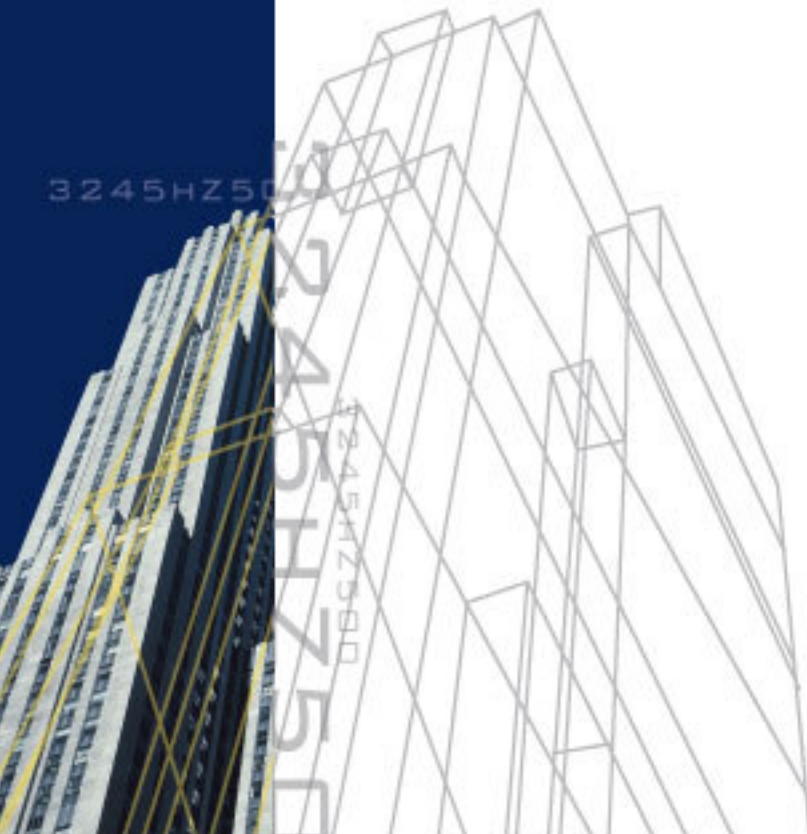


**L.V. v. D.O.E.
03 Civ. 9917 (RJH)**

Stipulation and Agreement of Settlement

**Independent Auditor's First Benchmark
Report**

June 11, 2009



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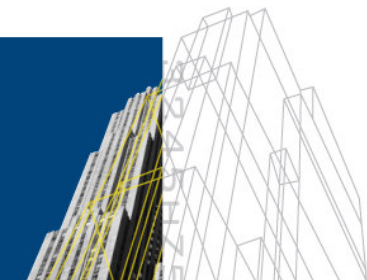
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I. Introduction

A. Overview

On December 12, 2003, Advocates for the Children of New York (“AFC”) and Milbank, Tweed, Hadley & McCloy LLP (“Milbank”) filed a class action, *L.V. v. D.O.E.* 03 Civ. 9917 (RJH). The class was comprised of parents of special needs children who alleged that while they had obtained a favorable order from an Impartial Hearing Officer against the New York City Department of Education (“Defendant” or “the DOE”) or stipulation of settlement placed on the record at an impartial hearing with the DOE, the DOE failed to obtain full and timely implementation of such order or settlement.

On December 11, 2007, the Corporation Counsel of the City of New York on behalf of the DOE and AFC and Milbank on behalf of Lead Plaintiffs and class¹ (“Plaintiffs”), referred to collectively herein as (“the Parties”), signed a Stipulation and Agreement of Settlement (“Stipulation”) in connection with *L.V. v. D.O.E.* 03 Civ. 9917 (RJH). Pursuant to the terms of the Stipulation, Daylight Forensic & Advisory LLC (“Daylight”) was appointed as Independent Auditor on March 26, 2008. On May 9, 2008, the DOE formally engaged Daylight to commence the independent audit.

This report focuses on Daylight’s review of Injunctive Relief Subclass² Orders and summarizes our analysis of the Total Orders and Total Action Items that were part of the first six-month Benchmark Measurement Period (“First Benchmark Period”).³

¹ Pursuant to Section I,1.f of the Stipulation, “Class” is defined as the Compensatory Relief Subclass and the Injunctive Relief Subclass.

² Pursuant to Section I,1.r and h of the Stipulation, “Injunctive Relief Subclass” is defined as the class of all persons who, on or subsequent to the Commencement Date of December 12, 2003, (1) obtain or obtained a favorable Order by an Impartial Hearing Officer against the DOE or stipulation of settlement placed on the record at an impartial hearing with the DOE and (2) fail or failed to obtain full and timely implementation of such Order or settlement.

³ Pursuant to Section III.16.b. of the Stipulation, this report considers Orders issued between June 1, 2008 and October 25, 2008 whose Action Items were due on or before November 30, 2008.

The terms defined in Section I. Definitions of the Stipulation apply to the present report.

