UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPORT OF THE EVALUATION TEAM
FOR THE 2009-10 SCHOOL YEAR

Submitted by:

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Court Evaluation Team

Filed: December 10, 2010

By: Amy Totenberg, Monitor

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I. INTRODUCTION

The Blackman/Jones Evaluation Team 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 2009-10 SY, although in various places we also report on developments and activities subsequent to the end of the school year to provide a proper context for the observations being made by the Evaluation Team.

At the outset, the Evaluation Team notes that both the Office of the State Superintendent ("OSSE") and the District's major Local Educational Agency ("LEA"), the District of Columbia Public Schools ("DCPS"), are in a very different state than in 2006-2007. Initially following the entry of the Consent Decree in August 2006, there was no coherent management system for identifying or managing the obligations created by Hearing Officer Decisions ("HODs") or Settlement Agreements ("SAs", collectively "HOD/SAs"). There was no system for accurately capturing and tracking all cases. The school system lacked a reliable system for tracking student school enrollment information in conjunction with HOD/SAs or special education data. There was a large backlog of unresolved cases whose precise number could not be determined. Additionally, administrative responsibility for oversight and handling of cases was allocated to an ever-changing configuration of staff. Not surprisingly, the rate of compliance with the timeliness standards contained in the Consent Decree was meager. However, through the concerted efforts of leadership in DCPS, the OSSE and the many talented staff they recruited and assigned to key responsibilities, substantial progress has been made in remedying the overall structural challenges of identifying, tracking, and managing cases described in earlier reports of the Evaluation Team. Due process complaints being filed are served on the LEA to enable prompt efforts to investigate and attempt to resolve the complaint or prepare for a due process hearing. Data on HOD/SAs issued are now captured on a timely basis in the Blackman/Jones database for the purpose of tracking implementation and producing management reports for accountability. The accuracy and reliability of the information in these data systems has improved dramatically and is generally dependable relative to identifying the overall nature and progress of the case. The assignment of clear responsibility to central office compliance case managers for managing the implementation of HOD/SAs has created a more accountable system

for implementing the obligations created, although it has also had the corollary consequence of relieving school staff from engagement with the issues at the heart of these cases.

This report describes and acknowledges the vastly improved level of performance produced by these efforts. At the same time, it identifies lingering, core problems of HOD/SA implementation, special education delivery, and special education information management that have eluded durable resolution despite the considerable efforts made. These core problems impact the Defendants' compliance with the Consent Decree as well as the provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. As we noted in our previous report:

> The requirements of the Consent Decree are deeply rooted in fundamental mandates of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*., including: requirements for the timely development and actual delivery of annual, tailored Individualized Education Programs ("IEPs") with appropriate consideration of evaluations and each student's level of academic performance and specific strengths and needs;[1] provision of timely evaluations and reevaluations;[2] establishment and operation of due process complaint and hearing procedures that adhere to specific federal requirements;[3] and timely implementation of binding due process hearing decisions and agreements. A host of exacting federal law timeline, procedural, and substantive requirements surround these obligations. Due process complaints in the District of Columbia typically raise basic legal compliance issues under IDEA with respect to evaluations and the development of appropriate IEPs, claims of the District's failure to implement earlier HOD/SAs, and claims of the denial of a Free and Appropriate Public Education ("FAPE") associated with the above legal breaches or schools' failure to implement required IEP services. The District's capacity to achieve and durably sustain compliance with the Consent Decree's central requirements and their parallel requirements under IDEA is tied to the District's capacity to implement management accountability changes, functional data tracking systems, and substantive changes in schools' delivery of special education services.[4]

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

[2] 20 U.S.C. § 1414 (a)-(c).

[3] 20 U.S.C. § 1415.

[4] In this same vein, DCPS' 2008/09 self assessment report submitted to OSSE recognizes DCPS' need for "compliance with IDEA through consistent and excellent implementation of service delivery" and that "compliance with IDEA and other obligations to students with disabilities will require full implementation of the Special Education Data System" ("SEDS"). (DCPS Self Assessment Findings and Action Plan, pp. 1-2).

(Report of the Evaluation Team for the 2008/09 School Year, Docket #2184, filed September 25, 2009, pp. 6-7 ["Evaluation Team 08/09 Report"]).

Based on our detailed review of the evidence, the Evaluation Team ultimately concludes that despite the substantive progress made, Defendants have not met the baseline HOD/SA implementation performance requirement of the Consent Decree (¶ 42(d)).

This report finds that the 2009-10 SY has been a year when the focused efforts of the District of Columbia Public Schools and the Office of State Superintendent of Education have resulted in marked gains towards achieving compliance with the provisions of the Blackman/Jones Consent Decree. As the District now embarks on a major change in leadership, we must note that, while we value these marked gains, we also recognize the fragility of the gains in a process that has been driven by central office initiatives and that are not yet embedded at the school level sufficiently to give confidence in its durability. As we describe in the sections below, the progress to date permits the Evaluation Team to issue a report that is substantially narrower in scope than our previous reports to the Court and the parties.

Plaintiffs invoked the provisions of the Alternate Dispute Resolution ("ADR") process in the Consent Decree (paragraph 113) on September 2, 2009, citing several areas of Defendants' alleged noncompliance. Subsequently, the parties have been engaged in the ADR process with the assistance initially of Linda Singer, as a mediator, and thereafter with the Hon. Richard A. Levie as the arbitrator. As a result of that process, the parties have reported to the Monitor and the Evaluation Team and to the Court that they have likely reached an agreement to conclude the *Blackman* portion of this case dealing with the Student Hearing Office's timely issuance of HOD/SAs. The Evaluation Team noted in our previous report that we observed great strides in the previous school year by the OSSE and SHO in reforming a once dysfunctional SHO into a vastly improved, modern and professional operation, capable of regularly producing timely HOD/SAs (Evaluation Team 08/09 Report, pp. 108-114).

As a result of this progress and the parties' apparent agreement in the ADR process that the Defendants have achieved compliance with the *Blackman* timeliness measures in paragraph 29 of the Consent Decree,[5] this report of the Evaluation Team does not address the *Blackman*

[5] The Monitor has brought to the District of Columbia's attention that while she concurs with the grounds for the

issues. Instead, we limit this report to the *Jones* part of the Consent Decree requiring timely implementation of HOD/SAs.

A. Demographics

There were a total of 72,711 students enrolled in all LEAs for the 2009-10 SY, including 8,571 students with IEPs (11.78%).[6] Of these, 44,718 (61.5%) attended DCPS schools, including 5,748 students with IEPs or 67.06% of all students with disabilities enrolled by LEAs. Charter schools enrolled 27,660 (38.04%) of the total students, of which 2,823 students had IEPs or 32.93% of all students with disabilities enrolled by LEAs. Non-public schools enrolled 2,336 students with IEPs, which comprises 3.21% of the total students enrolled but 27.25% of the students with IEPs.

In a pattern we reported on in last year's report, charter schools enroll a smaller proportion of students with IEPs at 10.2% of their enrollments compared to the 12.85% at the DCPS schools. Moreover, while 1,551 (28.31%) of DCPS students with IEPs are categorized at Level 4 requiring the most intensive level of services, the 560 students needing this level of service at charter schools comprise 19.83% of their students with IEPs. The vast majority of these students at charter schools attend two schools.

Agreement, she views it as imperative that the Student Hearing Office still create a transparent, easily monitored method for collecting and reporting the date when the resolution meeting process has been deemed by the parties to have ended in each case. Currently, the SHO's monthly reports and the standardized electronic reporting for individual cases do not necessarily provide complete or accurate information as to the resolution meeting date. This resolution meeting date may trigger a shorter overall hearing decision time line under IDEA than the standard 30-day default resolution period plus 45-day hearing/decision timeline. *See* 34 C.F.R. § 300.510(c). Currently, review of whether the timeline has been properly calculated or managed requires the SHO staff, OSSE, and even the hearing officer to dig into documentation or email communications that is inconsistently submitted or recorded in electronic and written files. Adoption of a systematic method of collecting and reporting this data should contribute to sustaining the institutional durability of the SHO's hearing legal timeline management capacity.

[6] Enrollment for District of Columbia Public Schools and Public Charter Schools, (TCBA, October 5, 2009), p. 4.

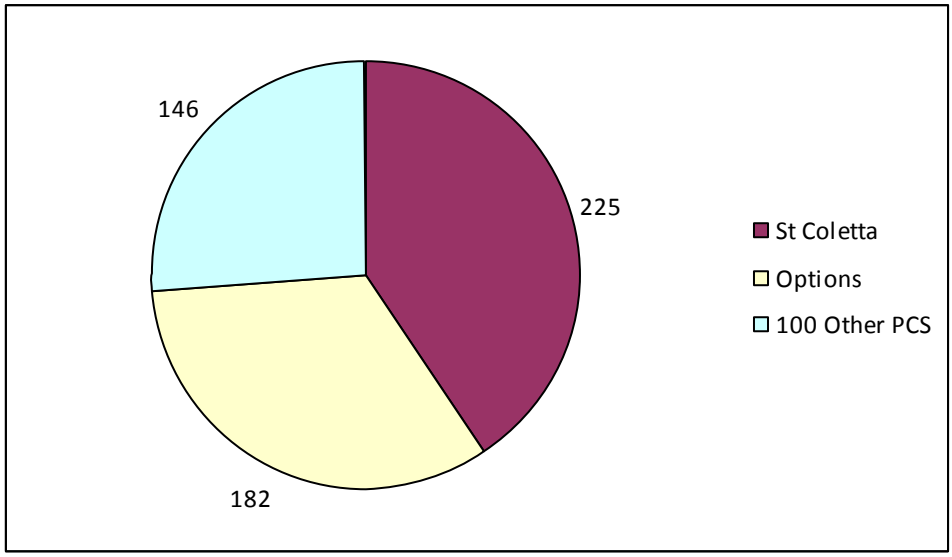

Fig. 1 Distribution of Level 4 Students at Charter Schools

Continuing a trend that began in the second half of the previous school year that we reported upon in our previous report (Evaluation Team 08/09 Report, pp. 13-14), in the 2009-10 SY there was a 38% decline in the number of due process complaints compared to the 2008-2009 SY. However, as the school year ended, the monthly rate of filing of due process complaints was rising, a trend which continued into the current school year.

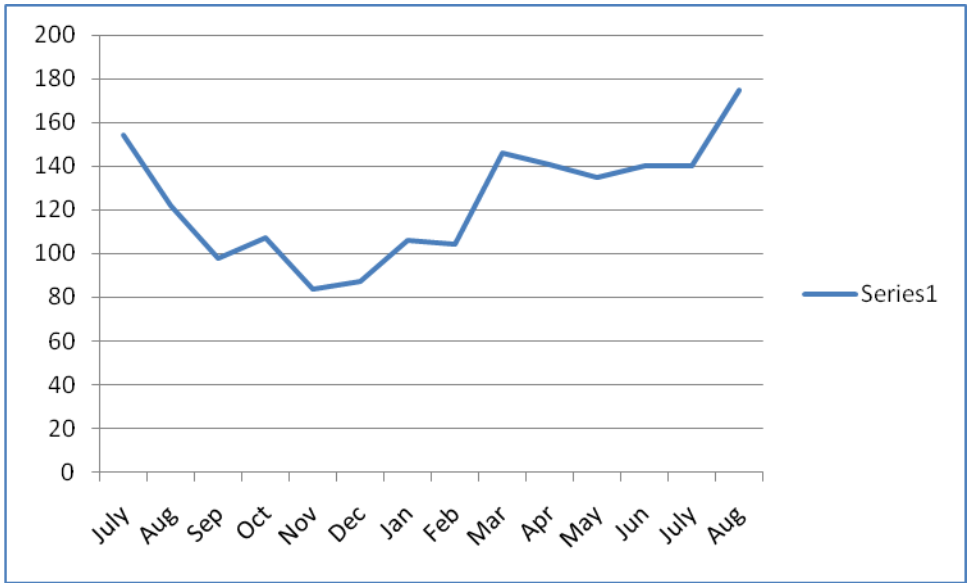

Fig. 2 Monthly Filing of due process complaints July 09-Aug.10

In turn, there was a 22% decline in the number of HOD/SAs from 1,199 in the 2008-09 SY to 938 in the 2009-10 SY.[7] In part due to a smaller and more manageable workload, as well as a more focused and tightly managed emphasis on achieving compliance with the Consent Decree benchmarks, at the end of the 2009-10 SY, Defendants reported that they had met the Consent Decree standard of 90% timeliness in the implementation of HOD/SAs (Consent Decree, ¶ 42 (d)). Given the Defendants' assertion of full compliance with the *Jones* standard of compliance, and the Plaintiffs' disagreement with the Defendants' characterization of some cases as timely implemented based on a review of the sample of cases in spring 2010, the primary focus of this report in Section II is on the Defendants' case closure process and on the decisions made to count cases as timely implemented. This section addresses the central issues at the heart of this case and assesses the critical problems and validity issues in the Defendants' report of meeting the 90% timely implementation standard. We also review in this section the ramifications of the Defendants' effort to shift responsibility to parents for implementation of substantial portions of the requirements of HOD/SAs adopted.

In Section III, the Evaluation Team examines and reports upon the delivery of related services and evaluations, an issue which frequently prompts the filing of due process complaints and which is often addressed by the provisions of HOD/SAs which resolve such complaints. It also reports on the Defendants' continued inability to provide the reports on related services lapses required by paragraph 65 of the Consent Decree.

Section IV of the Report addresses the Defendants' progress in implementing a functional, reliable, and accurate data management system for implementing special education services and implementing HOD/SAs, as required by the Consent Decree. (Consent Decree, ¶ 60-65).

In Section V, we report on significant developments in Defendants' movement of students with disabilities out of nonpublic schools during the 2008-09 and 2009-10 school years which affect implementation of these students' IEPs, IEP specified related services, and HOD/SAs requiring the delivery of specific services to them. These issues are covered because they impact a substantial number of class members as well as foundation requirements of IDEA.

[7] As we report elsewhere in the report, different sources of data produce different numbers of HOD/SAs for the 2009-10 SY, ranging from 938 to 952. See p.12.

B. ***Evidentiary Foundation for the Findings in this Report.***

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

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

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

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

4. Regular ongoing meetings, phone and in-person interviews, and email exchanges with a broad range of DCPS and the OSSE staff[8] throughout the school year relating to a wide range of issues touching their management of operations and initiatives in the realm of special education and the Consent Decree.

5. Visits to 11 schools[9] (including DCPS, charter, and nonpublic schools) where interviews were conducted with multiple staff members at each school, and reviews were made of due process complaints, HOD/SAs, student files, school staff's special education database access and usage, and school management reports.

6. Communications with nonpublic schools' representatives.

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

[9] School site visits were made to Accotink Academy, Anacostia SHS, Ballou SHS, Hamilton LC, Hart MS, Kipp Academy, Kramer MS, Patterson ES, Sunrise Academy, Village Academy and Woodson SHS. These school visits typically lasted at least a half day, during which time extensive interviews were conducted and school and student records were reviewed.

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

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.

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

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

A. Overview

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

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

Exhibit 1). These Protocols established a process for dealing with cases that remain outstanding more than 120 days and for administratively closing them.[10]

In a report submitted to the parties on July 14, 2010, as required by ¶ 46 of the Consent Decree, Defendants reported that they had met the 90% timeliness standard contained in ¶ 42. The Consent Decree requires the Monitor and Evaluation Team to monitor Defendants' compliance with its provisions and provide an annual report to the Court (Consent Decree, ¶¶ 83, 101). The Consent Decree provides that the Evaluation Team may perform its monitoring function without relying on statistically significant samples (*Id.* ¶ 101(b)). This provision is particularly pertinent to the work performed by the Evaluation Team in the current school year. As the Defendants are claiming compliance based on achieving the compliance standard exactly, with no margin for error,[11] any percentage of error in the cases claimed to be timely implemented by the Defendants, however selected by the Evaluation Team, would result in their falling below the standard required by the Consent Decree. The Evaluation Team is not seeking to statistically extrapolate the results of its review of the sample of cases described below to the universe of all

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

Independent Educational Evaluations.

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

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

1. The case has been administratively closed;

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

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

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

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

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

HOD/SAs reported as timely implemented by the Defendants. On the other hand, the issues raised by the Evaluation Team's case reviews clearly bear on the reliability of the Defendants' end-of-year case closure report as well the questions of whether case closures and closure data have been handled and reported in conformity with the provisions of the Consent Decree.

The Evaluation Team conducted its review of cases identified by the Defendants as timely implemented in two stages. First, in the context of the ongoing ADR process, the Plaintiffs reviewed a sample of the Jones cases identified by the Defendants as having been timely implemented, and disputed the Defendants' conclusions in a substantial number of cases. The Evaluation Team reviewed 13 of those cases about which the parties were in dispute. In addition, in May 2010, the Evaluation Team requested from DCPS a listing of all HOD/SAs closed since January 1, 2009 as timely implemented. From this list of over 1000 cases, we reviewed 12 randomly selected cases. At this stage, the review primarily consisted of examining the documentation contained in the Blackman/Jones database used to manage compliance activities to determine if there was evidence to support the Defendants' decision to classify these cases as timely implemented. The information contained in this database is the same information submitted by the DCPS compliance case manager to demonstrate timely implementation of a case, and is the same information relied upon by the DCPS reviewers who make the final determination that a case has been timely implemented.

