consent Decree standard that “No case is more than 90 days overdue.” (Consent Decree, ¶ 148).

3. Long delays in providing services to meet students' needs

As noted in last year's report, the due process procedures and the current implementation process for HOD/SAs often results in an extended period of time elapsing before the student can begin to receive any benefit from the process. The focus on maintaining the "timeliness" of the case in order to comply with the requirements of the Consent Decree has resulted in a number of practices which try to achieve this goal at the price of delaying the delivery of services to students and removing a sense of urgency for doing so. Delays continue in the implementation phase.

In last year's report, the Monitor noted a trend in Settlement Agreements towards eliminating deadlines for actions required to be taken by DCPS. Some of the cases discussed above and below are illustrative of this practice. The lack of deadlines is fundamentally inconsistent with the obligation for timely delivery of special education services to students as it removes accountability for timely action to meet students' needs, and elevates the obligation for technical compliance over the basic goal of the Consent Decree "to achieve, as quickly as possible, Defendants' compliance with federal law requirements for . . . timely implementation of Hearing Officer Decisions and Settlement Agreements" (Consent Decree, p. 8). But even where deadlines are not eliminated, delays occur frequently.

HOD/SA # 25846. A Settlement Agreement issued 7/24/12 authorized independent psychological assessment and educational assessment, to be followed within 20 business days of receipt by an MDT/IEP meeting to review the assessments and review/revise the IEP. The case manager promptly issued a letter of authorization for the independent evaluations, and during August and September kept in regular biweekly

contact with the attorney on the status of evaluations, offering assistance and arranging for transportation services for the family/student to obtain the evaluation.

But there appears to have been no contact again until 10/23, when the CCM asked the attorney for an update. There is no response in the BJDB. However, a CCM progress note posted on 11/8 states: *"Writer received a response email from provider regarding the IEE status. Provider stated that the IEE is currently in progress and provider is awaiting questionnaires for teachers."* (Could not find a copy of referenced e-mail in BJDB.)

In the following month, there are copies of e-mails, but few responses:

On 11/14, the attorney wrote to staff at the Washington School and the CCM: *"Please find attached the teacher questionnaire from Dr. Martin for the evaluation of [student]. It is my understanding that there have been several issues with getting the form completed. Please have the teachers fill out the forms completely per Dr. Martin's request"*. (Could not find a copy of referenced e-mail in BJDB.)

On 11/19, the attorney wrote staff at the Washington School & CCM: *"I am writing to confirm receipt of the teacher questionnaires last week. Please confirm that they have been received and are being completed. Thanks very much for your assistance."* (Could not find a copy of referenced e-mail in BJDB.)

On 11/21, the attorney wrote: *"Please see the two emails attached below. There is an email dated October 19, 2012 and October 14, 2012 regarding the teacher questionnaires. As you know, DCPS authorized independent evaluations for [student]. As part of the evaluation, the evaluator has requested that teacher questionnaires be completed in order for that data to be included in the evaluation. The evaluator initially sent the questionnaires to the school on October 1, 2012. The evaluator has had great difficulty with getting the school to return the questionnaires. As of today's date, the evaluator has not received the questionnaires. I have attached a copy of the teacher questionnaires for completion."* (Could not find a copy of referenced e-mails in BJDB.)

On the same day, another staff person from DCPS responded with a CC to the CCM: *"Thank you, I will get this to the BTW staff."*

Per 11/27 CCM progress note *"School questionnaires received and uploaded in QB. Writer will send copy to parent's attorney soon."*

On 12/12 a substitute CCM asked the parent's attorney for IEE status update and on 12/17 they were received from attorney, paving the way for the 1/10 MDT meeting which was held timely within 20 business days.

So, while this case was implemented timely, the lack of the deadline and lack of responsiveness from the school resulted in the evaluations not being completed for almost five months.

HOD/SA #26002. Settlement Agreement issued 12/15/12 contained no deadline for the implementation of compensatory education. After issuing the authorization for the

independent compensatory education, the case manager made periodic entries in the BJDB that no invoices or logs had been received, but otherwise made no effort to follow up with the parent/attorney until more than three months later on 3/19/13. The compensatory education services were never started and on 6/26/13, the case manager sent an alternative compensatory education packet to the parent and attorney in an attempt to close out the case.

HOD/SA #25868 --five month delay in completing an evaluation and holding an IEP meeting.

HOD/SA #25932 --seven month delay in completing IEEs.