B. Injunctive Relief Subclass

On August 6, 2008, Daylight submitted its report related to Orders issued between February 1, 2008, and before the Effective Date of June 1, 2008. The Stipulation also requires the Independent Auditor to generate reports concerning the DOE's implementation of Orders and Action Items for all Quarterly Measurement Periods (each a "Quarterly Report") and Benchmark Measurement Periods (each a "Benchmark Report") beginning on the Effective Date of June 1, 2008, until the prospective relief provisions of the Stipulation cease to be in force (Section III. Injunctive Relief; paragraph 16, and paragraph 17, Rights Retained by Injunctive Relief).

Daylight submitted its finalized First Quarterly Report on January 9, 2009. Our draft Second Quarterly and First Benchmark Reports were issued to the Parties on February 5, 2009. On March 27, 2009, Daylight received comments from the Parties on these reports. The finalized version of the Second Quarterly Report was issued in conjunction with the present report.

This first Benchmark Report includes an aggregate analysis of results from the first Quarterly Measurement Period ("First Quarter") and the second Quarterly Measurement Period ("Second Quarter") and documents whether the First Benchmark established in the Stipulation, in Section III. Injunctive Relief; paragraph 4, has been met.

Pursuant thereto, the DOE was required to Timely Implement 75% of Action Items or Orders to be in compliance with the six-month First Benchmark Period.⁴ If the DOE Timely Implemented 75% or more of Action Items within the First Benchmark Period, it had to also Timely Implement 70% or more of Orders within the First Benchmark Period to be deemed in compliance, or vice versa.

⁴ Pursuant to Section III.15.a. of the Stipulation, Daylight is required to measure compliance for each Quarterly or Benchmark Measurement Period, and separately calculate the percentage of Orders and Action Items that were Timely Implemented for Payment and Service Orders.

The following table represents the two scenarios by which the DOE could achieve compliance with the First Benchmark:

First Benchmark Period	Total Counted Orders	Total Counted Action Items
Compliance Scenario 1	75.0% Timely Implemented	70.0% Timely Implemented
Compliance Scenario 2	70.0% Timely Implemented	75.0% Timely Implemented

II. Executive Summary

Based upon the requirements of the Stipulation, Daylight measured implementation of the First Benchmark Period Orders and Action Items for benchmark compliance.⁵ Daylight determined that the DOE did not meet the First Benchmark. During the First Benchmark Period, Daylight found that the DOE Timely Implemented⁶ 51.6% of the Total Orders and 64.0% of the Total Action Items reviewed.

In particular, the DOE Timely Implemented 66.1% of Service Orders; 75.6% of Service Action Items; 33.1% of Payment Orders; and 35.4% of Payment Action Items during this timeframe.

The following table is a summary of the percentage of Timely Implemented First Benchmark Orders and Action Items by type of relief:

Type of Relief	Timely Implemented Orders	Timely Implemented Action Items
Service	66.1%	75.6%
Payment	33.1%	35.4%

Daylight assessed a total of 838 Orders during the First Benchmark Period. Specifically, Daylight determined which Orders included Action Items and were in the scope of the present report. In particular, Daylight determined that of the 838 Orders assessed during the First Benchmark Period, there were:

- 699 Total Orders, including 1,493 Total Action Items identified during the First Benchmark Period, subject to analysis in the present report;

⁵ Pursuant to Section III.16.d. of the Stipulation, the Independent Auditor's benchmark compliance analysis "shall aggregate the results for any previously reported quarters within that measurement period and shall report compliance on both a quarterly basis and for the Benchmark Measurement Period at issue."

⁶ "Timely Implemented" is defined as an Order or Action Item that was implemented within the length of time specified in the Order or, if no such time is specified in the Order, within 35 days of issuance (of the Order itself or of the Order containing the Action Item), except that particular Orders or Action Items will also be considered to have been timely implemented for measurement purposes pursuant to the additional requirements included in Section I.1.ii of the Stipulation.

- 10 Orders comprising 18 Action Items where Daylight determined that the DOE was not required to implement any of the Action Items because they were beyond the scope of our review. These Orders and Action Items have been retained in our case management system; and
- 129 Orders that did not include Action Items, such as Orders of Dismissal and Orders where the parent's request for relief was denied. These Orders have been retained in our case management system.

In addition, Daylight identified 31 conditional Action Items for which the conditional events did not occur. The aforementioned 31 Action Items were closed and not assessed as Uncounted⁷/counted or for Timely Implementation.

The following sections include a summary of our analysis at the Order and Action Item levels for the First Benchmark Period and also a detailed breakdown of the First Quarter and Second Quarter implementation statistics.

A. Order Summaries

1. First Benchmark Period Order Summary

Based on the methodology outlined in Section III of the Independent Auditor's First and Second Quarterly Reports, Daylight analyzed 699 Orders determined to be within the scope of the First Benchmark Period. The 699 First Benchmark Period Orders included 558 counted Orders.