As the Evaluation Team reported to the Court at a status conference on May 12, 2010, we found reason to question the conclusion either that a case was implemented at all or that it was implemented timely in half of the cases thus selected.[12]

Following the status conference, the Evaluation Team expanded its review of cases and requested from DCPS a listing of all HOD/SAs closed as timely implemented during the period July 1, 2009 to June 30, 2010 (Reporting Period 4) and from July 1, 2010 to October 15, 2010 (Reporting period 5). From each of these groups, the Evaluation Team randomly selected additional cases for review. For each case identified, the Evaluation Team reviewed all documentary evidence contained in the Blackman/Jones database relating to the case as well as

[12] The Evaluation Team additionally met with DCPS staff to review some of the cases flagged and brought to their attention our view that the District's new 45-day Settlement/Closure process deviated from the Case Closure Protocols agreed upon by the parties in 2006 pursuant to Paragraph 44 of the Consent Decree.

preceding and subsequent related due process complaints and HOD/SAs involving the same student. As part of this process, we also reviewed the students' educational records in EasyIEP, the District of Columbia's system of record for school special education documents, and the SHO Docketing System, in which pleadings were verified if necessary. In addition, the Evaluation Team conducted interviews with compliance case managers who work in the DCPS central office and are tasked with managing the implementation of HOD/SAs. These case managers are the focal point of accountability for timely closure of HOD/SAs and make the initial decision to submit cases for closure. The Evaluation Team also interviewed the DCPS reviewers who make the final determination whether to classify a case as timely implemented.[13] The Evaluation Team additionally met with Plaintiffs' class counsel, with members of the special education bar at a meeting of the special education roundtable, and conducted interviews with several attorneys representing students in some of the individual cases reviewed.[14]

In total, the Evaluation Team reviewed 100 cases which the Defendants have reported and counted as timely implemented. Several of the students involved in these cases had more than one HOD/Settlement Agreement, which the Evaluation Team also reviewed. As a result of these activities, the Evaluation Team identified cases in which we concluded that the documentary evidence did not support the Defendants' determination to classify cases as having been implemented timely. These cases fell into several different categories described below, although many of the cases overlap into multiple categories. Similarly, some of the case examples extend in implementation (or non-implementation) into the 2010/11 SY, yet exemplify the nature of the issues arising in the 2009/10 SY and are relevant to the question of what cases in fact should potentially be treated as open and overdue more than 90 days. (Consent Decree, ¶ 42d.)

[13] Previously, this review function was performed independently by Rebecca Klemm, a former member of the Evaluation Team.

[14] In prior years, Dr. Carran has worked with the Evaluation Team in performing an audit of case closures. As the Consent Decree provides that the Defendants shall meet the final Consent Decree performance goals by 2009/10 SY, the Evaluation Team viewed it as their responsibility to conduct a more intensive, substantive review of case closures than was conducted in earlier years. The apparent changes in DCPS' method of handling case closures in the 2009/10 SY particularly increased the need to understand the precise process and dynamics of the case closure techniques used and closure data reporting.

The total number of HOD/SAs issued in the 2009-10 SY varies somewhat according to what database or data run is used. According to the Defendants' compliance report at the conclusion of the school year (Exhibit 2), 936 HOD/SAs were issued. Subsequently, Defendants identified 2 additional HOD/SAs that were discovered after the reporting year was finished, resulting in a total of 938. The Evaluation Team conducted an independent Blackman/Jones database run to identify the total number of HOD/SAs, resulting in a count of 952 cases. With respect to the 952 total, DCPS stated that this included a few cases not connected with a due process complaint that had been included in the database for tracking. We also identified in our review of a sample of cases one additional HOD case[15] that was erroneously omitted from Blackman/Jones' tracking.[16] The Student Hearing Office reports a total of 947 HOD/SAs for the school year. DCPS and OSSE staff during the course of the 2009-10 SY affirmatively represented in meetings with the Evaluation Team that Blackman/Jones and SHO hearing case data was regularly cross-checked, verified, and corrected by a joint OSSE/DCPS technical team. However, this cross-checking apparently was confined to staff communications regarding individual cases and did not extend to a review of the total HOD/SA cases issued or the total Complaints filed. Based on these facts, the Evaluation Team concludes that the precise total number of HOD/SAs cannot be verified but that this total falls between 939 and 948 cases (the one case identified in our sample review was added to each reported total). The actual number here, of course, is important, as it determines the denominator for the calculation of timeliness under Consent Decree ¶ 46, with the higher denominator number resulting in a lower compliance percentage.

The HOD/SA and Complaint statistical data does not permit reasonable allocation of responsibility for cases to one type of school vs. another (e.g., DCPS school, charter school, or nonpublic school), although this can be reviewed on an individual case basis. Students continue

[15] Complaint #4453 resulted in a substantive HOD obligation imposed on DCPS.

[16] Independent Charter Schools did not regularly submit to OSSE (and in turn to DCPS) due process settlements for Blackman/Jones tracking during the better part of the 2009/10 SY. The Evaluation Team raised this issue with Defendants because we could see from review of hearing officer "closing" orders that some cases involving charter schools had been closed based on explicitly referenced settlements that did not appear in the Blackman/Jones data base. OSSE represented that by the end of the school year it had collected and transmitted all of these SAs to DCPS for recording in the Blackman/Jones data base. The Evaluation Team is unable at this juncture to do the detailed follow-up work with all counsel in these cases to verify that each and every charter settlement agreement in fact was submitted, but for purposes of this review, we will treat OSSE's representation as a good-faith statement that all or close to all of the independent charter settlements were collected and transmitted.

to float back and forth between schools, and legal obligations arising as a result of one school's default may end up being imposed on and associated with a different school.[17]

B. Sample Case Analyses

1. *Cases closed as timely implemented, after DCPS authorized independent evaluations, without supporting evidence of actual timely implementation.*

In the past, evaluations performed by DCPS staff have often resulted in disagreements over their conclusions and recommendations, which have led to new due process complaints and HOD/SAs requiring independent evaluations. Plaintiffs' class counsel, among others, have urged DCPS to eliminate this source of disputes and complaints by offering independent evaluations along with interim services (pending completion of the evaluations) in the first instance.[18] One of the new DCPS practices instituted during the 2009-2010 school year is a frequent granting of authorization to parents in settlement agreements to obtain independent evaluations as well as independent compensatory education, rather than DCPS first attempting to directly provide these services. Indeed, the Evaluation Team's review of cases throughout the year indicated that DCPS rarely offered in due process cases to assume responsibility for completing evaluations or compensatory services. Additionally, during the past school year, in November 2009, DCPS also unilaterally, without consultation or notice, made several significant changes in its practices for closing cases. Some of these changes are inconsistent with the Protocols negotiated with the Plaintiffs pursuant to ¶ 44 of the Consent Decree, which were described earlier. These changes have substantially shortened the period of time for the parent/attorney to obtain the independent evaluation from 120 days typically to 45 calendar days. While parents and their counsel often welcome the opportunity to have access to independent assessments and services, for a host of reasons, they often find that they are unable to ensure completed independent assessments in this truncated 45-day period. In this connection, the Evaluation Team notes that DCPS often has not been able itself to complete assessments for many months on end and now is apparently not willing to undertake these obligations.[19] Also typically, no offer is made by DCPS to undertake

[17] The Blackman/Jones database reflects that 518 of the 952 of the HOD/SAs identified (or 54%) could only be associated with a school type denominated as "other." With charter school enrollment not interfaced with Blackman/Jones data in the 2009/10 data, in reality all of the Blackman/Jones school breakout data is problematic.

[18] Plaintiffs' proposal was based on the premise that if assessments were handled by independent evaluators outside the school district, school related service providers would have more time to devote to actual provision of services.

[19] The District of Columbia, indeed, authorizes for its own LEAs one of the longest periods of time in the nation for

the precursor task or to offer meaningful assistance to the parent in completing the task (e.g., the assessment) as is required in the original Protocols.[20] When there are obligations placed upon DCPS, there are frequently no deadlines for which DCPS can be held accountable. Rather, once the deadline set in the settlement agreement for the completion of the precursor task by the parent/attorney expires, the case closure process begins. The effect of this new process adopted by DCPS has been to substantially shift the workload and onus of responsibility for obtaining services from itself to the parent/attorney. Yet, as will be discussed later, counsel for parents in these circumstances often feel obligated to agree to the form settlements, in order to move the student's case and services forward, even if they are cognizant that the timelines may well fall outside their ability to meet for a variety of reasons.[21]

The cases closed under this new process are finally closed substantively, not merely administratively, rather than being subject to being re-opened as provided in the Protocols (Protocols, II.B.4). Cases closed through this process are reported as timely implemented – as are the actions such as assessments or meetings required by the respective HOD/SAs, even though these actions or events have not, in fact, transpired. As a result of these unilateral changes, the administrative closure protocol adopted pursuant to the Consent Decree has been rendered substantially irrelevant, and the number of administrative closures has declined sharply to zero from earlier years. Instead, closures of cases based on the asserted failure of the parent/attorney to complete a precursor task are now reported as substantive "timely implemented" and are not removed from the data calculation as "outstanding" as required by Consent Decree paragraphs 7, 46, and 52.

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the assessment and initial evaluation of students for special eligibility process (120 days). *See* D.C. Code § 38-2561.02. (The typical time frame authorized by other states pursuant to IDEA's provisions is 60 days. *See* 34 C.F.R. 300.301.)

[20] Section IIB of the Protocols (Exhibit 1) requires that DCPS notify the parent/counsel that "DCPS is willing to complete assessments within 60 calendar days if the parent now elects to have DCPS conduct the assessments." Additionally, DCPS adopted an IEE Policy on July 18. 2008 in response to a prior ADR process with Plaintiffs in which it committed to provide the parent assistance in arranging the IEE upon request and in any event, a listing of qualified IEE evaluators within the DC Metropolitan area. As will be discussed later herein, the Evaluation Team did not seen any indication of the provision of assistance upon request. Lists of qualified evaluators were not provided until July 2010 – after the next round of ADR efforts were well underway.

[21] The original 2006 Case Closure Protocols negotiated, in fact, were crafted in part to address the problems raised by outstanding MDT meetings or IEEs.

DCPS has reported to the Evaluation Team its identification of 33 cases that they view as falling into this group. The Evaluation Team found at least 11 cases in our sample which illustrate how the new process works and affects students who filed due process complaints. Some of these cases flagged by the Evaluation Team were not in the group of 33 cases identified by DCPS. The fact patterns are indicative of systemic practices that prevailed during part of the review period and may very well affect an unknown number of other similar Settlement Agreements which did not fall within our sample.

Examples of these cases include:

- A settlement agreement entered into on January 22, 2010 (#23551) on behalf of an elementary school student authorized the parent to obtain an independent comprehensive psychological evaluation to be completed within 45 calendar days. Within 30 days of receipt of the evaluation, DCPS was required to convene an MDT meeting to review the evaluation, review and revise the IEP and discuss and determine compensatory education. On March 12, 2010, the case manager wrote to the parent's attorney that the evaluation was to have been completed by March 8, 2010 and that the case would be closed on March 26, 2010 if the attorney did not contact the case manager. On March 26, 2010, the case was closed and recorded as "implemented-timely." The evaluation was not completed, the MDT meeting did not occur, the IEP was not reviewed or revised, and compensatory education was not discussed. None of the steps contained in the case closing Protocols to assist the parent/attorney were followed.

- A settlement agreement (#23407) was entered into on November 23, 2009 on behalf of an elementary school student[22] authorizing an independent comprehensive psychological evaluation, a speech and language independent evaluation, an occupational therapy independent evaluation, and Vineland and auditory processing independent evaluations. The Agreement called for the evaluations to be completed within 45 calendar days and for DCPS to convene a meeting to determine the student's eligibility for special education services within 30 business days of receipt of the evaluations. The agreement also required that the MDT review whether compensatory education was warranted in the event the student was deemed eligible. On January 4, 2010, DCPS case manager faxed notice to counsel that DCPS was attempting to close the settlement agreement, as the assessments were supposed to be completed by January 7, 2010. The letter noted that the "HOD/SA closure is for Blackman/Jones reporting purposes" and does not limit counsel's ability to bring future claims under IDEA for the student. No documentation of prior communications regarding the status of the evaluations appears in the Blackman/ Jones database. On January 19, 2010, the case manager mailed a letter to counsel that the

[22] As alleged in several complaints involving this student, the parent requested that the student be evaluated for special education eligibility while he was attending the DCPS local elementary school, but DCPS failed to complete the evaluation within 120 days. Subsequently, the student enrolled in an independent charter school and later moved back to a DCPS elementary school.

case was closed based on the failure to provide the independent evaluations. Two days later, on the afternoon of January 21, 2010, the case manager contacted the parent regarding the status of the independent evaluations, and the parent responded that she would contact the attorney to check on these.[23] The case manager's note to the file indicates that he advised the parent that she will receive a case closure letter, though she can later submit all completed evaluations and an eligibility meeting will be convened. There is no indication of any offer to provide assistance to the parent in completing the evaluations or to hold the case open until she can communicate with counsel. On January 22, 2010, the case closure letter was faxed to counsel. The SA closure was formally approved on January 26, 2010. On January 22, 2010 the case was formally closed "after due diligence on 1/22/10" according to the DCPS reviewer's January 26, 2010 notation in the Blackman/Jones database. All actions required by the SA – the evaluations, the IEP meeting, and the discussion of compensatory education – are recorded as having been timely implemented either on January 21, 2010 or January 26, 2010, the dates of the initial or approved closure of the case. However, none of these events had transpired.

This treatment of the settlement as "timely implemented' and "closed" ultimately resulted in more delay in addressing the elementary student's learning disability and severe lack of progress in school. On January 25, 2010, counsel for the student transmitted the social history component of the psychological evaluation for the student to Dr. Nyankori, as Deputy Chancellor for Special Education and the case manager. Counsel at that time also requested that DCPS conduct a psychiatric or developmental evaluation, as recommended in the psychological evaluation, so as to rule out attention deficit hyperactivity disorder. There is no indication of any response to this request. Thereafter, counsel submitted other evaluations on an ongoing basis, including the psychological evaluation (1/28/2010), the auditory processing evaluation (2/25/2010), speech and language evaluation (3/3/2010), the occupational therapy evaluation (3/17/2010) and the Vineland (3/25/2010). The case was never re-opened by the case manager based on the submission of these evaluations or the request for a follow-up evaluation. Subsequent due process complaints were filed starting on March 17, 2010 based on the lack of follow-up on the requested psychiatric evaluation, the alleged DCPS failure to implement the November 23, 2009 settlement agreement, and other claims associated with the student's eligibility for special education services, appropriate classification, and services. These resulted in an HOD (7/22/2010) (providing for reconvening the MDT/IEP meeting to review assessments, and requiring review and development of an IEP, and a determination if compensatory services were warranted) and a settlement agreement (November 9, 2010) (providing for 35 hours compensatory tutoring services and 10 hours of counseling by an independent provider).

- This settlement agreement (SA #23501) was reached on December 30, 2009, after a prior HOD (June 16, 2009) that DCPS determined had been untimely implemented. The settlement agreement authorized an independent bilingual comprehensive psychological evaluation within 45 calendar days and that DCPS would within 15 business days of receipt of the evaluation convene an IEP meeting to revise and revise the IEP, discuss

[23] This contact occurred after DCPS' case reviewer kicked back the initial case closure based on the absence of any attempted phone contact of the parent. However, the contact, in reality, was not used to help get the evaluations done, but only to justify the case closure.

location of services, and discuss compensatory services if warranted. On March 15, 2009, the case manager emailed counsel that DCPS was seeking to close the settlement agreement by March 29, 2010 based on the evaluations not having been furnished. Notes in the file indicate that two phone calls were made to the parent on April 13th (1:31 PM) and one on April 20th (at 5:19 PM). The case closure Protocols require at least one call be made during non-business hours so as to increase the probability of reaching a parent/guardian. The call at 5:19 PM presumably was made to satisfy this requirement – though it so barely falls beyond normal work hours as to be unlikely to have reached a working parent. According to the file notes, the one voice mail message left on April 13th did not offer any assistance but simply asked about the status of completion of the evaluation. There is no other documentation in the database of an offer of assistance to counsel for the parent in conducting the evaluation. On April 21, 2010, notice of the case's substantive closure was sent to counsel. The case reviewer concluded the case is a proper "substantive closure" because the IEEs were never received. The evaluation, meeting, and compensatory education services in turn are all identified in the database as having been implemented timely on April 22, 2010, though none of these events occurred.

2. Cases closed by a subsequent settlement agreement which asserts that the case is timely implemented while substantially re-ordering its provisions in a new SA.

Parents for students in special education sometimes file multiple due process complaints which lead to multiple HOD/SAs placing requirements upon the school system. The case closing protocols adopted pursuant to ¶ 44 of the Consent Decree specifically address this phenomenon by providing for the consolidation of multiple cases ordering the same specific relief for the same student. When cases are thus consolidated, the protocols provide that the earlier timeline will be maintained.[24]

However, in multiple cases DCPS has entered into a new settlement agreement which (1) closes a previous HOD/SA which has *not* been timely implemented, (2) substantially incorporates into the new settlement agreement the provisions of the closed HOD/SA which have not been implemented, (3) states that the parties agree that the closed HOD/SA was satisfied and timely closed "for Blackman/Jones reporting purposes," and (4) starts a new timeline. The closed

[24] Section IV of these Protocols provides that:

1. Multiple cases with the same specific line item relief ordered for the same student will be consolidated into one case by OSE.
2. Line items that are the same and those that are conditioned upon it will be consolidated *and the earlier timeline will be maintained.* (Emphasis added.)
3. For additional line items, the new case will remain open with the new timelines as specified in the HOD/SA.

HOD/settlement agreement is then recorded as having been timely implemented. These practices are plainly at odds with the requirements of the Protocols and with common sense. As with the 45-day settlement agreements, they also pose a "Hobson's Choice" to counsel for the parent/guardian: Agree to settlement terms which may at least move the student's situation forward practically or alternatively, refuse to sign off on the agreement and litigate longer because the provisions of the agreement provide unacceptable legal language (e.g., counting an open case now as closed under Blackman/Jones that has no immediate meaning to the parent or student).

The following cases illustrate how this process has worked.

- A Settlement agreement entered into on March 11, 2010 (#23687) on behalf of a middle school student authorized the parent to obtain an independent Lindamood Bell assessment to be completed within 45 calendar days. Within 15 business days of receipt of the independent evaluation, DCPS was required to convene an IEP meeting to review the evaluation and develop a program based on recommendations from the assessment. It also provided for compensatory education by funding specialized instruction for 75 minutes per week in English and 75 minutes per week in math for a total not to exceed 175 hours to begin April 1, 2010 and to be completed by October 1, 2011.

  Although the parent's attorney submitted a referral for the independent assessment within eight days of the settlement agreement, it was not completed and submitted to DCPS until June 29, 2010. A month went by before the case manager entered a progress note that he was in the process of scheduling an MDT meeting to discuss the recommendations and provide the compensatory education ordered in the settlement agreement. There is no explanation for the delay which went beyond the 15 business days specified in the settlement agreement.

  On August 27, 2010, a new settlement agreement was reached which closed the previous settlement agreement as timely implemented. Paragraph 4.a. states "the parent agrees that all of the provisions of the settlement agreement dated March 11, 2010 have been satisfied and the HOD and SA are timely closed for Blackman/Jones court reporting purposes." This settlement agreement further provided that within 20 business days DCPS will convene an MDT meeting to review the assessment received on June 29, 2010 and determine the form and amount of services to be provided by DCPS.

