

**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.)	
_____)	

**EXECUTIVE SUMMARY
OF THE REPORT OF THE EVALUATION TEAM
FOR THE 2009-10 SCHOOL YEAR**

Submitted by:

**Amy Totenberg and Clarence J. Sundram
Court Evaluation Team**

Filed: December 10, 2010

By: Amy Totenberg, Monitor

EXECUTIVE SUMMARY

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.

This report finds that the 2009-10 SY has been a year when the focused efforts of the District of Columbia Public Schools (“DCPS”) and the Office of State Superintendent of Education (“OSSE”) 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 reform process that has been driven by central office initiatives and is 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. The Evaluation Team does not address here the *Blackman* issues involving operation of the Student Hearing Office based on the parties’ report of a likely resolution of that part of the case. Instead, we limit this report to the *Jones* part of the Consent Decree requiring timely implementation of Hearing Officer Decisions and Settlement Agreements (“HOD/SAs”).

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)).

A. *Compliance measures*

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)).

Although the Defendants reported having met the Consent Decree standard of 90% timely HOD/SA implementation in the 2009-10 SY, the Evaluation Team’s review of a sample of 100 cases did not confirm this level of compliance. Using the most conservative analysis, we concluded that the District’s HOD/SA timely implementation rate fell at least seven percentage points lower than the 90% standard. The percentage of timely implementation would be still lower if we considered the many additional cases that we determined had been improperly classified by Defendants as timely implemented. (Report, Section II, B). The difference resulted largely from decisions of the Defendants to classify as timely implemented cases in which a variety of procedural shortcuts or devices were used, some of which violate the Case Closing Protocols adopted pursuant to the Consent Decree ¶44, or alternatively, case closures which entailed substantive errors. As a result, some cases were reported as timely implemented when in fact the actions required by a Settlement Agreement had not occurred; others were reported as timely implemented even though the evidence indicated otherwise.

These cases fell into several different categories described below, although many of the cases overlap into multiple categories, including:

- (1) cases closed as timely implemented, after DCPS authorized independent evaluations, without supporting evidence of actual timely implementation;
- (2) cases closed by a subsequent settlement agreement which asserts that the case is timely implemented while substantially re-ordering its provisions in a new Settlement Agreement;
- (3) cases in which a subsequent HOD/SA finds that the previous HOD/SA was either not timely or not implemented but continues to be counted by DCPS as timely implemented;
- (4) cases where the Evaluation Team finds that the determination of timely or full implementation is not supported by the record and attorney “waivers” were liberally misconstrued;
- (5) cases in which improper internal “extensions” of time were granted to make the cases timely;
- (6) cases closed as timely implemented, after DCPS authorized compensatory services, without supporting evidence of actual substantive initiation of services; and,
- (7) cases in which DCPS convened Individual Education Program (“IEP”) Team meetings required by HOD/SAs where the teams were not legally constituted teams under the Individuals with Disabilities Education Act (“IDEA”).¹

In sum, our review of cases during the course of the year reflects that while major progress has been made, fundamental misjudgments occurred in the handling of significant batches of cases as a result of the District’s rush to reach the Consent Decree’s 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.

B. General Observations

1. The Defendants have made notable substantive progress in creating and maintaining the Blackman/Jones database to manage their tracking and implementation of HOD/SAs. The accuracy and reliability of information in this data system used for tracking the progress of individual cases stands in sharp contrast to the chaotic conditions which existed during the first two school years (2006 – 2008) of the Decree. The assignment of clear responsibility to

¹ We note that in our analysis, though, we ultimately did not count any case as not properly classified as implemented solely based on the fact that a MDT/IEP team required by a HOD/SA did not include a proper legal team, as specified by the Individuals with Disabilities Education Act.

central office compliance case managers for oversight of 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.