VI. MISCELLANEOUS ISSUES

A. ADR implementation

In the wake of the Defendants' failure to achieve the levels of compliance required by the Consent Decree, the parties entered into ADR Agreements in August 2011 and May 2013.⁵⁸ The ADR agreements between the parties required the Defendants to issue quarterly reports to the Monitor and class counsel outlining all steps taken and results achieved. (§ 17) The Defendants have provided the required quarterly reports, the most recent of which covers the last quarter of agreement covering the period from January 1 to June 30, 2012.⁵⁹

Among the notable accomplishments during the past school year have been the special effort made by the OSSE to engage the independent charter schools in better understanding their obligations under the Consent Decree. This included ongoing training opportunities as well as a special focus on working with charter schools that had open and untimely cases. This effort resulted in the closure of several cases that had been open for a substantial period of time.

A number of provisions of the 2013 ADR Agreement address the subject of resolution sessions and the preparation for and authority of resolution specialists to engage in meaningful negotiations and resolution of issues presented by a due process complaint. It also requires DCPS in good faith to waive the 30 day resolution period where appropriate in cases where it is apparent that resolution will not be possible during the 30 day resolution period. It also requires

⁵⁸ See note 1; *Agreement of the Parties re Jones Compliance*, May 19, 2013.

⁵⁹ *Jones August 2011 and May 2013 Alternative Dispute Resolution (ADR) Agreements, Progress Report to the Court*, April 1-June 30, 2013 ("ADR Report").

the implementation of a Facilitated Resolution Session pilot program using a neutral facilitator to assist in improving resolution session outcomes.

Special education attorneys continue to report to the Monitor their lack of success in getting DCPS to agree to waive resolution sessions where it is clear that a settlement of the complaint is unlikely and there are no meaningful negotiations. According to data submitted by DCPS, there were only 20 instances during the school year –less than 3% of the complaints-- where the District agreed to waive a resolution session. However, DCPS reports that settlements are sometimes reached after the resolution session, as a result of the exchange of information that takes place.

The ADR Report describes the implementation of the pilot program of Facilitated Resolution Sessions with the assistance of a neutral facilitator. This pilot program was conducted by the OSSE from March 10 through May 15, 2013, using mediators from the Student Hearing Office as facilitators. DCPS selected 31 cases for the pilot program, and the parents in seven out of these 31 cases accepted the offer to engage in facilitated resolution sessions. Two of these cases reached settlement during the facilitated session, and four were settled after the facilitated resolution session. The OSSE survey of the participants in the pilot program reflected a mixed response, with some participants finding the process beneficial and others reporting no benefit from the use of the facilitator.

The Monitor conducted follow-up interviews with case managers, resolution specialists and members of the parents' bar. Several interviewees expressed the opinion that the mediators who were assigned the task of facilitation of resolution sessions had no background in the IDEA beyond a single day of training by the Chief Hearing Officer. Parents' attorneys believed them to be ill-equipped to understand the nuances of the issues presented by the due process complaints and were therefore reluctant to seek their facilitation. In their view, the cases that settled would have settled in any event. The SHO's own follow-up analysis also concluded that there was inadequate communication about the program and about the role of the facilitator, and that a much more robust effort to communicate with stakeholders was necessary and planned.

The interviews also revealed that in some cases, especially early in the SY, resolution specialists were not successful in getting adequate information from schools about the complaint, and therefore used the resolution session to get a better understanding of the nature of the complaint rather than to engage in substantive negotiation of a settlement to the complaint.

Resolution specialists reported that they found these discussions with parents/attorneys were often helpful to the eventual resolution of the complaint prior to a hearing unless the issues involved the adequacy of the attorneys fees offered as part of the settlement. For these, they rely entirely on the staff of the DCPS Office of General Counsel to determine the amount to be offered.

The ADR Report states that case managers used the HOD/SA Model questions and the communication checklists that are required by the parties ADR Agreement were used appropriately in 99% of the cases analyzed. There were similarly high compliance rates of documentation that the Parent Guide was distributed, and that offers of interim services, child care assistance and transportation were made. Case managers generally are scheduling required meetings within the time frames set forth in HOD/SAs.

The Monitor concurs that the quality of documentation regarding the use of these tools was generally found in the records reviewed in the Monitor's sample. Unfortunately, they seem to be having a paradoxical effect in some cases of promoting technical compliance with the documentation requirements rather than encouraging case managers to consider alternative strategies when the standard device of sending e-mails notices is not producing a substantive response. In cases where case managers' e-mail inquiries to parents/attorneys repeatedly went unanswered, rarely was there evidence of alternative methods being used to reach the parent/attorney, or engaging the school staff in finding more effective means of making contact. It is likely that the workload of the case managers plays a part in their rote implementation of the documentation guidelines to the exclusion of other strategies.