  In effect, notwithstanding that the IEP meeting required by the March 11, 2010 settlement agreement had not yet been held, and there is no evidence that the compensatory education that was included in the previous settlement agreement had been delivered or begun, the settlement agreement declares the previous one to have been satisfied and timely closed. On the strength of this new settlement agreement, the case manager and the DCPS reviewers determined this case to have been implemented timely. What DCPS has done in this case is to start the clock anew contrary to the requirements

of the case closing Protocols and declare a plainly untimely and partially unimplemented case to be timely implemented.

- A settlement agreement was entered on December 22, 2009 (case # 23481) after a due process complaint alleging non-implementation of a prior HOD (see section 3 below) that had required a meeting to review student progress and performance. The settlement agreement authorized the parent to obtain a comprehensive psychological evaluation to be completed within 45 calendar days and provided that within fifteen school days of receipt of the evaluation, DCPS would convene an IEP meeting to review the evaluations and revise the IEP if necessary. DCPS concluded that this case was timely implemented and closed by virtue of rolling this same meeting obligation into a new settlement agreement entered on September 9, 2010, pursuant to paragraph 4.a of the agreement (Case # 24298). The reviewer notes also justify the closing by stating that the student's counsel had agreed on July 9, 2010 to an extension of time for conducting the meeting. However, counsel did not agree to an indefinite extension but instead, was responding to a request from the case manager who indicated he would provide alternate meeting dates by a new letter of invitation to be issued by fax on July 14, 2010. No LOI was issued, though. The outstanding meeting issue instead was addressed through still another due process complaint (August 30, 2010) and "rolled into" the September 9, 2010 settlement agreement (Case No. 24298), which declared the December 22, 2009 settlement Agreement timely closed for Blackman/Jones reporting purposes.

- Another case, which spans the 2009-10 and 2010-11 school years, illustrates several problematic practices in managing the implementation of HOD/SAs, and with the review process that results in determinations to categorize a case as timely implemented. In this case, an October 26, 2009 HOD (#23332) required DCPS to issue a letter authorizing funding for:

    1. independent comprehensive psychological assessment;
    2. functional behavioral assessment;
    3. audiological processing disorder assessment;
    4. Vineland adaptive behavior assessment;
    5. within 15 business days of receipt of all the assessments, to convene an IEP meeting to develop a behavior intervention plan, review and revise the IEP discuss and determine placement, with notice of placement to be issued; and discuss and determine compensatory education.

  These assessments were completed on different dates in December, January and February, with the audiological assessment being completed last on February 5, 2010 and faxed to DCPS on March 4, 2010.

  The ***school*** case manager sent a letter of invitation on February 1, 2010 for an annual IEP meeting. This does not seem to be the one required by the HOD since all evaluations had not yet been received. Although the DCPS case manager's progress note states that this was the meeting to review assessments received, the letter of invitation does not state that and the box for reviewing evaluations is not checked.

The MDT meeting was held on March 15, 2010. The parent attended by phone but the attorney was not there. The DCPS case manager also noted that they do not have the audiological processing assessment (which had been completed on February 5, 2010 and faxed on March 4) and asked the parent if she has a copy and told her that they could not send invitations for another date in April until they received copies of the evaluation.

On March 26, 2010, a letter of invitation was faxed to the parent and attorney proposing MDT meeting dates on April 15, 19 and 22. On April 1, 2010, a paralegal confirmed the meeting date for April 19. *This meeting was plainly untimely under the terms of the HOD, with all of the delays attributable to DCPS.*

The IEP was developed on that date, with Anacostia determined the appropriate location. The DCPS audiologist could not locate the evaluation and it was not discussed. *No Behavior intervention plan was developed.*

This case was submitted for closure after the IEP meeting of April 19, 2010, but was kicked back from initial review due to lack of evidence regarding development of a behavior intervention plan. No mention is made about the failure to review the audiological assessment. The case was submitted for closure again and closed as implemented timely on June 22, 2010 based on a subsequent settlement agreement of that date including a paragraph stating the parent agreed that its provisions have been satisfied "and the HOD is timely closed for Blackman/Jones court reporting purposes." This settlement agreement recited that the parent had been given a behavior intervention plan at a meeting on June 10, 2010.

The settlement agreement dated June 22, 2010 (#24021) required implementation and funding of predetermined compensatory education. It further provides that within 10 business days of the execution of the settlement agreement, DCPS will convene an IEP meeting to review an independent audiological assessment and behavior intervention plan provided to the parent at the resolution meeting on June 10, 2010. The agreement explicitly does not close the allegation of failure to comprehensively evaluate all areas of suspected disability, which will be litigated at a due process hearing. The compensatory education is funding of 10 hours of tutoring by an independent provider. This case was closed as timely implemented on September 9, 2010 by yet another settlement agreement provision.[25]

On July 2, 2010, the DCPS case manager wrote the attorney requesting an extension of time of two weeks to convene the meeting to review the behavior intervention plan and audiological assessment. On July 6, 2010, the attorney agreed.

[25] The Settlement agreement dated September 9, 2010 (# 24312) also contains paragraph 4.A. which states that:

> "The parent agrees that all of the provisions of the settlement agreement dated June 22, 2010 and the Hearing Officer's Decision dated July 18, 2010 have been satisfied and the SA and HOD are timely closed for Blackman/Jones court reporting purposes. This provision will have no impact on any of the attorneys fees which may be still be outstanding for services already provided relating to the SA dated June 22, 2010 and the HOD dated July 18, 2010."

On July 18, 2010, another HOD (#24117) was issued requiring DCPS to complete a comprehensive psychological evaluation and psychiatric evaluation within 30 calendar days of the order. DCPS is required to convene an IEP meeting to review the status of these evaluations as well as the independent auditory information processing evaluation no later than 15 business days after the results of the testing has been completed and to review/revise IEP and determine placement.

This HOD is classified as implemented timely also based on a later settlement agreement of September 9, 2010 which shifted DCPS' obligations for evaluations under the HOD to the parent/attorney. The reviewer's note states: "Timely per paragraph 4(A) of the newly signed Settlement Agreement dated 9/9/10, HOD 7/18/10 is closed timely for Blackman/ Jones reporting purposes."

A new complaint was filed on August 30, 2010, and on September 9, 2010, a new settlement agreement was entered in which the parent agrees that the previous settlement agreement of June 22, 2010 and the HOD dated July 18, 2010 have been satisfied and are closed for Blackman/Jones court reporting purposes. There is no evidence that DCPS had complied with the HOD of July 18, 2010. Instead, the settlement agreement authorizes the parent to obtain an independent psychiatric evaluation to be completed within 45 calendar days of the agreement. Within 15 business days of receipt, DCPS will convene an IEP meeting to review the independent psychiatric evaluation, the independent auditory assessment, and other evaluations. DCPS will fund a total of 100 hours a specialized instruction in reading by an independent provider. This settlement agreement essentially had the effect of absolving DCPS of its failure to timely complete the evaluations required by the HOD of July 18, 2010, and holding the IEP meetings previously ordered, dropping the comprehensive psychological evaluation ordered, but calling the previous settlement agreement and HOD to be timely implemented. It also shifted the responsibility for getting the evaluations done from DCPS as ordered by the HOD to the parent/attorney.

On September 14, 2010, the DCPS reviewer approved the final closure of the July 18, 2010 HOD based on the parent's agreement in the settlement agreement that this was timely closed for Blackman/Jones purposes only.

The September 9, 2010 settlement agreement is listed as Not Implemented, in progress -- untimely. As of November 1, 2010, the independent psychiatric evaluation was still in process and expected to be completed within a week. The case manager applied for an internal extension of time. The same day the compensatory education plan was sent to the parent. The plan is dated September 8, 2009, (probably intended 2010) with no explanation for the two-month delay in sending it to the parent. If this settlement, which rolled in the provisions of the previous settlement agreement and the HOD, is untimely, shouldn't the previous ones be untimely as well except for the extraction of an admission from the parent that they are timely for Blackman/Jones purposes? In this case as well, the Defendants have ignored the impact of the case closing Protocols regarding maintaining the timelines of multiple cases which are consolidated.

Following our discovery of this pattern of using language in new SAs to close as timely implemented cases which were in fact not implemented, the Evaluation Team requested DCPS to conduct a search of its Blackman/Jones database to identify all cases closed pursuant to similar language in new SAs. This search resulted in DCPS identifying nine HOD/SAs which were closed as timely implemented based on a parent/attorney's acknowledgment in a subsequent settlement agreement that they were timely closed "for Blackman/Jones reporting purposes."[26] Notably, this search appears not to have captured the universe of such cases, as two other cases which were included in the Evaluation Team's randomly drawn sample, which were also closed pursuant to similar language, were not identified in the DCPS search and not included in its report.

3. Cases in which a subsequent HOD/SA finds that the previous HOD/SA was either not timely or not implemented but continues to be counted by DC as "timely implemented."

- An HOD was entered on August 16, 2009, for this eleven-year-old student, though it was never entered or tracked by the Blackman/Jones database except as a record in connection with a due process complaint filed on June 24, 2009 (Complaint # 4453). Although the HOD found no FAPE violation, it required that a full evaluation of the student's progress should be made in early December, 2009 to determine if the IEP was adequate and if the student was not making adequate educational progress, that he should be placed in a full time special education setting with a small class size. The HOD also required DCPS to follow up on the "huge discrepancies in the student's verbal and nonverbal cognitive abilities and in various of his achievement tests. A neuropsychological evaluation should be conducted to aid in explaining these discrepancies, determine the extent to which they are related to the student's ADHD, and make recommendations concerning the student's specialized instruction." Neither the Blackman/Jones database nor SEDS reflects that these actions were taken or that a meeting was held in December, 2009. This case is not recorded or entered as a non-implemented case by Defendants, although its non-implementation was clearly brought to their attention anew by a subsequent due process complaint seeking its enforcement that resulted in a settlement agreement on December 22, 2009 (SA # 23481). As discussed in Section 2 above, that December 22, 2009 case in turn was declared "closed" and "timely implemented" solely by virtue of rolling the same outstanding MDT meeting obligation into still another settlement agreement, effected September 9, 2010.

- As summarized by a June 27, 2010 HOD (#24034), "On February 5, 2009, a Hearing Officers' decision was issued in a prior complaint involving this student, wherein the Hearing Officer granted Petitioner's Motion for Summary Judgment, based on Respondent's concession that it failed to comply with the June 6, 2008 HOD; and failed

[26] Report Closures per new SA para 4a lang 11 17 10.xls

to provide a placement for the 2008/09 school years; which were issues in the complaint." The February 9, 2009 HOD required the review of the student's evaluations, review and revision of the student's IEP, and a discussion and determination of compensatory education consistent with the Hearing Officers' Decisions of June 6, 2008 and February 5, 2009. On May 6, 2010, the Petitioner filed a due process complaint alleging that DCPS had failed to comply with the February 5, 2009 HOD requirements. The June 27, 2010 HOD finds that as of that date DCPS had "failed to reconvene a meeting to review with the parent findings and recommendations in the Lindamood Bell evaluation; and discuss and determine compensatory education services for the two (2) school years the student failed to receive services; and in accordance with the June 6, 2008 and February 5, 2009 HOD, as agreed by the MDT." It also finds that DCPS had failed to comply with the February 5, 2009 and June 6, 2008 HODs because of its failure to discuss and determine compensatory services in accordance with these decisions. Despite this HOD finding on June 27, 2010, DCPS continued at the conclusion of the 2009/10 SY to report the February 5, 2009 HOD as timely implemented, rather than open and outstanding.

4. Miscellaneous cases where the Evaluation Team finds that the determination of timely or full implementation is not supported by the record and attorney "waivers" were liberally misconstrued.

These are cases where the Evaluation Team has found that the evidence available, including in the Blackman/Jones database, does not support the finding of timely implementation. These cases cover a range of circumstances. In some, DCPS either clearly erred in reviewing the evidence or, alternatively, improperly interpreted the evidence to support a finding of timely implementation. In others, the case manager left out of the record critical evidence, or left out communications of objections by private counsel that bear on the propriety of labeling these cases as timely implemented. These included cases where DCPS insisted on stating counsel had agreed for Blackman/Jones purposes in the timeliness of actions even when there was clear evidence to the contrary. They also included cases where attorneys had agreed to an extension or waiver of a timeline for one purpose (e.g., one MDT meeting), but the "waiver" was then construed as a blanket – one to cover all timelines. Finally, we identified cases where the case managers did not give reasonable notice of meetings to parents/counsel, consistent with established legal norms or the Protocol provisions. *See* 34 C.F.R. §300.322 (LEA must afford notice to parents of IEP Team meeting "early enough to ensure that they will have an opportunity to attend" and schedule "the meeting at a mutually agreed on time and place."); (Protocols, Exhibit 1, ¶1 and ¶2). Parents must receive sufficient advance notice of meetings so as to be able to ask for time off from work or make other arrangements so that they can attend a meeting. When meeting notices are drafted to provide as little as one to three days' advance notice of a

meeting within the timeline, they do not realistically provide parents with an opportunity to attend a timely meeting.

- In case # 23497, the SA dated December 10, 2009 required that an MDT meeting be held to review authorized independent evaluations, revise the student's IEP and discuss compensatory education services, if warranted, within 14 business days of the District's receipt of the evaluations. DCPS did not coordinate or communicate effectively with the nonpublic school or its own placement specialist assigned to the school regarding the transmission of the evaluations to the specialist and school. Documentation independently retrieved from the nonpublic school indicates that all evaluations were received by January 7, 2010. An MDT meeting was held on February 17, 2010 at the nonpublic school to review the assessments conducted and revise the IEP. No review of compensatory services occurred, as required by the settlement agreement. The eligibility review indicated that changes in the IEP were warranted; however, the IEP meeting was not held until April 6, 2010. No extensions were ever sought from parent's counsel. However, DCPC granted two internal extensions of sixty days each (120 days total) to itself based on its erroneous view that the independent evaluations had not been completed and provided. When the DCPS Blackman/Jones case manager (newly assigned to the case in March 2010) realized that a meeting to review previously delivered evaluations actually had been conducted, she also saw that compensatory education services had never been discussed or determined. She then emailed counsel about the possibility of conducting another MDT meeting for that purpose. However, before receiving any response from counsel (or seeking out the education advocate who had attended all meetings at the school on behalf of the student), the case manager contacted the grandparent/guardian directly regarding compensatory services. She then arranged for a laptop computer (as part of compensatory services) to be delivered to the grandparent's home on April 1, 2010, and at that time personally secured the grandparent's signatures on (a) a written receipt of the laptop, (b) an agreement for a package of twenty hours of independent compensatory services, and (c) a letter stating that the settlement agreement had been timely closed and fully implemented. Counsel continued to represent the student at that time. There is no documentation indicating the case manager provided notice to counsel of her independent transactions with the parent. The case manager advised the monitor during an interview that she assumed the responsibility for explaining the agreement documents to the grandparent herself. She stated that she had no idea herself if the case had been implemented on a timely basis because she was new to the case herself and because of the peculiar circumstances of the case. She did not view herself as having any responsibility to take any further action to ensure delivery of compensatory education services, including communicating with counsel regarding the service agreement she had presented to the grandmother/client at the moment she was being asked to sign for receipt of a laptop computer. In reality, the meetings required by the settlement agreement were not held in the timeframes specified by the agreement; the MDT never did discuss and determine compensatory services; and there is no documentation in the record as to whether compensatory services were ever delivered to the student beyond the laptop. Yet the case was closed as timely (and fully) implemented.

- A settlement agreement (#23070) was entered on July 24, 2009 for a student who had been enrolled at a full-time stand-alone DCPS special education school through eighth grade. The case arose when DCPS unilaterally issued a Prior Notice of Placement ("PNOP"), without any change in the student's IEP or evaluation of needs, to an inclusion program in a high school offering far fewer hours of specialized instruction. The agreement provided that the parent would enroll the student at a different public high school before the start of the school year, for transportation to the school, and four hours of tutoring services per week during the 09/10 SY. The agreement also provided, in light of the student's significant change in placement and services, for convening of an IEP meeting at a mutually agreeable time before August 24, 2010 for review and revision of the student's IEP, with an emphasis on addressing the least restrictive legal requirements. Finally, the student was to be assigned a case manager to help transition him to the high school for no more than one year.

  The parent enrolled the student on August 19, 2009, a few days prior to the start of the school year. However, the student could not begin school and receive required services because transportation services were not available to him at the start of school. Based on the delay in transportation, the student missed multiple days of required instructional and related services as well as tutoring services specified under the settlement agreement. A compensatory education plan therefore had to be developed in late October to address these service breaks. The early pre-August 24, 2010 IEP meeting was deferred because the parent recognized that there was no point in meeting if the student had not been in school yet or had limited time in the high school program due to the delayed initiation of transportation services required by the IEP. A tutor was assigned on October 30, 2009. Despite all of these facts, the DCPS reviewer determined that the case was timely and fully implemented, writing: "Timely - Mtg to be held end of October per parent request and atty agreement - see signed atty letter granted extension dated 8/18/09 & email correspondence dated 9/4/09 & 9/30/09. Mtg held 10/27/09. IEP reviewed. Case mgr assigned per email 10/6/09 - no deadline. Tutoring confirmed 10/30/09 invoice - no deadline."

  The most fundamental error here was the reviewer's premise that the requirement of transportation services was not linked to a requirement for actual delivery of the student to school at the start of school – despite the requirement that the parent enroll the student prior to the start of school! Indeed, the entire package of services agreed upon, including tutoring services, was clearly designed to be implemented from the school year's start to transition the student from a full time, self-contained special education program to a more inclusive, general education high school program. The attorney and parent's initial agreement to defer the pre-August 24 IEP meeting was provided after DCPS requested this extension. Subsequently, the delay in services caused the parent to agree to a meeting deferral until October, so that the student's experience could properly be assessed. Most significantly, though, regardless of whether the attorney agreed to a later meeting under these circumstances, the settlement agreement was not timely implemented because of DCPS' failure to provide transportation and tutoring services at the start of the school year.

- This settlement agreement **(**# 23692) was entered on March 15, 2010 for a student who, until the 2009/10 SY, had attended a full-time self-contained DCPS special education school. The student was unilaterally placed by DCPS as a 9th grader in a regular high school for the 2009/10 SY and did not receive instructional service hours consistent with the requirements of her IEP until January. She began for the first time manifesting serious behavior issues and experiencing disciplinary suspensions. The settlement agreement contained multiple requirements, based on the extreme circumstances of the case, including: provisions dealing with the student's disciplinary suspensions, review of independent evaluations authorized within 15 school days of receipt; compensatory education consisting of four hours a day for five days a week for three weeks; a funded diagnostic assessment at Lindamood-Bell to individualize instruction; 100 additional hours of tutoring through an independent tutor; 25 hours of compensatory counseling through an independent counselor; a laptop with educational software as a form of compensatory education; and two credits or up to $500 worth of credit recovery courses.