2. The total number of due process complaints filed has continued on the downward trend noted in our previous report as has the number of HOD/SAs issued, although the complaint rate has generally drifted upward since January 2010. (Report, Section I. A) At the same time, the number of HOD/SAs requiring diagnostic assessments of students --- primarily to be conducted independently by professionals retained by the parents -- increased more than threefold over the previous year, despite the overall decrease in the total number of HOD/SAs. (Report, Section III). The vast majority of provisions for compensatory services² in Settlement Agreements similarly called for independent provision of such service. Generally, the great bulk of Settlement Agreements entered into from the 2009-10 SY forward shifted the responsibility for implementation of critical provisions to parents and their attorneys. While parents and their counsel often welcome the opportunity to have access to independent assessments and services, the shift accomplished in these cases often was tied to provisions requiring completion of independent assessments or evaluations in limited time frames that Defendants have generally not been able to meet. The shift in responsibility also occurred without any offers of District assistance when difficulties arose in the execution of independent evaluations, although such an offer of assistance is required by the case closing protocols adopted pursuant to the Consent Decree.
3. The attorney fee guidelines adopted by DCPS in 2006, are intended to establish 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. However, these guidelines generally place limits on the time period for which fees will be paid to the 30 days preceding the filing of a due process complaint, and 45 days after the issuance of an HOD/SA. With the shifting of substantial responsibility for the implementation of HOD/SAs to parents who must rely upon their attorneys for case evaluation and support during a more extended period of time, the Evaluation Team believes these guidelines should be reviewed and revised. (Report, Section II. D)
4. The capacity for the provision of related services remains limited due to both short staffing and the management and allocation of resources. According to a report provided by DCPS for the 2009-10 SY, 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. (Report, Section III, C)

² Compensatory education service is authorized when students have not received special education instruction or related services as required by their IEP or law, and make-up services are deemed necessary.

5. 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, 2008,³ and at a 90-100% standard of current IEP timeliness for students with disabilities. The Office of the State Superintendent produces monthly reports drawn from the Special Education Data System (“SEDS”) that reports on the Rate of Timeliness for IEPs, assessments and re-evaluations.
 - a. 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%.
 - b. With respect to timely assessments in the 2009-10 SY, DCPS has improved over its performance in 2009 but did not reach either its performance level of 2008 or the Action Plan standard of 85-95% timeliness.⁴ Nonpublic schools remained far behind at substantially the same level as 2009 at 37%, although the Evaluation Team notes that this data may, in part, reflect delays in DCPS’ performance of assessments ordered for students placed in nonpublic programs. Both independent charters and dependent charters experienced declines from their performance in 2009, with respective assessment timely rates of 43% and 10%.

The low rates for dependent charters may in part reflect, as in the case of the nonpublic schools, a backlog of delayed assessments that had to be tackled due to prior gaps in DCPS’ performance of required assessments. Finally, the rates for independent charters may be negatively affected by the failure of some independent charters to enter student assessment data into SEDS in the first part of the 2009-10 SY.
 - c. 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. (Report, Section III, A)
6. 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.
 - a. The data in the software systems used by DCPS to manage related services delivery continued to be plagued with problems of accuracy due to data entry errors. As a

³ The Action Plan assumed achievement of these measures by the 2008 SY and therefore did not contain goals for school years past June 2008. (The Action Plan goals all fall beneath the 100% compliance requirement of the law with these basic legal foundation requirements of IDEA.)

⁴ 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 hit the 95% benchmark by March 1, 2011.

result, these systems continued to be unable to produce an effective, valid, and accurate reporting tool for managing related services as required by paragraph 65 of the Consent Decree.⁵ 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.

- b. 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).
 - c. The District began work on an accuracy audit with a design that the Evaluation Team did not believe would result in meaningful or helpful results. The District agreed to re-visit how to best approach the accuracy audit issues. 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.
 - d. 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. (Report, Section IV)
7. 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. Many of the students the District identified for placement changes are older students who had poor patterns of attendance in their previously assigned nonpublic schools. By the beginning of the 2010-11 SY, DCPS, through its reintegration placement initiative, had changed the placement of 301 students with disabilities in nonpublic placements in addition to the 97 moved nonpublic schools at the end of the preceding school year. Due process complaints had been filed in the past for 119 of these 301 students, according to data provided by DCPS and for 17 of the students in the 90 days prior to the November 17, 2010 report provided.

DCPS indicates it has endeavored to search for more effective and economic placement alternatives to serve these students' needs. The evidence indicates that these efforts at this

⁵ 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...

juncture are still at a fledging 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. For 101 of the 301 (or 33%) moved by the start of the 2010-11 SY, no date of school admission (or actual enrollment) for a new school was listed in documentation provided to the Evaluation Team. 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. (See generally, Section V.) The Evaluation Team recognizes the systemic challenges posed in developing or securing appropriate programs for older students and addressing their truancy patterns. However, placement changes that are handled in non-conformity with IDEA will potentially undermine the probability of "returning" students to viable educational or vocational programs and in the long run may catalyze more due process complaints, thus perpetuating the very cycle of due process complaint litigation and HOD/SA implementation challenges the District earnestly now seeks to break.

C. Conclusion

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 needed educational and related 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, can result 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 for the funding of schools will likely contract, particularly with the cessation of the Stimulus Act's expanded federal 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.