DCPS and the OSSE have also made appropriate use of "provision waivers" to alter actions required by HOD/SAs based on changed circumstances. There have been no instances of a recurrence of past practices of closing cases as timely implemented when the underlying services were not delivered, or entering into new settlement agreements to extend expired timelines, or improperly reporting administrative closures as timely implemented. The Monitor did find a few cases in which old Settlement Agreement templates were being used, which provided for closure of a case if the parent did not obtain an IEE within 45 calendar days;

however, there is no evidence that these provisions were being enforced if the parent failed to obtain the IEE within the time limit.⁶⁰

The cases in which the Monitor concluded cases were not timely implemented have been discussed earlier in this report in section V.B. 1. Defendants' compliance with provisions regarding compensating attorneys for their implementation work is discussed in section III. F. of this report dealing with attorneys fees.

B. Accuracy Audit

The ADR Report also describes actions taken in wake of the completion of the 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. Recognizing that accurate data is a foundation element in any effective data management system, the 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).

During the 2011-12 SY, the OSSE began implementation of an accuracy audit, and a final report of the audit was submitted in March 2013.⁶¹ In addition to examining the accuracy of data enumerated in the Consent Decree, the scope of the audit was expanded to include the validation of data used to assess compliance with other state and federal requirements. The overall purpose was to implement an accuracy audit protocol that could meet not only the requirements of the Consent Decree, but serve an ongoing purpose of assisting the District in

⁶⁰ See, e.g., HOD/SA# 25896.

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 the receipt of the IEE are also waived.

See also, HOD/SA #25838.

⁶¹ Blackman Jones Accuracy Audit, March 2013.

carrying out its legal responsibilities in a post Consent Decree environment. This baseline accuracy audit covers the 2011-12 SY, and is based upon a random sample of 332 students receiving special education services selected from the 2011 Child Count to represent the 56 LEAs, with a minimum of 2% sample from each active LEA. The accuracy audit was designed to be a cross systems audit examining the accuracy and consistency of data in multiple record-keeping systems including the Blackman Jones database, SEDS, iSight (the system of record for due process complaint data), the Student Tracking and Reporting System ("STARS"-the system of record for DCPS student data), and Proactive (the system of record for student data for the Public Charter School Board students).

Among the notable findings of this initial accuracy audit were the following:

- **Related Services.** Only 28.3% of the 332 student records were considered "fully accurate" with regard to receiving each related service prescribed on the IEP in a timely and complete manner.
 - DCPS schools had stronger relative performance overall at 43% aggregate accuracy while independent charter schools had 19% aggregate accuracy.
 - The primary reasons for inaccuracies were poorly trained related service providers, related service provider workload issues, student transfers between schools, data entry errors, and the use of alternative methods to document related service delivery (during the school year, some nonpublic schools and the OSSE state school did not use SEDS to document related service delivery).
 - Services were delivered with the same frequency as prescribed on the IEP in 61.5% of the cases.
 - Services were delivered as prescribed between the IEP start and end date in 76.4% of the cases.
 - The full number of minutes or hours of prescribed services on the IEP were delivered in 48.9% of the cases.
- **Parental consent.** Only 48% of the sample student records had documentation of parental consent to provide initial special education services.
- **Hearing dates.** Approximately 35% of the 136 hearing dates in the Blackman Jones database for the students in the sample matched the hearing dates on the Hearing Officer Determination.

- **Due Process Documentation.** Approximately 94% of the due process complaint data was accurately documented in the BJDB and 89% was entered in a timely manner.
- **IEP Compliance.** The OSSE's IEP Process Policy requires each IEP to be signed and captured in SEDS upon completion. Approximately 75% of the IEPs in the sample met this requirement while 24% were neither signed nor captured in SEDS.
- **Absenteeism.** Approximately 96% of the students tested had at least one documented absence from a related service session during the IEP period. Although the OSSE's Related Services policy requires that LEAs develop a written related service policy to address student absences, the audit reports that most did not have a written policy in place as of the date of the audit.⁶²
- **Cross Systems Accuracy.** Cross systems testing of the accuracy of specific data elements specified in the Consent Decree (e.g., student name, date of birth, attending school, student ID, etc.) found that most student records were consistent for certain tested elements, but were not accurate across all data elements, resulting in an aggregate accuracy of 34%.⁶³
- **Due Process Review.** Similarly, cross systems testing of the accuracy of due process complaints concluded that 223 of the 374 student records were accurate, for an aggregate accuracy score of 60%, although individual elements tested had accuracy scores as high as 99%.⁶⁴