  DCPS concluded that the case was timely and fully implemented, with this notation: "See 10/5/10 email from parent's counsel stating that all issues within the settlement agreement have been implemented, but for payment of atty fees, therefore, she will not sign a closure letter. Implemented-timely." The evidence indicates otherwise. Significantly, the case manager excluded from her case notes and documents appended in the closure file highly relevant documentation the Evaluation Team independently retrieved, including: the attorney's request to DCPS for assistance with problems being experienced in the evaluation process which was ignored; the attorney's request to the case manager for the scheduling of a meeting to review placement prior to moving the student to a nonpublic placement; the attorney's emails proposing earlier dates for meetings; and finally, a September 8, 2010 letter to the case manager explicitly advising that the District was in non-compliance with the settlement agreement. When the family finally gave up and moved out of the DC jurisdiction in late September 2010, the attorney stated she still would not sign a letter confirming the case had been fully implemented because the major delays in payment of attorneys fees experienced in the case constituted an important issue and related to the ability of families to require LEA compliance with relevant law, but stated she would stipulate at that point (with the family having given up on DCPS for educational services) that other provisions of the SA had been satisfied.[27]

  The selective inclusion of documentation in case files of course is disturbing, as it complicates review of any case. HOD/SA #24111 posed similar issues as counsel's letter was excluded from the Blackman/Jones file – with the omitted letter providing a detailed, strenuous objection to any characterization of the settlement agreement as having been timely implemented pursuant to Blackman/Jones requirements. The Evaluation Team has additionally identified other omissions of pertinent email and documents from other cases that relate to assessing implementation and the accuracy of the case chronology portrayed by particular case managers.

[27] This case entailed extensive attorney work to support the student in obtaining the services required by the settlement agreement. However, as will be discussed later in this report, substantive portions of this work ultimately were deemed non-compensable by DCPS.

(a) Insufficient Meeting Notice Cases:

- The January 12, 2010 settlement agreement (#23518) provides: DCPS will provide a copy of a completed Vocational Assessment Evaluation within five days, or parent is authorized to obtain the evaluation independently within 45 calendar days. Within 15 calendar days of the completion or receipt of the final vocational assessment evaluation, DCPS will convene an IEP meeting to review both the completed educational evaluation and the vocational assessment evaluation, review and revise the IEP, review the transitional service plan and discuss compensatory education if warranted. On January 14, 2010, DCPS issued authorization for independent vocational assessment evaluation. On March 15, 2010, DCPS issued an attempted substantive closure letter for the SA because the independent vocational assessment evaluation was due by February 28, 2010. The letter apparently contains boilerplate language that DCPS has not received the independent comprehensive psychological, independent functional behavior plan, or the adaptive behavior evaluation – none of which seem to be required by the settlement agreement. Phone calls were made to the parent on April 7, at 11:24 AM and April 8 at 9:10 PM. "Parent informed CM that she does not have the eval completed. CM will issue a Substantive Closure." No offer of assistance with the evaluations was made to the parent. On April 9, 2010, an administrative closure letter was sent to counsel and the parent. On April 13, 2010, the DCPS case reviewer changed this to a substantive closure. DCPS then received on April 16, 2010 the Vocational Assessment. On April 29, 2010, an e-mail was sent to the student's attorney to schedule a meeting for the very next day (April 30th) to keep it within the 15 calendar days required by the settlement agreement. The attorney responds on the same day, "it is just not enough notice. I'm waiting to hear back from mom regarding available alternate dates." The meeting was held instead on June 2, 2010.

  The meeting notes taken were taken by the case manager. The non-public school's vocational education teacher failed to attend the meeting and as a result, the IEP team did "not update the student's transition goals to incorporate the findings and recommendations of the vocational evaluation."[28] (Finding #16 of subsequent HOD dated 8/11/2010). The compensatory education awarded in a settlement agreement dated May 25, 2010 was deemed to satisfy this settlement agreement. The placement specialist informed the parent that due to the student's pattern of truancy, DCPS would unilaterally dis-enroll him from his nonpublic placement and discontinue the dedicated aide service. The placement specialist also stated that the student's next placement would be his neighborhood high school and DCPS will issue PNOP, which it did the same day. The advocate challenged this action.[29]

  The DCPS case reviewer's note declaring this case to have been timely implemented states:

[28] The DCPS transition specialist did attend the meeting.

[29] An HOD was subsequently issued on August 11, 2010, requiring DCPS' continued funding of a non-public placement for the student based on DCPS' unilateral change of placement of the student that occurred without appropriate notice and DCPS' failure to provide the student with an appropriate IEP in the 2010/11 SY.

"Timely – IEE letter for voc was provided within 5 days of SA on 1/14/10. IEE received via email from atty 4/16/10. Mtg to be convened within 15 days. LOI for mtg to be held within timeline sent via email 4/29/10. Parent/atty unable to make date. Mtg held 6/2/10 – Ed and voc evals reviewed, IEP reviewed/no revisions necessary with exception that aide will be discontinued, transition plan reviewed, comp ed discussed determined that 5/25/10 proposal satisfies SA requirement." However, the bottom line obligation that DCPS was initially responsible for – convening of the MDT/IEP meeting within 15 days of receipt of the IEE – was handled on an untimely and improper basis. DCPS' provision of one day notice of the planned MDT meeting is not reasonable advance notice designed to ensure that the parent will have an opportunity to attend. 34 C.F.R. §300.322.

- SA #23699 follows the identical fact pattern as the case discussed above. Per the SA, the deadline for the meeting was required on May 11, 2010, fifteen calendar days from the date of receipt of IEEs (April 27). DCPS' letter of invitation for the IEP meeting was faxed on May 10, 2010, (two weeks after the case manager's receipt of the IEEs), proposing a meeting for either the next day (May 11) or May 12. The educational advocate responded immediately on May 11 that this was insufficient notice. The meeting was subsequently held in June, 2010. DCPS treated the meeting and case as timely, stating in the case note, "Timely - IEEs received via fax from atty 4/27/10. LOI sent 5/10/10 via fax with available dates to convene mtg within 15 days of receipt. Parent/atty unable to make dates…" The case reviewers make no review or mention of the clearly inadequate one day prior meeting notice.

(b) Missing the Central Point:

- HOD #23241, issued on September 17, 2009, required that DCPS, "If it has not already done so by the date of the issuance of this Order DCPS shall, within ten (10) business days of the issuance of this Order, convene a MDT meeting to review the student's existing evaluations, review and revise the student's IEP as appropriate and discuss and determine an appropriate placement for the student for SY 2009-10." The HOD also found that DCPS had not complied with the preceding HOD and Order of June 27, 2009 based on its failure to convene the requisite MDT/IEP meeting to review evaluations on a timely basis. (Conclusion of Law #2). The clear focus of both HODs was to compel DCPS to review the student's needs and assessments and determine an appropriate placement and IEP for the 2009/10 SY. The DCPS reviewer concluded that the September 17th HOD was implemented on timely basis, with this note in the Blackman/Jones database: "Timely - Mtg held within 10 business days on 9/29/09." While a meeting was held on September 29, 2009, it is difficult to conclude that the IEP team actually reviewed and revised the student's IEP as appropriate as the review process left the student without any valid, timely IEP. The *draft* IEP generated for the meeting while nominally dated September 29. 2009, provided for NO special education or related services or goals past June 4, 2009, approximately three months earlier. In fact, the IEP was simply the 2008/09 SY IEP which had expired by its own terms, identifying services and goals ending in June 2009, but containing on the front page now a new date of September 30, 2009. The parent at the September 29th meeting asked for a new IEP to be completed by October 4, 2009, due to concerns regarding the minimal special

education services delivered as of that date. No valid IEP was ultimately developed to cover the student's services for the 2009/10 SY.[30]

(c) Sample Cases Involving Improper Application of "Waiver of Timeline" or "Waiver" of HOD/SA Requirements:

- HOD #23292 involves an 8-year-old student with multiple disabilities, including severe learning, physical, and emotional ones. He has never attended school. As phrased by the hearing officer, the central issue posed in the case was "Did DCPS deny the student a free and appropriate public education by failing to provide an appropriate program/placement? Petitioner specifically alleges that because the student has never attended school and is significantly behind academically from his same age peers, he is in need of a program that will gradually integrate him into a school environment so that he is not thrust into a setting that would exacerbate his emotional condition." The HOD required the IEP team to develop an IEP that provided for a clear transition plan for gradual integration of the student into the general/special education setting. The HOD's discussion of the evidence in the case, including expert testimony, recognized that an intensive transitional catch-up program, involving a variety of facets, would be required. DCPS declared that the grandparent had waived the entire transitional re-integration program requirement – a central component of the HOD – at the MDT meeting and therefore classified this obligation as implemented. The Evaluation Team can only conclude that DCPS gave a wooden, superficial review of the MDT minutes to reach this conclusion. The meeting minutes, solely prepared by the case manager, quote the grandmother as saying at some point in the meeting, while venting about her distrust of DPCS, that she is not interested in a transition plan for gradual reintegration. However, the rest of the lengthy MDT meeting, as reflected in the minutes, was devoted substantially to a discussion of what type of intensive transition/reintegration educational program would work for the child. The associate director of the Lindamood Bell Learning Center participated in this discussion, as did the student's physician, discussing the type of individualized program that the child would initially need to provide the educational and emotional foundation that would prepare him for return to the school. The case manager meanwhile asked, according to the minutes, why the student couldn't just return to the elementary school (the position of the District at the hearing that led to issuance of the HOD). The meeting concluded, according to the case manager's minutes, with the case manager asking counsel "to give her until next week" for a decision so she could obtain her supervisor's approval for the Lindamood Bell transitional program proposed by the parent's counsel and experts. The case manager promised to get back to counsel within a week (2/5/10) according to the minutes. There is no evidence in the record that the case manager ever did so. Counsel affirmatively now states that the case manager never responded after the MDT meeting. Instead, another MDT meeting was

[30] Various independent assessments were authorized as a result of the September 29, 2009 meeting. The next recorded meeting in SEDS for the development of an IEP did not occur until May 4, 2010, when a due process resolution meeting was converted to an IEP meeting, over the parent's objection, due to the absence of proper notice. See summary discussion contained in SHO Case No. 2010-0376 with respect to sequence of events thereafter, leading to a due process complaint and the hearing officer's conclusion that the student had been denied FAPE and that a private placement was warranted.

held on March 17, 2010 – the minutes of which do not appear in either the Blackman/Jones database or SEDS – that reviewed a speech/language assessment and also discussed transitional program issues relative to the student, with counsel reiterating the need to agree on a transitional program that would effectively introduce the student to a less restrictive educational environment than the home. The school system at that time proposed a different program, but as it turned out, the vendor for that program proposed by the case manager was going out of business and was not available. As of this date, the student remains out of school.

The MDT minutes of 1/29/2009, in conjunction with the HOD itself, make clear that the case manager's (and reviewer's) contention that the central HOD requirement for the IEP team's development of a transition reintegration plan and services had been waived, under these facts simply is not tenable. It is not supportable to convert the grandparent's expression of frustration to a formal legal waiver, when the substance of the meeting in fact addressed the transitional needs of the student and concluded with a proposal for a program that DCPS was supposed to approve (or not) within the week and never did.

- This settlement agreement dated December 23, 2009 (#23488) required DCPS to convene an MDT meeting by January 15, 2001 to assess the student's academic services, progress, and location of services. It also authorized the parent to obtain a variety of independent evaluations within 45 calendar days and committed DCPS to conducting an MDT/IEP meeting within 15 business days of receipt of the last evaluation to review and determine services, a behavior intervention plan, and compensatory services if necessary as well as placement.

  The original letter of invitation for the required meeting to be conducted by January 15th was faxed at 7:36 PM on January 13, 2010. It notified the parent of two alternate times for the January 15th meeting and one time on January 19th, beyond the deadline. The notice given in this case was clearly inadequate to meet the meeting deadline.

  Counsel for the parent subsequently communicated with the case manager on February 5, 2010 that the parent was in the hospital and the she would send the evaluations in one package, rather than on a piecemeal basis. On March 8, 2010, the case manager emailed counsel, asking about the status of the evaluations and stating, "I also would appreciate your approval of a waiver of the meeting we wanted to have earlier to address the student's academic stability. You previously agreed that we could have one meeting to review the evaluations, update the IEP and address the academic stability of the student." Counsel for the student responded to this specific request, indicating she would waive the timeline. The next day (March 9th) she transmitted to DCPS all of the evaluations. On March 26, 2010 or March 20th (two different fax dates are stamped on the documents), the case manager faxed a letter of invitation to counsel for an IEP meeting, with alternative dates of April 12, 13, and 15. More than fifteen business days elapsed from March 9, 2010 when DCPS received the independent evaluations and the dates offered as potential IEP meeting dates. (The meeting was subsequently convened on April 29th after further scheduling coordination with the student's counsel and parent.) The meeting was

not completed on April 29th and reconvened on May 17, 2010.[31] The DCPS reviewer concluded that the IEP review meetings convened in April and May (and the SA) were held timely based on the attorney's agreement to waive the initial January 15th meeting requirement and timeline, even though counsel's "waiver" was clearly solely in response to the case manager's request on March 8, 2010 with respect to the separate requirement for a meeting by January 15, 2010. It should be noted that the case reviewer also had already authorized a sixty-day extension for the MDT/IEP review meeting based on the evaluations purportedly not having been submitted by March 9, 2010, though in fact they were submitted on that date. (The database indicates that the due dates for the IEP/comp ed review meeting had been ultimately therefore set by DCPS as June 7, 2010.)

5. Cases in which improper extensions of time were granted to make them timely.

There are cases where the Evaluation Team simply disagrees with the conclusion that a case is timely, based on DCPS' loose application of extensions of time for actions which DCPS is required to take, an approach that stands in contrast to the strictness with which timeframes in SAs are often enforced against parents who do not make contact or require extensions of time. Additionally, the Evaluation Team notes that DCPS policy (effective 11/2009) is to grant standard internal extensions of substantial length – e.g., 30 to 90 days – when DCPS deems appropriate, without notifying Plaintiffs' counsel of how they are proceeding.[32] (*See* Exhibit 3, DCPS internal extension policy). The Evaluation Team recognizes that "extensions" can well be justified when a parent's counsel has been unable to furnish an IEE or agree to a meeting date within the initial time frame or with the parties' agreement. However, DCPS has managed this extension process in a non-transparent or even-handed manner.

- Case # 23337 involved a SA dated October 27, 2009, authorizing an array of independent assessments and requiring DCPS to conduct a FBA and to convene an IEP meeting within 15 school days of receipt of the last independent evaluation to discuss eligibility, determine IEP services, location of services, and compensatory services, if warranted. The student involved was a ninth grader at the time of the due process complaint; his parent had been seeking a special education evaluation and services for him since he was enrolled in middle school as an eighth grader.[33]

[31] The case manager serves as the LEA representative. No regular educator attended, although the student's capacity to be served in the general education program remained a disputed issue in the IEP meeting.

[32] Plaintiffs' class counsel, after review of a sample of cases during the 09/10 SY, commented that extensions entered did not bear a direct or proportional relationship to the amount of time needed to complete outstanding obligations.

[33] An earlier HOD dated September 9, 2009 found that DCPS had failed to comply with Child Find requirements in conducting a full and individual evaluation of the student. However, it determined that no FAPE violation had yet

The last independent evaluation was provided on December 30, 2009, triggering the 15 school day required timeline for convening a MDT meeting. An invitation to an IEP meeting was not transmitted by DCPS until January 14, 2010, offering three meeting times on the identical date of January 26, 2010, which technically would be the sixteenth school day after the December 30th, assuming a professional development day when DCPS operates is counted. When the student's counsel had not responded by January 21st, DCPS granted itself an initial 60-day internal extension for conducting the meeting to March 21, 2010. DCPS did not disclose that a 60-day internal extension would be applied on this or another occasion. A MDT/IEP meeting was held on May 2010, after snow storms, death in the student's family, teacher illness, and another 60-day internal extension. The case manager wrote in unsigned minutes that counsel and parent agreed that the settlement agreement had been timely implemented and DCPS in turn treated the meeting as timely because the unsigned MDT notes exclusively prepared by the case manager stated this. Counsel has affirmatively represented to the Monitor that neither he nor his client ever represented that they agreed that the settlement agreement was timely implemented. Neither the minutes nor the IEP drafted on May 20, 2010 appear in SEDS. In sum, a year passed from the point of the parent's request for an evaluation and services for her 8th grade child and an initial due process complaint to the point of its asserted accomplishment at the end of 9th grade, after a second due process complaint.

In the 2010/11 SY, the parent enrolled the student at IDEAL Public Charter School and the student received at that time an educational evaluation and eligibility review. The first IEP adopted for this student that appears in SEDS for this student since the start of the 2009/10 SY was one executed an October 26, 2010.

See also Case 23070 discussed above under Item #4.

The practice of granting lengthy extensions, as described earlier in this report, has the effect of keeping cases that would become untimely or more than 90 days overdue from reaching that state. We have described several cases in which lengthy extensions of time were granted with insufficient justification for the duration of the extensions (Case #s 24298, 24034, 23497, 23488, & 23337).

6. Cases closed as timely implemented, after DCPS authorized compensatory services, without supporting evidence of actual substantive initiation of services.

For all or most of the 2009/10 SY, DCPS closed as "timely implemented" case provisions for independent compensatory services solely based on evidence of the case manager's execution of the authorization form or the draft of a compensatory education plan. This poses the most

occurred and that the complaint was not ripe because the 120-day period of time for evaluation, dated from the date of the parent's formal written consent, had not yet passed.

significant issue in cases involving substantial hours of compensatory services, where the award far exceeds any single digit *de minimis* award of hours. It is important to remember that compensatory hours in these cases have been awarded because the student has been harmed by the LEA's failure to timely conduct the "child find" and eligibility process under IDEA, to provide special education instruction, or to provide related services that the school district should legally have supplied in the first place. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005); Consent Decree, ¶74 (rebuttable presumption of harm for "students denied timely hearings or HOD and for students who failed to receive timely implementation of HODs and SAs."); *Hawkins v. District of Columbia*, C.A. No. 07-00278 (HDB) (March 7, 2008) (reversing hearing officer's erroneous failure to find that DCPS violation of a prior HOD constituted a denial of FAPE). The parents and guardians of the students so harmed are often stretched to the limits in their own lives – caring for other children or grandchildren, living in constrained and mobile circumstances, working at all hours of the day, and functioning with limited personal, financial and educational resources. It would accordingly be unacceptable for the LEA to routinely issue compensatory service awards based on its failures to provide services and evaluations and then disclaim any responsibility for supporting parents in confirming, arranging, or ensuring that services are delivered.[34]

Sometime after the May 12, 2010 status conference, DCPS made a change in its practices regarding the closure of cases offering independent compensatory education. According to information provided to the Evaluation Team during interviews with DCPS compliance case managers and their supervisors, the new procedure is to require evidence that compensatory services have begun, even if they have not been fully completed or paid for, before a case can be closed as implemented. Alternatively, after independent compensatory education is authorized, the compliance case managers are required to continue to make follow-up calls to the parent/attorney every two weeks to determine if services have begun. If at the end of 60 days there is no response, the case closure process is triggered and the case can be closed as timely implemented. Some attorneys have commented that these new bi-weekly contacts often end up

[34] DCPS has previously raised the question of why Dr. Carran's prior HOD/SA audits did not examine whether there was any confirmation of delivery of compensatory services. As the Evaluation Team has explained to DCPS staff, the Evaluation Team did not ask Dr. Carran to review this issue for two main reasons. First, compensatory services in prior years were not exclusively being farmed out to parents to execute. Secondly, the Evaluation Team asked Dr. Carran to focus instead on broader process and implementation issues because of the severe scope of problems and documentation issues that historically had attended review of implementation of HOD/SA cases.

being non-productive and sometimes even hostile, as case managers remain primarily focused on obtaining confirmation of service initiation solely for purposes of case closure, rather than for reaching out to assist counsel in arranging services. Yet arrangements for independent compensatory services can be challenging, particularly because students receive these services outside the normal school environment and have significant and complex needs.

Examples of the cases arising in the 2009/10 SY that involved the closure of compensatory education provisions reviewed include:

- A settlement agreement entered into on April 9, 2010 (#23803) provided that DCPS will fund summer camp for up to four weeks at a cost not to exceed $2,500 to be completed by August 31, 2010. It also provided that DCPS will fund two hours per week of tutoring for 12 months, two months into the 2009-2010 school year and 10 months in the 2010-2011 school year, with all services to be completed by June 30, 2011. On the same day as the Settlement agreement, DCPS issued a letter of authorization to purchase independent services, and the case manager submitted the case for closure. Five days later, the case was closed as timely implemented with a note "timely-no deadline for DCPS action." There is no evidence that any compensatory education services had begun or were paid for.

- A March 18 settlement agreement (#23707) provides that DCPS has awarded interim compensatory education to the student in the amount of two hours per week for visio-cognitive therapy or visual therapy for three months through an independent provider to be completed by September 1, 2010. The Agreement provided that these services are to be factored into any final compensatory education or missed services determination for the student but are available immediately pursuant to the execution of this settlement agreement. (The settlement agreement additionally addressed other issues which are not relevant with respect to implementation of compensatory education.)

  The compensatory education plan reflecting the above was faxed to the attorney on March 12, 2010. There is no further documentation in the record that these compensatory education services had begun or been delivered. DCPS closed the compensatory education provision as timely based solely on the mailing and faxing of the authorization. However, the Evaluation Team has obtained from the attorney for the student documentation of communications to DCPS and the case manager of substantial problems the grandparent/guardian was experiencing with transportation so as to obtain this compensatory education service for the student. These documents (not included in the Blackman/Jones database) make clear that there was a mutual expectation and agreement that DCPS would arrange for transportation for the compensatory service vision therapy appointments. As it became evident that the guardian was having difficulty in accessing transportation services for the student, the case manager tried to shift the responsibility to the guardian to take a bus or taxi to get to the service, and then seek reimbursement from DCPS and fill out a W9, and presumably wait for DPCS' reimbursement payments over time. However, as was clear from the start, the

grandparent needed to accompany the student in traveling to the therapy services due to his youth – and she was physically impaired, unable to take public transportation, and unable to advance funds for regular taxi transportation. When DCPS refused to honor its commitment to provide acceptable transportation assistance to facilitate the student's access to the compensatory visual services, compensatory education could not be accessed and was not provided. Nevertheless, the compensatory services obligation under the settlement agreement was closed by DCPS as timely implemented.

- A settlement agreement entered into on December 11, 2009 (#23462) provided that DCPS will fund 82 hours of independent one-to-one tutoring, to be available upon the execution of the agreement and to be completed by March 31, 2010. The compensatory education plan was faxed to the parent/attorney on December 14, 2009, and the case was submitted for closure on the same day as timely implemented. The closure was approved three days later with an accompanying note which stated "Timely-no deadline for DCPS action." In response to an inquiry from the Evaluation Team, the case manager wrote on May 28, 2010 "I have checked with all of our records and determined that DCPS has never been billed for the services."[35]

- A settlement agreement entered into on May 14, 2010 (#23899) provided that DCPS will fund 40 hours of specialized instruction and 12 hours of mentoring services by independent provider to begin by June 1, 2010 and to be completed by December 31, 2010. On July 12, 2010 (already six weeks into the service period), the case manager sent a letter of authorization to the parent repeating that the services may begin on June 1, 2010, attaching the compensatory education plan.

  At a subsequent resolution session meeting on August 11, 2010 (regarding a complaint filed on July 28 alleging failure to develop an IEP, which led to a second settlement agreement), the DCPS case manager inquired if the compensatory education had started or had been completed. The parent informed him that the tutoring services had begun but the mentoring services had not started as of that date. The case manager then inquired if the parent would be willing to sign a closing letter indicating that all provisions of the settlement agreement had been complied with. The parent did so, and on the same day the case was submitted for closure. It was reviewed and approved six days later with a note "timely-no deadline for DCPS action." Thus, despite affirmative evidence that one of the compensatory education services had not even begun, the case was closed as implemented and timely.

- See case # 23497, discussed in Section 4 above.

[35] Other similar cases of closures as Implemented-Timely, without evidence of actual timely implementation of the Settlement agreement and delivery of or payment for the services include, among many others:
23256 dated 9/23/09
#23768, dated 4/1/10
#23493, dated 12/23/09
#23481, dated 12/22/09
23410, dated 11/24/10 (similar to case #23409)
#23695, dated 3/12/10
#23556, dated 1/22/10
#23453, dated 12/9/09.

- This student has several HOD/SAs, all of which are recorded as timely implemented including the September 11, 2009, July 3, 2009, May 25, 2010 and July 29, 2010 cases. The comp ed provisions of the September 11, 2009 SA were open and not implemented as of the time it was "closed" by virtue of being rolled into the settlement agreement of May 25, 2010. This May 25, 2010 settlement agreement (SA # 23924) provides in paragraph 4.a that all of the HOD/settlement agreement provisions of the agreement of September 11, 2009 have been satisfied and the settlement agreement is timely closed for Blackman/Jones reporting purposes.

  This latter settlement agreement also provides in relevant part for compensatory education of 80 hours of specialized instruction by an independent provider to be completed by June 30, 2011. A letter of authorization was issued June 1, 2010. There is no evidence in the file that this compensatory education was begun or completed. The case was closed as timely implemented on June 7, 2010 with the following note by the DCPS case reviewer: "Timely – Mtg held within 10 business days of SA on 5/27/10. Goals/hours/data/IEP reviewed, location determined at Anacostia, transition plan reviewed/revised, ESY determined warranted. Signed comp ed plan dated 5/25/10 authorizing funding for independent services."

  The previous settlement agreement of September 11, 2009 (#23229) was also closed as timely implemented. On May 26, 2010, the case manager entered the following note to justify closing this case: "The CM received a signed settlement agreement from a resolution session held on 05/25/10. A complaint was filed on March 31, 2010, alleging that the previous settlement agreement dated 09/11/09 was not complied with. The first provision of the settlement agreement reached on 05/25/10 indicates that the parent agreed that the settlement agreement from 09/11/09 has been timely complied with and can be closed for Blackman/Jones court reporting purposes. The CM is submitting the provisions and case for timely closure."

  On May 27, 2010, the DCPS case reviewer approved the closure based on the settlement agreement of May 25, 2010. "Timely - new SA signed 5/25/10 stating 9/11/09 SA is closed timely per paragraph 4(a)." There was a new due process complaint in the current school year which led to a hearing officer decision (HOD #24153) on July 29, 2010 which ordered the student placed at the Monroe school.

- A settlement agreement (#23921) was entered on May 25, 2010 and subsequently determined to be timely implemented. The agreement provides for compensatory education of two hours of tutoring a week for one month and one hour a week of counseling for two months to be completed by August 31, 2010. The case was submitted for closure the same day but was kicked back based on a new closure procedure in the 2010/11 SY that requires verification that services had begun. An August 4, 2010 e-mail from attorney states "my understanding that compensatory education has started for Thomas." The case manager again submitted the case for closure based on the e-mail, but was kicked back by the DCPS case reviewer the next day with a note to get confirmation as to who the provider is/has services begun. Four days later, the case manager resubmitted the same e-mail. At this time the closure was approved by the case

reviewers. There is no other evidence in the file that indicates what compensatory services had started, or if both services had started.[36]

The student also has a prior HOD on May 27, 2009, January 12, 2010, and a subsequent HOD August 21, 2010. (#24238-- implemented timely)

- Settlement agreement #23920, on May 24, 2010, provides in relevant part that as compensatory education DCPS will fund 30 hours of tutoring by an independent provider to be completed by January 1, 2011. "This total is in addition to any previously authorized compensatory education for the student." The student had two other settlement agreements on 2/1/10 (#23578), and on 4/13/10. The settlement agreement of April 13, 2010 (#23801) authorized 30 hours of tutoring starting January 2010 to be completed by January 1, 2011.

  The MDT meeting notes of September 23, 2010 indicate that "the student is currently in restriction and will be out of school for 10 days. Teachers and tutors are going to home for instruction." The notes also indicate that tutor has been seeing student for three months and has seen student for around 24 hours. (There is nothing that specifically ties this tutoring to the comp ed award in either settlement agreement.) The notes also state "Settlement agreements from 2/1/10 (#23578), 4/30/10, 5/24/10 have been implemented and are in full compliance." The case was closed as timely implemented following the IEP meeting with the following note: "See 9/23/10 meeting notes whereas tutor confirmed he has been tutoring student and has completed 24 hours. Implemented – timely."

  Since the student had received only 24 hours at the time this case was closed, and the May 24 settlement agreement specifically stated that the compensatory education awarded therein was in addition to the previous award in April of 30 hours of tutoring, there is no evidence that the May 24 compensatory education award had begun or been implemented, despite the statement in the MDT notes that the agreement had been fully implemented.

7. DCPS' convening of IEP/MDT Teams for meetings required by HOD/SAs where the teams are not legally constituted teams under IDEA.

The vast majority of HOD/SAs entered require that a MDT meeting be convened for the review of evaluations, review and revision of an IEP, location of services, and compensatory services. As specified at 20 U.S.C. §1414(d)(B), IDEA requires that an "IEP Team" be composed of: (i) the parents of a child with a disability; (ii) not less than 1 regular education

[36] The attorney in this time period was seeking assistance from the case manager in contacting any educator at the Transition Academy at Shadd which DCPS had proposed as a placement for the student and which the parent wanted to visit. The case manager emailed the name of the SEC. The attorney responded that this parent had called the school numerous times and has been unable to reach anyone in person. She asked therefore for a phone number for the SEC. There is no indication of what response, if any, was made to this request for assistance. The case manager's focus seems to have been on obtaining evidence that compensatory education services issue is closed.

teacher of the child if the student is participating in regular education; (iii) not less than 1 special education teacher of the child or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency who – is (I) qualified to provide or supervised the provision of specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local agency. Additionally, the team must include "an individual who can interpret the instructional implications of evaluation results who may be a member of the team described above or other individuals designated by the parent or agency with such special expertise."[37] While IDEA contains provisions for waiver for the attendance of members when the discussion does not touch on that member's curriculum or related services expertise, this waiver must be in writing. 20 U.S.C. §1414(d)(C).

While the Evaluation Team did not originally seek to review the question of whether the MDT Teams convened meet the legal requirements, case documentation so clearly raised this issue that we think it must be noted. Regular education teachers, the LEA representatives, and other required team members were frequently missing. OSSE's May 2010 monitoring review of a sample of DCPS' special education files similarly flagged this issue, reporting that the required LEA Designee attended the IEP meetings in only 36.67% of the files examined. In some cases, the Blackman/Jones case managers, who often do not possess the qualifications required by law to function as the LEA representative, convened meetings in a LEA designee capacity and without a full IEP team. DCPS Blackman/Jones case managers unquestionably perform a valuable function. However, they do not all have the educational and supervisory expertise to work with the IEP team to consider the substantive issues that may be raised in the review process, as envisioned by the applicable provisions of IDEA. The Evaluation Team additionally could not in many cases accurately evaluate whether a legally constituted full team had been convened because of the absence of an executed and final IEP and/or MDT meeting minutes signed by participants. Some counsel for students voiced concerns that case managers or special education case coordinators often did not share the minutes of meetings, which are used to record what individuals participated in the meeting and what issues were discussed – or alternatively, shared these minutes weeks after the IEP meeting was already finalized, providing no

[37] 20 U.S.C. §1414(d) (B) also calls for the participation of the student with a disability whenever appropriate.

meaningful opportunity for correction of the minutes, including their listing of attending team members.[38]

Finally, the Evaluation Team found that SEDS, the District of Columbia' special education data system of record, often did not contain all of the IEPs and meeting minutes that were contained in the Blackman/Jones database as documentation of the occurrence of HOD/SA required actions or reviews to be completed by the student's MDT team. Without being in SEDS, these documents do not electronically travel with the student as his or her official special education record as s/he moves to different schools within the District or outside of the District.[39]

The Evaluation Team did not endeavor to count how many times in cases the IEP team was not a full or proper team so as to denote the case as one where we disagreed with DC's reporting of cases' full, timely implementation. However, this issue is one that clearly must be addressed by OSSE and DCPS in the future.

C. Discussion of Issues Raised by Defendants' Methods of Handling Cases

The District has totally transformed its efficiency and capacity to track every element of implementation of HOD/SAs since 2006 when it operated blindly without any consolidated information regarding its HOD/SA obligations and the status of implementation of these obligations. The central office Blackman/Jones administrative team has a single-minded focus:

[38] For instance, in case #23337, the case manager convened the SA required eligibility meeting, listing himself as the LEA representative and drafted unsigned minutes for the Blackman/Jones database that were never made a part of the SEDS permanent record. The meeting notes indicate that a follow-up meeting would be conducted to finalize an IEP and determine compensatory education services. The case manager convened the meeting as the LEA representative and this time, no regular education teacher of the student was present. Counsel for the parent expressly objected to the regular educator's absence. The meeting minutes again were unsigned, and included such seemingly contradictory information as the assertion that counsel and the parent purportedly agreed that the case was "timely and in compliance" and alternatively that "the MDT team with the exception of ___ [the parent] agreed that the IEP could be implemented at Anacostia." The minutes of these meetings did not appear in SEDS, when last available for review. The IEP contained in the Blackman/Jones database is marked "draft." Similarly, in case 23365, the IEP meeting for the student, who was in a mixed regular/special education program, included a psychologist, a special educator, the special education coordinator, attorney and parent – but no regular education or LEA representative. Sometimes counsel object to these incomplete teams, and other times, not. However, under the law, it is the LEA's responsibility to convene a proper IEP team. Counsel note that by the time they are sitting in an MDT/IEP or eligibility meeting at the school, they typically do not want to hold up the meeting and cause still further delay in handling of the student's case.

[39] Where IEP documents are generated and stored in the Blackman/Jones database but not on SEDS, it becomes evident that the school's special education staff did not play a primary or active role in the MDT process. Blackman/Jones case managers have only "read only" access to SEDS and apparently cannot upload MDT minutes and other documents they draft into SEDS, while most school special education staff members have full access to SEDS.

move cases into a "closure" accounting column for purposes of counting cases as "timely implemented for Blackman/Jones purposes," whatever it takes. Case entries on case managers' computer screens turn yellow when case deadlines are imminent and red when deadlines have passed. Case managers as well as the entire Blackman/Jones team face clear accountability consequences, including termination, if they cannot produce timely case closures at high rates. The Evaluation Team recognizes the hard work and zeal of many of the Blackman/Jones case management team members and their overall desire to improve educational outcomes within the district. They have handled many cases with professionalism and efficiency, properly implementing and closing cases on a timely basis.

The Evaluation Team notes that there is a distinction between having a clearly focused responsibility and accountability for implementing HOD/SAs and measuring success and compliance on a narrowly construed numbers-basis alone. The latter approach risks creating a "culture of compliance" among the compliance case managers and reviewers which places the closing of cases as the central value in dealing with due process complaints and HOD/SAs rather than substantively addressing the educational and related services needs of students at issue in these legal actions, and in the process, implementing each case in a substantively complete manner. Yet, ironically, it is precisely the school District's single-minded focus on closure at all costs that has eroded the credibility and integrity of the case closure process in the past year. The enormous job pressure on staff members to get "the job done" appears to have created a climate in which an individualized, careful focus on the substantive issues at the heart of each student's case can be compromised or lost. And in the process, some staff came to view and excuse efforts to obtain closures "for Blackman/Jones purposes only" as an "administrative procedure." While the majority of cases reported as timely implemented and closed have been properly reported, we have seen a disturbing pattern of case closures that are not in reality substantively implemented consistent with the facts presented, the terms of the HOD/SAs, the case closure Protocols, and relevant IDEA provisions. Our review of cases during the course of the year reflects that fundamental misjudgments have occurred in the handling and closures of significant batches of cases as a result of the District's rush to reach the finish line and in the process, its adoption of short cuts that violate the letter and intent of the terms of the HOD/SAs, the Consent Decree, and applicable law.