In a response to the audit report, the Assistant Superintendent of the Division of Specialized Education stated an intent to "combine audit findings with data related to compliance on key federal indicators to inform a tiered system of technical assistance this spring."⁶⁵ This technical assistance initiative was implemented from March-June with three levels of assistance. LEAs in Tier 1 (universal support) were required to attend special education quality improvement training focused on improving the quality and accuracy of data, and using data to enhance student outcomes. The OSSE identified 18 LEAs for more intensive and targeted technical assistance to develop an improvement plan for implementation in the 2013-14 SY. The OSSE response also identifies several specific corrective actions to address the audit findings, prevent the recurrence of errors and improve the overall accuracy of data.

⁶² *Id.* pp. 5-6.

⁶³ *Id.* pp. 22-23.

⁶⁴ *Id.* pp. 24-26.

⁶⁵ *OSSE Response to the Blackman Jones Accuracy Audit Report*, March 19, 2013.

VII. CONCLUSION

It is clear from this year-end review that although the District has not yet achieved compliance with the specific measures in the Blackman Jones Consent Decree, it stands at the threshold of doing so. This is the case because the diminishing numbers of due process complaints and HOD/SAs make the workload more manageable, because improved internal management processes for maintaining accountability during the implementation process have been developed, and because changes in the content of Settlement Agreements have eliminated timelines against which DCPS' actions can be measured and have thus eased the burden of achieving compliance with the specific measures, as described in this report.

As the Monitor has noted on many occasions, the current state of special education in the District of Columbia is vastly different than it was when the Consent Decree was entered. The focus on education reform in the District has led to significant structural reforms in local government, including the establishment of a strengthened Office of State Superintendent of Education to carry out the state supervisory role in education. With each year that has passed, the execution of this oversight role has improved and broadened. The quality of monitoring of special education services has improved and become more regular, and more effective strategies for the identification and correction of deficiencies have been developed. The District's management and oversight of the timely disposition of due process complaints and the implementation of HOD/SAs has improved steadily. All of these are notable accomplishments of the leadership and staff at DCPS and the OSSE that must be acknowledged and applauded.

Yet, as this report also demonstrates, there remain stubborn problems in the delivery of special education and related services that continue to draw the attention of OSEP and that demand prompt remedial action. The oversight of the Court as a result of the Blackman Jones Consent Decree, and the enforcement mechanisms available to the Plaintiffs have also been a potent force in spurring on the process of reform and improvement that have been described in this report. But the demand for accountability for timely implementation of HOD/SAs that is embodied in the Consent Decree has also led to continual changes in policies and practices which have the effect of eliminating accountability measures rather than ensuring prompt actions to deliver services to students. These include the shifting of responsibility from DCPS to parents and their attorneys for timely performing significant amounts of implementation work. There has also been a growing trend of eliminating any deadlines in Settlement Agreements for actions

DCPS is required to take. Such practices undermine the Consent Decree, and elevate the elimination of judicial oversight over the goal of the Consent Decree “to achieve, as quickly as possible, Defendants’ compliance with federal law requirements for . . . timely implementation of Hearing Officer Decisions and Settlement Agreements” (Consent Decree, p. 8)

“When the objects of the Decree have been attained” (*Frew v. Hawkins*, 540 U.S. 431, 442 [2004]) and the court relinquishes oversight jurisdiction, all that will remain as a source of pressure upon the special education system in the District of Columbia will be the oversight by OSEP and the ability of the private bar to bring due process complaints on behalf of individual students. The former has not proved to be an effective remedial tool as demonstrated by the years of persistent “high risk” status maintained by the District of Columbia schools. And the latter has been a diminishing presence as described in this report.

With compliance with the specific Consent Decree measures in sight, the parties must not lose sight of the underlying goals of this action, and the attention of the parties and the Court must turn to the issue of sustainability of the state of compliance – which still allows that one in 10 students will not have their HOD/SAs timely implemented. Compliance must be more than breasting the tape at the finish line momentarily; it has to provide a reasonable assurance that the conditions that led to the complaint in this case have been remedied in a manner that can be expected to endure.