Based on the findings discussed at length in this section, the Evaluation Team finds that the evidence reviewed does not confirm the District's data submission that 90% of HOD/SAs issued in the 2009/10 SY were implemented on a timely basis, in conformity with the requirements and calculation provisions of the Consent Decree. *See* Consent Decree ¶ 7, 42d, 43, 44, 46, 52. In reaching this conclusion, the Evaluation Team has taken the most conservative approach to the available data. First, we used the District's reported number of HOD/SAs as the denominator (938), without regard to whether other cases ought to have been included in the count. Second, we subtracted from the reported 586 timely implemented cases (a) the 33 cases discussed in section II.B. 1 above reported by DCPS as falling into the category of cases closed without evidence of actual implementation after IEEs were authorized; and (b) the nine cases reported by DCPS discussed in section II.B. 2 above where unimplemented HOD/SAs were rolled into new SAs and closed as timely implemented, and two other similar cases discovered by the Evaluation Team. Without reference to cases in any of the other categories discussed above, these 44 cases reduced the number of timely implemented cases reported on by the Defendants from 586 to 542. Applying the formula in the Consent Decree, ¶ 46, produces an 83% rate of timely implementation rather than the 90% reported. We believe there are many additional cases in other categories that have not been timely implemented, for the reasons discussed in Section II. B, which if included in the calculation, would further lower the rate of timely implementation.

In the process of driving the case closure process, the District has obtained the acquiescence of attorneys that cases are timely implemented for Blackman/Jones purposes in a range of cases. It is critical to understand that for most private counsel and their clients, the question of whether a client's case is "counted" as timely implemented and closed for Blackman/Jones purposes has no immediate significance. The pressing issue for counsel and parents in these cases is whether they can gain any traction in moving the student's evaluation, services or eligibility forward in the direction desired by the parent. An attorney at the negotiating table with a parent can face the Hobson's choice of approving a settlement that provides the promise of a timely evaluation or special education services conditioned on Blackman/Jones timeliness waivers or timelines for independent evaluations that typically are unrealistic or, alternatively, the choice of litigating for months more when the student has already experienced months and even years of delay in receipt of evaluations or services which predated

the due process complaint. In these circumstances, most attorneys will proceed to approve the settlement – even if required to "sign off" on waivers or timelines they think unacceptable, unenforceable, unrealistic, or irrelevant to the individual client. After all, a new due process case can always be brought regarding the student's receipt of FAPE or the District's failure to evaluate the student properly, as the evidence shows – even if the District declares a case "closed" for Blackman/Jones purpose. Yet, as the cases reviewed also show, evasion of the substantive issues arising in cases simply delays development of an appropriate educational program for the student, as required by law, and resolution of the dispute at hand.

The case closure Protocols adopted by the parties in 2006 were negotiated over many weeks. They were crafted to deal with the parties' understanding of the array of challenges posed by handling and closing HOD/SAs in a context where a range of dynamics may defer closure of cases, require cases to be kept "open and outstanding," or require more extensive school efforts to reach out to families to provide assistance: families frequently move; they have may have difficulty getting independent evaluations completed; students may be unavailable for evaluation for a variety of reasons including truancy or issues directly relating to their disability; parents may be difficult to contact due to work or other demands, etc. The Protocols also specifically addressed issues that related to how consolidated cases should be counted. These issues all are as pertinent now as they were in 2006.

The District's efforts to detour around the Protocols so as to create other vehicles or shortcuts for denominating cases closed are not consistent with the case closure Protocols or the Consent Decree. The Evaluation Team's case reviews indicate that even when private counsel explicitly asked for assistance in cases where evaluations proved problematic, the case managers focused so exclusively on case closure that their response typically was not to provide assistance – but simply to reiterate that meetings would be scheduled when all evaluations had been received. They had not received any directive that their responsibility should be to extend an offer of the District's completion of an evaluation, where an independent evaluation had not been conducted for a lengthy period of time – despite the Protocols' requirement for such an offer – and/or a re-opening of the case once evaluations were provided. (Protocols, Section II). In saying this, the Evaluation Team wants to make clear that it still recognizes that many staff members personally engaged with families and hoped to produce positive outcomes in these cases. Again, with respect to compensatory services, staff was not required during the 2009/10

SY to determine if awards of large volumes of independent compensatory services had, in fact, been initiated or delivered in any respect. The District had freed itself of this critical responsibility by delegating it back to the parents/attorneys of students via a blank voucher, regardless of whether parents in these circumstances were adequately positioned to oversee delivery of such services.

D. The Impact of Attorneys Fees' Issues on HOD/SA Implementation and Due Process Case Litigation

The conflicts over the payment of attorneys' fees that have persisted since the 2007/08 SY have compounded the dynamics involved in shifting responsibility to families for implementation of critical HOD/SA provisions. Many if not most of these families, because of their life circumstances, rely upon their attorneys to navigate a complex bureaucratic process to find and arrange for the special education and related services that have been delegated right back to them. DCPS policies and practices with respect to compensating attorneys for the time and effort required to perform work that otherwise would be the responsibility of DCPS staff can create an additional hurdle to students ultimately gaining the benefits they have won on paper, even though the policies were intended to provide a sound, uniform administrative review process for review and approval of fee invoices.

DCPS uses guidelines originally issued on October 1, 2006 for management and approval of attorney fee applications. (Exhibit 4) The guidelines provide that no fees will be paid for work on cases that occurs 30 days prior to the due process complaint (¶6.e). Counsel are also required to submit any invoices within forty-five (45) days of the issuance of the HOD/SA which may give rise to fees, although the guidelines include provisions for submission of supplemental invoices. Finally, the guidelines provide that DCPS will make reasonable efforts to process invoices within 60 days but that if the attorney receives no acknowledgement that the invoices have been processed within 90 days of submission, counsel may consider the invoice as denied. The General Counsel's Office views itself as having established a transparent, functional, and accountable process for attorneys to submit invoices and receive payment and responses regarding invoices submitted much more quickly than alternate processes that would require independent, often lengthy, litigation in federal court. Counsel for the District maintains that this process is handled in a manner that is congruent with the office's obligations to expend funds in a fiscally responsible and appropriate manner.

The Guidelines were issued prior to DCPS' shift to a model of relying heavily on counsel to carry the weight of arranging all evaluations and compensatory services for students. The Evaluation Team reviewed a small sample of invoices. The sample cases provided by the General Counsel's office appeared reasonably handled as a whole. On the other hand, the samples provided by private counsel reflected that whole swaths of work and hours had been declared not reimbursable, including the attorneys' ongoing essential conversations with Blackman/Jones case managers regarding the cases as well as work with clients and the professionals responsible for evaluations or compensatory services. The Evaluation Team recognizes that each case presents its own particular set of facts bearing on the appropriateness of fees requested. The Evaluation Team cannot make a full evidentiary-based assessment of fee payment issues at stake and does not endeavor to do so here. Still, there are certain issues which cut across the fee cases and potentially impact the entire due process and case implementation system within the District of Columbia.

Currently, the General Counsel's office generally declines to authorize payment to attorneys for diligent investigation of cases prior to litigation that may involve work (meeting with parents; obtaining and analyzing school records, treatment and evaluation documentation) that precedes by more than 30 days the filing of a due process complaint. This type of lead work may be essential to appropriate handling of cases and due diligence in representation of students whose cases don't suddenly emerge whole cloth from a single event occurring within the 30-day period prior to the complaint. Similarly, while the Guidelines authorize supplemental billing after 45 days, private counsel contend that their capacity to obtain full compensation after the initial 45 day period also is subjected to greater cutting and diminished after this time frame, despite the fact that their obligations under most HOD/SAs now typically continue long past a 45-day period.

We think it essential to observe that the time limitations regarding eligibility for attorney fees and the 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 implementing HOD/SAs, especially arranging independent evaluations and independent compensatory education which can be both time-consuming and protracted. In carrying out these tasks as well, the Evaluation Team has also seen cases in our sample where the parent and attorney have encountered difficulties in obtaining District-provided transportation

services that are essential to delivering the services contained in the Settlement Agreement, resulting in delays (*See, e.g.*, Case #s 23707, 23692 and 23070). Parents with few resources of their own rely on attorneys to provide the support and to make the arrangements that typically are required to implement the Settlement Agreements or HODs. Under these circumstances, the current policies and practices inject uncertainty into the process of reimbursing attorneys for the time and effort they are required to expend to carry out tasks that formerly have been the responsibility of DCPS employees. We believe that these guidelines and their application should be re-considered and revised and are pleased that the General Counsel for DCPS has now committed himself to such a review. We would additionally recommend that this review be conducted in consultation with members of the private bar, in light of the changed conditions that have transpired since the guidelines were promulgated in 2006.

III. RELATED SERVICES AND ASSOCIATED ISSUES

This section of the Report reviews and assesses the status of Defendants' attainment of the Consent Decree's performance measures and associated underlying IDEA legal requirements for the provision of timely IEPs, evaluations and reevaluations.[40] As the Evaluation Team has observed in previous years, the timely delivery of adequate and appropriate related services is essential to Consent Decree compliance. The Consent Decree itself recognized that approximately one third of all hearing requests involve allegations of untimely assessments and IEPs (Consent Decree, p. 9).

As in previous years, disputes over the adequacy or timeliness of assessments, evaluations and IEPs continued to lead to due process complaints and to HOD/SAs, and difficulties in delivering the required related services continue to impede timely implementation of HOD/SAs in the 2009-10 SY. According to data provided by DCPS, the number of due process complaints filed decreased by 38% from 2,335 in SY 2008-09 to 1,455 in SY 2009-10.[41] At the same time the number of complaints with allegations relating to assessments declined from 1,677 to 751 over that same period, according to a DCPS data run.

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

[41] In this case as well, the data reported by DCPS is different than that reported by the SHO. The SHO reports that there were 1,424 due process complaint filed in the period July09-June10.

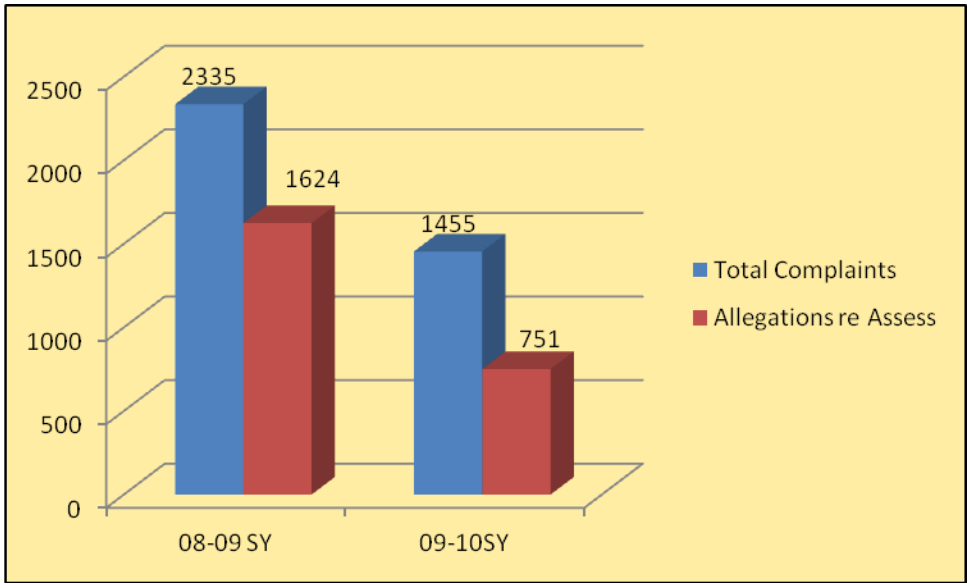

Fig. 3 Complaints with allegations relating to assessments

While the number of complaints decreased sharply, as did the allegations relating to assessments, the number of HOD/SAs requiring assessments increased more than threefold between the 2008-2009 SY and 2009-10 SY, despite an overall decrease in the total number of HOD/SAs from 1,199 to 938 over the same period. As we discuss elsewhere in this report, the vast majority of the increase was in independent assessments authorized by DCPS, although the number of assessments required to be performed by DCPS increased as well.[42]

[42] The Evaluation Team has not independently verified DCPS' breakout of the allegations identified in the Complaints.

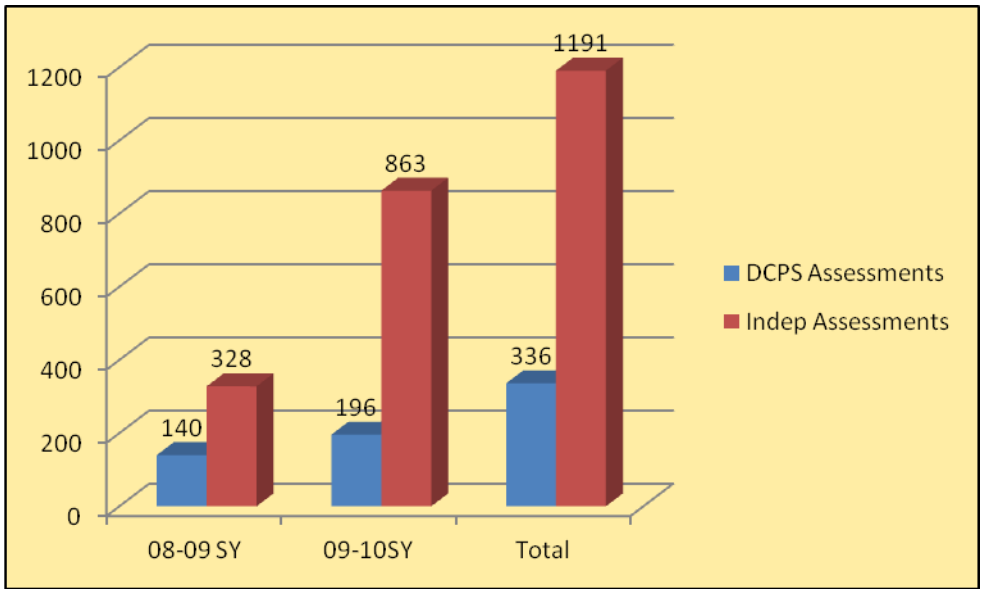

Fig. 4 Number of HOD/SAs Requiring Assessments

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,[43] and at a 90-100% standard of current IEP timeliness for students with disabilities. The OSSE produces monthly reports drawn from SEDS that reports on the Rate of Timeliness for IEPS, assessments and re-evaluations.

Recognizing that in previous school years many of the charter and non-public schools did not record their data in SEDS, with the result that reports drawn from this database were substantially inaccurate as to these schools, the OSSE proposed a new rule in June 2009 requiring charter and nonpublic schools to utilize SEDS.[44] This rule was adopted as an emergency rule on August 7, 2009 and later superseded by a substantially similar final rule on December 4, 2009.[45] In addition to adopting this rule, the OSSE adopted a Related Services

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

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

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

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

Policy on July 31, 2009 to be effective in October 2009 stating the obligation of all LEAs to provide related services as required in students' IEPs. In November 2009, DCPS adopted Missed Services Guidelines which specified schools' obligation to make up services that were missed within the quarter in which they were missed, and also specified the due diligence efforts required to provide the services.

This OSSE rule was initially promulgated in August 2009. Training in the use of the SEDS was offered beginning on August 31, 2009 for the DCPS LEA and training sessions continued to be offered throughout the school year, with greater emphasis on charter LEAs and nonpublic schools beginning in mid-September 2009. The rate of usage of SEDS in charter schools remained uneven throughout the school year, and the system was not accessible by all staff in the schools or to related services providers. At nonpublic schools, the responsibility for entering data in SEDS for DCPS students was given to Placement Specialists (later renamed Progress Monitors). At both charter and nonpublic schools, the Related Service Tracker function of SEDS was not utilized to record services provided or to track missed services.

In the Evaluation Team's review of a sample of cases from various schools, we found the content of the students' records in SEDS to be highly variable.[46] The legal documents related to due process complaints, resolution sessions, settlement agreements or HODs were rarely found in SEDS. The students' IEP was generally but not consistently available, – and many files had drafts of IEPS – some of which were adopted and some of which appear not to have been. In most cases, only the signature page of the IEP had been faxed into SEDS. In some instances, the final IEP document which had handwritten additions made at the IEP meeting was not found in SEDS, but was supplied to the Evaluation Team by the parent's attorney. IEP meeting notes frequently had not been uploaded into the system. As discussed in Section II, some IEPs and IEP minutes were contained in the Blackman/Jones database that were not contained in SEDS – and vice versa.

For DCPS schools, to which the Service Tracker function was available and expected to be used, actual usage and frequency of uploading reports of delivered and missed related services

[46] See also the discussion in Section IV regarding the observations in the Enrollment Audit about data in SEDS.

was also highly variable among schools and related services providers, partly due to issues with training and access to the SEDS.[47]

Despite the OSSE rule, during the 2009-10 SY attendance data with respect to charter schools from the OLAMS database was not being imported into SEDS consistently for all schools. As a result, in charter schools students have showed up on the special education roster several weeks after schools opened. Conversely, students who may have left the charter school but who had not been properly exited in the data system continued to appear incorrectly on the school's roster.

During school site visits conducted by the Evaluation Team, we observed continual issues in SEDS with accurately recording the correct related services provider. We discovered numerous instances in which the related services provider who may have been on the school's staff in the previous year was still recorded in SEDS as the current provider, although the student had actually been assigned on the caseload of another provider. Retired related services providers were still in the SEDS system and shown as carrying a caseload, although they had been replaced by current staff. As recently as October of the current school year, school social workers complained of having problems with caseload management due to data entry errors in SEDS. Their caseloads bounced unpredictably from one day to the next for no discernible reason. Thus, during the 2009-10 SY there continued to be significant concerns regarding the accuracy of data in SEDS which is used to produce the various reports used by Defendants to manage special education services and to produce reports that are distributed to the parties and the Evaluation Team.[48]

As a general matter, the data in SEDS with respect to the DCPS schools is more accurate as to the timeliness of students' IEPs and the timely completion of assessments and evaluations. The accuracy issues as to these schools are more acute in recording the ongoing delivery of related services prescribed in students' IEPs.

[47] At the beginning of the 2010-11SY, all related services providers were mandated to complete a one hour long web-based SEDS refresher training course that was made available to be accessed at any time. This training targeted key functions including how to upload an assessment and document services. At the same time, DCPS launched the use of an electronic signature for service trackers which significantly reduced the time and effort required by the documentation process.

[48] In section IV below, the Evaluation Team discusses issues related to the accuracy audit required by the Consent Decree.

A. Rate of Timeliness Reports.

The Rate of Timeliness reports for SY 2009-10 drawn from SEDS indicates that DCPS has met the 2008 standard for timely IEPs as contained in the Action Plan, but that all other LEAs continued to lag behind and remain below the expected performance goal of 90-100%.

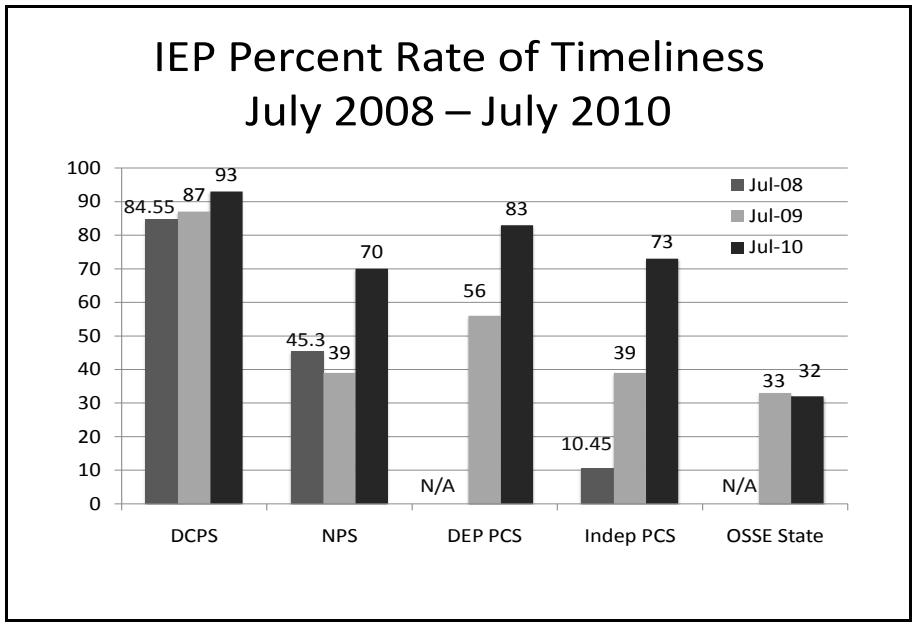

Fig. 5 IEP Rate of Timeliness

With respect to timely assessments, DCPS has improved over its performance in 2009 but has not yet reached either its performance level of 2008 or the Action Plan standard of 85-95% timeliness.[49] Nonpublic schools remained far behind at substantially the same level as 2009 at 37%, while both independent charters (43%) and dependent charters (10%) experienced declines from their performance in 2009. Although this data appears simple, in reality it is not so straightforward. An indeterminate number of students moving from DCPS schools to nonpublic and charter schools arrive with overdue IEPs and outstanding required assessments. While the same phenomenon, of course, occurs in reverse, there has been overall a greater flow of students into charters and nonpublics than back to the regular public schools.

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

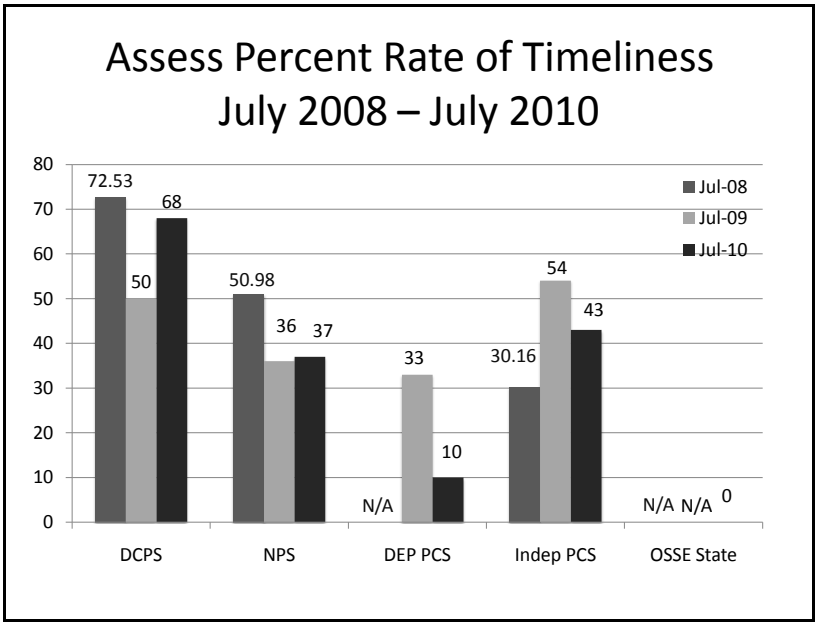

Fig. 6 Assessment Rate of Timeliness

There was across-the-board improvement in the rate of timely re-evaluations required at least once every three years, although these as well did not reach the 2008 Action Plan performance goal of 85-95% timeliness.

All of these data are as reported to the Evaluation Team, which has not conducted an audit to verify the accuracy of the numbers reported by the OSSE.

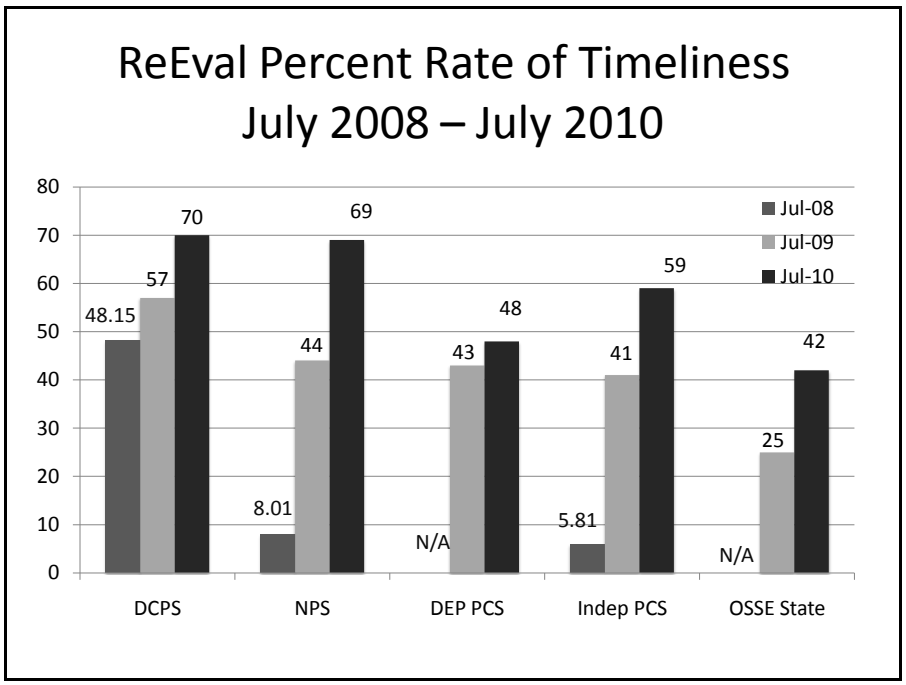

Fig. 7 Re-Evaluation Rate of timeliness

B. Charter and Nonpublic School Assessments.

As charter and nonpublic schools continue to report lower rates of timely assessments and re-evaluations than DCPS, the Evaluation Team regularly monitored the data regarding performance of assessments in these schools. Last year, the Evaluation Team reported: "As the new school year starts, there is an estimated current backlog of 548 open evaluations (352 psychologicals) affecting 440 students, which is in the same range as the numbers last year." (Report of the Evaluation Team for 2008-09 School Year, pp. 56-57).

Although the 2009-10 SY began with a substantial backlog, as the year progressed the total number of overdue assessments was steadily reduced according to data provided by DCPS. A bright spot has been the progress made through collaboration with the District of Columbia Association for Special Education (DCASE) for the performance of a subset of the outstanding assessments at a select group of nonpublic schools, some of which are participating in a Quality Provider Network through which they offer to perform assessments for other DCASE schools which do not have the internal capacity to do so. This collaboration succeeded in eliminating the backlog of assessments in nonpublic schools which had been reduced to zero by the end of June 2010. That contract with DCASE has since been terminated. (For the current school year DCPS has contracts with the Futures Group for the provision of some related services.)

DCPS Report Date	Backlog	SY09-10 Open Assessments	Total	Students Affected
12/10/09	509	278	787	588
2/25/10	188	392	580	469
5/3/10	39	255	294	N/A
6/17/10	14	95	109	N/A

Fig. 8 Charter and nonpublic assessments

C. Related Services Capacity.

The data reported to the Evaluation Team, as well as the due process complaints and HOD/SAs, indicate a continuing gap in capacity to provide the related services required by students' IEPs. Moreover, beyond the problem of timely assessments and evaluations discussed above, schools continue to experience problems in their ability to deliver the related services required by students' IEPs. In our previous report, the Evaluation Team discussed DCPS' view that there was an over-prescription of related services and its plans to reduce this over-prescription. (Report, pp. 48-52). However, according to the data provided by DCPS for the 2009-10 SY, there is no evidence of any significant change in the rate of prescription of related services. A plan to expand capacity by increasing reliance on Medicaid Managed Care Organizations also proved unsuccessful, as DCPS concluded that there was less available capacity than had been anticipated.

As discussed in the section II of the report on verification of the Defendants' rate of compliance with the Consent Decree measures for Jones' implementation, the evolving strategy for coping with the lack of related services capacity has been to shift the responsibility for securing assessments and evaluations to parents and their attorneys, and to rely on missed services plans and compensatory education awards to remedy the failure to provide the related services prescribed in students' IEPs.

The 2009-10 SY began with shortages of special education teachers and related services staff, based upon reports provided to the Evaluation Team by DCPS. On October 2, 2009, DCPS implemented a Reduction in Force of 266 positions to cover a budget shortfall. In a November 13, 2009 report on related services delivered by DCPS, there were 16 vacancies for related services providers and 19 vacancies for special education teachers. In December 10, 2009, DCPS reported gaps in service for OT/PT, speech and language and behavior support services affecting

161 students. A subsequent report on February 25, 2010 reported continuing gaps in service affecting 145 students, with seven vacancies for social workers, and lesser vacancies in occupational therapy and speech and language services.

According to a report on missed services provided by DCPS to the Evaluation Team on May 14, 2010, which reported on service gaps at schools that had no provider coverage for one month or longer, there were 163 students affected by these service gaps: inadequate behavioral support services affected 87 students, occupational therapy affected 33 students, and speech and language services affected 43 students. This report understates the dimension of the capacity gap due to its narrow focus on schools completely lacking in capacity for a month or more. The report did not capture the failure to provide services due to inadequate staffing or shorter-term vacancies, or the assignment of related services staff to perform administrative or crisis management duties which make them unavailable to deliver services. In conducting monitoring visits to schools during the course of the 2009-10 SY, the Evaluation Team frequently identified significant related service lapses due to such circumstances, even though there was not a vacancy for one month or longer.[50]

The overall magnitude of the gap in related service delivery is seen most clearly in a year-end report for 2009-10 SY. According to this report provided by DCPS, of the related services prescribed for the 5,710 DCPS students in special education, 73.53% were documented and 45.28% of the services were delivered to the student. Student absences and unavailability account for approximately 12% of the difference, with school closures (9.46%) and provider absences (7.16%) accounting for the remainder. The rate of delivery of the most commonly prescribed related services, Speech & Language (3,290 students) and Behavioral Supports (3,250 students), was 52.20% and 34.48% respectively. In May 2010, near the end of the school year, DCPS identified 11 schools which needed additional related services capacity and developed summer plans for social workers to make up missed services.

[50] The related service staffing shortage continued into the current school year according to a report provided to the Evaluation Team on October 1, 2010. That report indicated that due to vacancies in occupational therapy, 316 students at 30 schools were affected for between one to eight weeks. Social work vacancies affected 250 students at four high schools. This report also did not capture the failure to deliver related services due to administrative decisions to assign related service providers to perform other duties at a school. For example, during a site visit to Sousa Middle School by the Evaluation Team in October 2010, we learned that virtually no behavioral support services had been provided to students since the start of the SY as a result of a Principal's decision to assign social workers to other duties. Nor did it report on the impact of transfers of students from nonpublic schools to other placements which lacked the capacity to provide the related services prescribed in the IEPs.

The true picture of staffing shortages is clouded by the shared responsibility for hiring special education teachers and related services staff on both the school payroll and a central office payroll. If hiring decisions at a school result in inadequate related services capacity, additional positions from the central office pool may be assigned to fill the gap once they are identified and if positions and funding are available. Moreover, the reports provided did not capture data about support staff such as behavior techs who provide essential support services in the classroom for students who have related services prescribed in their IEPs.

D. Problems with Management of Related Services and Data System.

The data systems used by DCPS to manage related services delivery continued to be plagued with problems of accuracy, rendering them an ineffective tool for managing these services or providing the reports required by paragraph 65 of the Consent Decree.[51] Despite the reports and data provided by DCPS, we cannot properly rely on these data, as there is evidence of continuing problems with the accuracy of data regarding related services, some of which was described earlier in this section. Although the DCPS staff have worked hard at remedying many of the problems described in the Evaluation Team's last report (pp. 54-55) and have developed several plans of correction as the chronology below indicates, at the end of the 2009-10 school year, DCPS and the OSSE were still not able to provide the reports required by paragraph 65 of the Consent Decree, which in reality are essential tools for ensuring delivery of services. The Related Services Management Report (RSMR), which is the tool designed to produce the required reports, contained significant data entry errors that have persisted throughout the 2009-10 SY and continued into the current year, partly for the reasons described earlier with respect to importing attendance data from the charter school OLAMS database, but also due to other operational issues.

- On December 10, 2009, there was a plan to clean the related services data and implement a new Provider Management Application for related services to be rolled out by February 1, 2010 to identify gaps in service, achieve compliance by ensuring that all required

[51] The Consent Decree ¶ 65-66 provides:

> To ensure that related service delivery functions as required by law, the defendants shall establish an effective process to identify related service lapses as soon as possible and to resolve service lapses and individual complaints in an expeditious manner. . . . (b) DCPS will monitor and analyze the data from the ET system, to obtain an early warning on related service lapses and to determine individual staff performance and accountability...

documentation is inputted into SEDS, and provide reporting capabilities to display data on missed services.

- On February 25, 2010, the data validation was projected to be completed by March 5, 2010. The assessment database was reported to be 100% operational with the data validation completed. It was projected that by June 18, 2010 all assessments with a referral date on or before May 4, 2010 would either be completed or have properly documented due diligence process.

- On June 17, 2010, in the face of continuing problems with data accuracy, DCPS acknowledged that there continued to be erroneous caseload data for providers, as caseloads were not properly validated after training provided to SECs in late November 2009. It announced a new fix to assure accurate data reporting with a Plan of Correction and caseload validation to continue through August 2010.

- On October 10, 2010, DCPS reported that validation of caseloads was 78% complete and that in the validation process, data entry issues were identified. At the time of preparing an IEP in SEDS, if the staff did not enter a new start date for each prescribed related service, the software would continue to use the date of the previous IEP as the default entry. In pulling data from SEDS, the RSMR would not recognize prescribed related services which pre-date the IEP. As a result, the RSMR did not list a subset of students whose services were entered into SEDS with erroneous dates.

- Later in October 2010, DCPS reported a high occurrence of incorrect caseloads for related services providers due to providers not being assigned to students at the schools they serve using the correct system process. A smaller subset of caseloads was inaccurate due to school assignment changes. In total, 86% of students were not assigned to the correct school related services provider and required student-by-student central office manual reassignments in the data base. A new Plan of Correction was developed to complete validation of caseload data by November 8, 2010 regarding related services provider assignments, and to have correct data regarding service duration and have all students appearing on RSMR by January 4, 2011.[52]

- As charter and nonpublic schools were not using the Service Tracker function of SEDS, the RSMR could not produce reports regarding the services delivered or missed in these schools.

In summary, for the 2009-10 SY, DCPS has met the Action Plan performance goal for timely IEPs; the charter and nonpublic schools have not yet done so. All schools failed to meet the Action Plan performance goals for assessments. The Action Plan goals all fall beneath the

[52] In response to a draft of this Report, DCPS reported that it has continued its system wide data validation efforts with respect to related services provider assignments and had completed validating 96% of the caseloads by November 8, 2010. By December 1, 2010, the number of IEPs with inaccurate related services duration dates had been reduced to 3%. The Evaluation Team has not validated this data at this late juncture.

100% compliance requirement of the law with these basic legal foundation requirements of IDEA. Defendants continue to be unable to provide reliable reports required by paragraph 65 of the Consent Decree to identify and remedy lapses in related services.

IV. STATUS OF DEFENDANTS' OPERATION OF AN ACCURATE AND RELIABLE DATA SYSTEM

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).

In the 2008-09 SY, the District did not conduct an accuracy audit because it had recently been in the throes of transition to a new special education data system. In late fall of the 2009-10 SY, the District began making plans for a $1.5 million accuracy audit. The Evaluation Team raised major concerns regarding the scope, expense, and methodology of the audit from the start and addressed these in the status hearings held by the Court. The Evaluation Team's central concern was that the District's various data systems should be evaluated to determine if consistent and substantively accurate information for students is provided across systems. (For instance, throughout the 2009-10 SY, the charter school data still was not directly integrated into the Blackman/Jones database, and therefore school enrollment data for charter school students in that database was absent or erroneous and in conflict with other student enrollment information.) In the Evaluation Team's view, the accuracy audit was not designed to address these types of cross-system data issues or a range of other critical substantive data issues.

The Evaluation Team addressed issues surrounding the accuracy audit at the January 12 and March 23, 2010 status hearings. At the conclusion of the March hearing, District representatives agreed to revisit the entire audit process, to meet with the Evaluation Team and

Plaintiffs' counsel, and discuss the adoption of alternative strategies for using available resources to tackle, assess, and address substantive special education data issues and cross-system accuracy issues. The parties and Evaluation Team engaged in a number of positive discussions regarding these issues and special education monitoring. In the end, however, while the District expressed its commitment to a variety of ongoing data related initiatives, it did not adopt a concrete plan for reviewing special education data (enrollment, services, provider, HOD/SA, etc.) for accuracy or consistency across data systems.[53]

In examining SEDS data files for students while conducting individual case reviews for the instant Report, the Evaluation Team has observed that the IEP and service records in a large number of students' records appeared to be incomplete and at times, inaccurate – and this combination of incompleteness and inaccuracy has a practical impact on schools providing services to students. And, as noted in our case reviews, data and documents maintained in the Blackman/Jones database did not necessarily appear in SEDS. When we consider the SEDS and Blackman/Jones file data analyzed in the course of our individual case reviews or the system wide related service provider caseload data errors in SEDS discussed earlier, we would have to project that a credible accuracy audit would result in significant inaccuracy findings in a range of areas.

The District of Columbia's annual 2009-10 SY student enrollment audit by Thompson, Cobb, Bazilio & Associates, PC (TCBA) reinforces the Evaluation Team's view regarding the scope of data accuracy issues that continue to impact delivery of services to special education students and tracking of their records. TCBA used SEDS, rather than manual IEPs, for the first time in the 2009-10 SY for review of the records of students with disabilities. Its findings are consistent with our review of SEDS records. As this was the first year of TCBA's usage of the

[53] The types of initiatives OSSE and DPCS outlined in early May 2010 included activities such as completing an agreement with the Public Charter School Board with respect to the use of its student data system OLAMS; improving the accurate integration of the student docketing system with other student data systems; capturing charter school settlements in the Blackman/Jones database that charter schools had not reported; and implementing additional training and other measures to address problems of accurate data entry in SEDS. (OSSE and DCPS PowerPoint of May 5, 2010). As discussed at length in the Related Services section above, data errors continue to plague provider caseload data in SEDS and the related services management report; therefore, it is not accurate or truly functional. OSSE's contract with the Public Charter School Board for integration of OLAMS with the Blackman/Jones data finally materialized in time for the 2010-11 SY. This has resulted in improvements in the accuracy of the school student enrollment information in the Blackman/Jones database. Other policy changes and training initiatives surrounding charter school input of student special education information and documents into SEDS promise in the long run to increase the completeness of special education student data, so that schools can locate students' full records of service, IEPS, and applicable HOD/SAs.

electronic IEP data, OSSE and local schools may have a variety of legitimate issues to resolve with TCBA that relate to review of enrollment issues. Still, TCBA's findings as a whole are consistent with our review of SEDS records. The "special education funding levels" referenced in TCBA's findings relate directly to the level of hours of special education services required by a student's IEP and usually the student's educational environment (placement in a self-contained full time-special education program for instance vs. in a general education environment). TCBA found:

> Because SEDS can contain multiple versions of an IEP, the latest IEP in the system at any point in time may not be the IEP from the most recently properly convened meeting. As a result, hours captured from the signed IEPs did not always match the hours that were provided to TCBA in the SEDS data download for October 5th. Of the 5,748 DCPS students reported as special education, the hours recorded from the IEPs for 756 students did not match the SEDS download, of which 253 resulted in a different special education funding level…

Comparable findings applied to the public charter schools. (Enrollment for District of Columbia Public Schools and Public Charter Schools, October 5, 2009, http://osse.dc.gov/seo/frames.asp?doc=/seo/lib/seo/final_2009_enrollment_report__march_24_2010.pdf, accessed December 2, 2010). Among other notable data accuracy issues, the audit found that 160 total public school (DCPS and charter) students with disabilities had an IEP but were not included in SEDS data or on charter rosters as of October 5, 2010. It also found that date of birth information for students – often considered crucial for distinguishing students with similar or identical names – had little data integrity.

Despite the very real concerns identified above, we think it essential to recognize that DCPS' and OSSE's focused efforts on data-driven education reform and accountability over the last three years has vastly elevated the emphasis placed on data analysis and usage in the District compared to 2006, when the Consent Decree was approved. In the first two years after the Consent Decree's adoption, it was difficult at times to obtain *any* reliable data reporting from Defendants, whether on Blackman/Jones implementation, student enrollment, IEP and assessment timeliness status, or the number and age of pending due process complaints and decisions. In the last two years, the District has clearly been totally engaged in the challenge of developing and using data to guide its education, reporting, and service support efforts. The contrast between the DCPS central office's approach to and usage of data in the 2006-2008 and

2008-2010 periods could not be sharper. While the Evaluation Team must express grave concerns regarding SEDS' non-systematic recording of student IEP documentation and the District's continuing inability to launch and maintain a functional and accurate data system for managing related services delivery, we also recognize the notable transformation in the District's focus and usage of data for all purposes, including special education management.

The District's current expansive use of student data in its work raises the stakes of using accurate data in sensible, functional ways. The Evaluation Team has seen in the related services management report and other contexts examined during monitoring how huge volumes of data and reports can be generated that in the end do not produce useful tools and results without accurate data and a deep understanding of what the data actually means. We recognize that the District's productive use and management of student data is in a major state of evolution. The District will still need to engage in the cross-data system, candid internal data analysis necessary to complete the process of developing an accurate and reliable special education and HOD/SA data system for special education management purposes.

V. PROVISION OF SERVICES AND ADHERENCE TO IDEA REQUIREMENTS IN THE "RE-INTEGRATION" PLACEMENT PROCESS FOR STUDENTS PREVIOUSLY ATTENDING NON-PUBLIC PLACEMENTS OR FULL TIME SPECIAL EDUCATION PROGRAMS

The 2009/10 SY DC Enrollment Audit Report reflects that as of October 5, 2009, 2,336 students with disability were attending DC funded private placements, and 117 were attending county schools on a tuition basis. Over time, a large number of these students have been placed in nonpublic special education schools and programs as a result of the District's failure to provide students with a Free and Appropriate Public Education (FAPE), as required under IDEA and resulting due process complaints and HOD/SAs. *Florence County School District School District Four v. Carter*, 510 U.S. 7 (1993). Some students have been placed in nonpublic placements after the preliminary injunction process used for individual cases in this case. Hearing officers also have ordered nonpublic placements, particularly after finding that a succession of HODs and/or SAs or student IEPs had not been fully implemented by the District's schools. Because many Blackman/Jones class members have been the subject of due process cases culminating in nonpublic placements at one time or another during their education, they are

likely to be particularly affected by the District's new "reintegration" initiatives which seek to change the nonpublic school placement of significant numbers of special education students.[54]

In the last two school years, the District's leadership has repeatedly publicly expressed its intent and plan to "reintegrate" students with disabilities in nonpublic placements to less restrictive educational programming and optimally provide appropriate educational services in public school settings, with attendant significant cost savings for the District schools at large. As the Evaluation Team detailed in our 2008-09 SY report, at the end of the 2008/09 SY and directly preceding the 2009/10 SY, DCPS "returned" 51 students from nonpublic schools to DCPS schools and 46 students from private, comprehensive residential programs outside of DC to a mixture of DCPS, charter, and nonpublic schools. (Evaluation Team Report for 2008-09 SY, pp. 84-85). We reported at that time that the majority of the students who had been "returned" had not been enrolled in any schools or programs as of the date of our Report.[55] In January and February 2010, the parties submitted memoranda to the Court regarding their respective differing assessments regarding the enrollment status of these students and whether DCPS had unilaterally moved students without requisite parental or student notice and participation, as provided for under the law. *See* 34 C.F.R. §300.501(c)(1)[56] (Docket Docs. # 2220 and 2227).

By the beginning of the 2010-11 SY, DCPS, through its reintegration placement initiative, had changed the placement of an additional 301 students with disabilities in nonpublic placements.[57] Due process complaints had been filed in the past for 119 of these students,

[54] Some of these students have profound disabilities; some are wards of the District, with multiple life disadvantages compounding the impact of their disabilities; others have a range of emotional and learning disabilities that have significantly affected their capacity to access educational services and make progress in the regular public schools.

[55] The Deputy Chancellor for Special Education disputed some of these findings at the October 8, 2009 hearing.

[56] 34 C.F.R. § 300.501(c)(1) provides, "Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child." 34 C.F.R. § 300.501(c)(4) provides that if the placement decision is made by the school team without the participation of the parent because of the LEA's inability to obtain the parent's participation, it must maintain a record of its attempts to ensure their involvement. When students have reached the age of 16, federal law requires that the student be invited to participate in this meeting and review process as well as representatives of any agency that is likely to be responsible for providing or paying for transition services. Extensive procedural requirements apply requiring advance notice and reasonable scheduling of meetings as well as due diligence in securing parental participation. *See*, generally, 34 C.F.R. § 300.321- .300.322. If the student is of the age of majority, he would be accorded the same rights as a parent.

[57] Only a few of these 301 students came from residential placements.

according to data provided by DCPS and for 17 of the students in the days prior to the November 17, 2010 report provided.[58] For 101 of these 301 (or 33%) students, no date of admission (or actual enrollment) to a new school was listed, even though a variety of schools were identified as assigned schools. The Evaluation Team's spot checks of the SEDS records for randomly selected students in this group of 101 students indicates that these students generally are "in transit" or not apparently enrolled at the schools identified. Seventeen additional students are formally classified as "in transit" on the DCPS list. Similarly, the DCPS November 17, 2010 report indicates that only 13 of the 51 (or 25%) students moved from nonpublic schools in the preceding year (leading up to or at the start of the 2009-10 SY) are now actually enrolled, per DCPS' enrollment data, in any school (whether a DCPS school or a nonpublic anew). Three students additionally were listed as having graduated.[59]

Older students have been particularly targeted for DCPS' reintegration placement changes based on DCPS' view that many of them are effectively no longer being educated or served in their nonpublic schools. Students remain eligible for special education services through the school year in which they turn 21 and from 16 onward, should be provided transition support services. 34 C.F.R. § 101(a); 34 C.F.R. § 300.320(b). One hundred and twenty-five (125) of the students whose placements were changed in the 2009-10 SY and start of the 2010-11 SY students are identified as 18 years of age or older. Similarly, the majority of the students moved from nonpublic programs (nonresidential) in the preceding year were 18 years or older or over 16 years of age in the case of the residential programs. Many of these students have at various times experienced chaotic and frustrating outcomes in the educational system and manifested inconsistent attendance and truancy patterns, particularly as they grew older. They may require intensive intervention services to support their continued attendance and engagement in educational or transitional services.[60] In DCPS' view, the District was seeking to address the

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[58] The Evaluation Team has spot checked but not fully verified the data DCPS has furnished to us regarding students moved from nonpublic programs.

[59] The rest of these students (38) are not listed as being associated with a charter school – one explanation previously provided for their location. Twenty-nine of the students are listed with the same last present date of June 22, 2010, which appears to be used as a "dummy date" in the attendance database, rather than an actual attendance date. June 22 was the last date of school in the 2010 SY, but the data reflects that none of these students were listed as registered in school in this time period.

[60] This does not mean that the District cannot proceed with an appropriate IEP exit meeting and truancy procedures

needs of the group of older students by moving forward with alternate public placements. DCPS indicates it has endeavored to search for more effective and economic placement alternatives to serve these students. The evidence indicates that these efforts at this juncture are still at a fledgling level, as many of the students whose placements were modified now are not enrolled in school and a significant number were moved to new placements in a manner outside the parameters of the legal requirements of IDEA. See, 34 C.F.R. § 300.116, § 300.322- §300.324.

The Evaluation Team cannot resolve the question of whether DCPS unilaterally proceeded with a change in placement for a substantial proportion of students moved from nonpublic schools in the periods leading up to the 2009/10 or 2010/11 school years. However, we are able to assess the way in which placement occurred for approximately 51 students placed in two quite different educational/vocational programs – programs which are clearly preferable to some of the other school placements assigned. The vast majority of these 51 students were placed by DCPS, with at best nominal consideration of the change of placement requirements of IDEA.[61] They were often selected based, at least in part, on truancy patterns, as opposed to their needs and capacity to effectively access and benefit from the programs. Nine of the 29 students placed at Advance Path came from SunRise Academy, which OSSE determined should be closed after a monitoring visit in early May 2010 identified systemic lapses in the delivery of related services, specialized instruction, and management of student attendance and truancy. (OSSE Monitoring Report of May 7, 2010 for SunRise Academy). DCPS representatives participated in this monitoring review.

IEP team meetings were not held in most of these students' cases prior to the placement changes, even though in the case of students such as those from SunRise Academy, the District was well aware of their need for new educational placements by early May 2010. In the case of the SunRise students, Prior Notices of Placements were issued, though they failed to substantively convey the information required under law with respect to the proposed placement. *See* 34 C.F.R. § 300.503. There is no evidence that actual IEP meetings were convened, as

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if students are persistently truant after the age of majority and refuse to attend school.

[61] DCPS has represented, though, that it did engage in dialogue with students regarding their placement interests prior to moving them to these new programs.

required by law.[62] 34 C.F.R. § 300.116, § 300.322- §300.324. In a variety other cases, no PNOPs were issued, nor were the students' IEPs adjusted to address their individual support and educational needs in programs markedly different from the full-time special education programs in which they had previously participated, including far fewer hours of instruction.[63] DCPS is only now on a crash course of holding IEP meetings, essentially to adjust students' IEPs to address their new placements.

Defendants' submission regarding non-public placement changes last year reminded the Court that students over the age of 18 could make their own decisions regarding their IEP services. (Doc. #2227, p. 3). Federal law, however, requires that when a student reaches the age of majority under State law, the public agency must formally notify the parent and child of any transfer of rights and that all notices required under IDEA shall be provided to both the child and parents. 34. C.F.R. §300.520(a).[64] That said, the District still is obligated to observe the full IEP participation and review process required by IDEA in conjunction with a change in a student's placement. Moreover, we must note that some of these students have acute intellectual as well as emotional disabilities and may require assistance from counsel and parents in negotiating with District officials how best to make determinations with respect to major changes in their respective educational programs. Unilateral placement changes by the District undermine the legally required opportunity for students to obtain the parental, legal or other support they may need to participate on a fully-informed basis in determining an appropriate educational program and IEP placement change process.

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[62] While letters of invitations to attend an IEP team meeting were issued in selected students' cases, SEDS does not reflect any meetings being held in the months prior to the change in placement or the development of new IEPS to address the new placements.

[63] The changes that occurred did not entail mere changes in building locations without significant changes in the students' educational programs. Where a change in location results in a clear departure from the requirements of a student's IEP program that impacts the nature of services delivered, a change in "educational placement" occurs. Additionally, "[c]ourts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment." *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005).

[64] Additionally, the State (District of Columbia) "must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of this Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program." 34 C.F.R. § 300.520(b).

Most of these 51 students' IEPs called for full time special education instruction (27.5 hours) plus weekly counseling or other related services. One of the programs, Advance Path, provides a half-day credit recovery instructional program, with a major component of the program being based on the student's working on programmed curriculum on an individual computer, with instructors available as needed for resource support. The other program, Project Search, offers a full day program, consisting of both instruction and vocational experience and training in one of three different federal agencies. These programs offer very real potential benefits to properly selected students. However, neither of these programs was congruent with most of the students' current IEP instructional service hours and requirements. Despite the recognized individual behavior support service needs of most of these students for successful program involvement, IEP-required social work related services were not in place for them in their new programs, which lacked the capacity to provide such services. Initiation of these services is now supposed to start the week of December 13, 2010, and compensatory services will have to be offered instead. Other related services also were initiated well after the start of the school year and are being offered in a catch-up or compensatory double-up mode. We recognize that these new programs extend substantive, concrete benefits to some of these older students, especially those who are now in a position to take full advantage of the programs without the additional IEP supports or services that have in the past been recognized as needed. However, the placement of students in totally different programs without required IEP services and supports may jeopardize some students' chances of successful transition.

Students placed in both of the above programs were assigned to DCPS' Transition Academy at Shadd for administrative, enrollment, and special education management purposes. Shadd is DCPS' designated district wide program for serving high school age students with severe emotional disabilities. As part of the reintegration placements, there were some students with primary disabilities other than emotional disabilities, who were also assigned for direct enrollment at Shadd. The challenges of addressing the huge range of educational and IEP non-compliance issues created by these inadequately planned transitions swamped the school and its special education compliance and related service resources. DCPS has now initiated a "corrective action plan" and expedited schedule of IEP meetings to address the educational and IEP compliance issues that have developed.

The District has the authority to initiate proposed educational placement changes to programs for students which provide FAPE and are tailored to address their individual needs in the least restrictive environment with appropriate supplementary supports and services designed to create educational benefit. *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176, 203 (1982); 300 C.F.R. §§ 300.101, 300.107, 300.115, 300.114; 300.116. The Evaluation Team recognizes the responsibility of LEAs to regularly review students' placements in nonpublic schools to assess student participation and educational progress in such settings. If students are habitually truant or are otherwise not making academic progress in such settings, LEAs can and should review the appropriateness of the placement and consider anew whether less restrictive alternative placements offer the promise of better outcomes for these students before their entitlement to FAPE ends. The concern we express has to do with the manner in which these transitions have been managed and with the capacity of other alternate placements to meet the educational and related services needs identified in their IEPs. The fact that a significant number of students who have thus been moved can no longer be located in any school environment must be a cause for concern. Even where the District's overarching programmatic purpose is wholly appropriate, a routine effort to change the placements of students in non-compliance with basic IDEA strictures would pose risks for the future of effective re-integration efforts and undermine the probability of "returning" these students to viable educational or vocational programs. Most germane for the issues at stake in this case, such a course of action would only serve in the long run to catalyze more due process complaints, and thus perpetuate the very cycle of due process complaint litigation and HOD/SA implementation challenges the District earnestly seeks to break. In responding to the draft version of this Report circulated to the parties, DCPS representatives have strongly expressed their commitment to future management of change of placement transitions from nonpublic placements in conformity with IDEA.

VI. CONCLUSION

The District's leadership has aggressively pushed an agenda of education reform over the last three years. In the special education arena, the District has moved forward in developing the organizational resources, accountability process, and data system foundation that have proven essential to its significantly expanded capacity and equally significant performance in implementing HOD/SA obligations on a timely basis. We recognize the extraordinary hard work

and fiscal resources that have been devoted to establishing this foundational structure and in making the demonstrable progress that has been achieved. Yet, as we stated at the outset of the report, some of the most challenging work lies ahead.

The process of implementing HOD/SAs, entered after parents have been forced to file due process complaints to address educational or related services deficits in their children's schools, must be more than simply an exercise in achieving technical compliance, especially by altering the rules to make it easier to do so. The spirit of educational reform, which the District has rightly and enthusiastically embraced, requires a more robust effort to actually correct the long-recognized deficiencies in the special education system, specifically for the students who have successfully won HOD/SAs, but also for the broader population of students with special needs. To that end, the District must stretch beyond a quick-fix, "track, issue independent authorizations, and close-out" paradigm in handling implementation of HOD/SAs, work far more collaboratively with students' counsel in problem solving, and engage in candid, in-depth reviews of these cases, if it is to move the last miles required for full Consent Decree compliance. In the absence of this more robust and open approach, parents – aided by their attorneys – will continue to seek additional and alternative educational needed services through due process cases – and thereby continue the very dynamic that led to the Consent Decree in this case.

Based on our close work with District staff over the past three years, the Evaluation Team is confident that the District currently has the commitment, capacity, and quality central staff required to take this reform effort to the next level of challenge. Yet we also recognize that any transition in top leadership, as is now underway in the District, results in long term changes in staff and operations – and can pose challenges, risks, and opportunities for maintaining organizational momentum and focus on change initiatives adopted by a prior administration to address systemic legal and educational infirmities. The challenge in the next two years will be especially acute because revenue resources for the funding of schools will likely contract, particularly with the cessation of the Stimulus Act's expanded education funding. The serious work required to sustain and build on the progress to date will require continued hands-on leadership commitment on the part of the District in the period ahead.