⁷ Pursuant to Section I.1. II of the Stipulation, Orders or Action Items are deemed "Uncounted Orders" or "Uncounted Action Items," respectively, when an Order or Action item could not be Timely Implemented because:

- i. It required the DOE to take action that would either violate applicable law or is factually impossible;
- ii. The DOE had made a substantial showing of attempts to reach the parent and attempts to obtain compliance with the parent's obligations under the Order;
- iii. It required the provision of a DOE designated shortage area service which includes, inter alia, occupational, physical and speech therapy and where the DOE made a substantial showing that it offered the parent an appropriate substitute service within 35 calendar days of the issuance of the relevant Order or Action Item and
- iv. The Order or Action item was timely appealed by the DOE

Of the 558 counted Orders, 270 (48.4%) were Unimplemented⁸ and 288 (51.6%) were Timely Implemented. In particular, 313 of the 558 counted Orders were service-related⁹ and 245 were payment-related.¹⁰ Of the 313 counted service-related Orders, 106 were Unimplemented (33.9%) and 207 were Timely Implemented (66.1%). Of the 245 counted payment-related Orders, 164 were Unimplemented (66.9%) and 81 were Timely Implemented (33.1%).

The following table is a summary of the results of our assessment of First Benchmark Period Orders by type of relief:

Type of Relief	Unimplemented Orders	Timely Implemented Orders	Total Orders	Percentage Unimplemented	Percentage Timely Implemented
Service	106	207	313	33.9%	66.1%
Payment	164	81	245	66.9%	33.1%
Total	270	288	558	48.4%	51.6%

⁸ Pursuant to Section I,1. mm of the Stipulation, “Unimplemented” or “Unimplemented Order” is defined as an Order or Action Item that is found by the Independent Auditor to have not been Timely Implemented. Daylight assessed Action Items as Unimplemented when 1) there was no indication that implementation occurred or 2) the analysis determined that implementation occurred after the due date. Orders were deemed Unimplemented when one or more of the Action Items associated with the Order was determined to be Unimplemented.

⁹ Pursuant to Section I,1.dd of the Stipulation, “Service Order” is defined as an Order, or all Action Items within an Order that requires the DOE to take any action other than make a payment directly to a parent, private service provider, or private school.

¹⁰ Pursuant to Section I,1.v of the Stipulation, “Payment Order” is defined as an Order, or all Action Items within an Order, requiring the DOE to make a direct payment to a parent, private service provider, or private school.

In addition, Daylight determined that 141 of the 699 First Benchmark Period Orders were Uncounted as follows:

- 19 Orders were timely appealed by the DOE;
- 7 timely appealed Orders for which settlements were reached prior to State Review Office (“SRO”) determination;
- 99 Orders for which the DOE had made a substantial showing of attempts to reach the parent and attempts to obtain compliance with the parent’s obligations under the Order;
- 2 Orders that required the DOE to take action that was factually impossible to implement in a timely manner; and
- 14 Orders for which the DOE was required to provide a service designated as a shortage area and instead offered an appropriate substitute service.

2. First Quarter Order Summary

Daylight analyzed 156¹¹ Orders determined to be within the scope of the First Quarter. The 156 First Quarter Orders included 120 counted Orders and 36 Uncounted Orders. Of the 120 counted Orders, 64 (53.3%) were Unimplemented and 56 (46.7%) were Timely Implemented. In particular, 73 of the 120 counted Orders were service-related and 47 were payment-related. Of the 73 counted service-related Orders, 37 were Unimplemented (50.7%) and 36 were Timely Implemented (49.3%). Of the 47 counted payment-related Orders, 27 were Unimplemented (57.4%) and 20 were Timely Implemented (42.6%).

¹¹ Daylight’s First Quarterly Report included its analysis of 155 Orders, 119 of which were counted. Order 115357 was issued and analyzed during the First Quarter, but was inadvertently from the final version of the Independent Auditor’s First Quarterly Report due to a case management system error. All of the Action Items associated with this Order were correctly reported on during the First Quarter.

The following table is a summary of the results of our assessment of First Quarter Orders by type of relief:

Type of Relief	Unimplemented Orders	Timely Implemented Orders	Total Orders	Percentage Unimplemented	Percentage Timely Implemented
Service	37	36	73	50.7%	49.3%
Payment	27	20	47	57.4%	42.6%
Total	64	56	120	53.3%	46.7%

Appendices A and B provided with the Independent Auditor's First Quarterly Report include lists by case number of the 120 Orders analyzed during the First Quarter that were Unimplemented and Timely Implemented, respectively. In addition, Appendix E provided with the First Quarterly Report lists by case number the 36 First Quarter Orders determined to be Uncounted.

3. Second Quarter Order Summary

Daylight analyzed 543 Orders determined to be within the scope of the Second Quarter. The 543 Second Quarter Orders included 438 counted Orders and 105 Uncounted Orders. Of the 438 counted Orders, 206 (47.0%) were Unimplemented and 232 (53.0%) were Timely Implemented. In particular, 240 of the 438 counted Orders were service-related and 198 were payment-related. Of the 240 counted service-related Orders, 69 were Unimplemented (28.7%) and 171 were Timely Implemented (71.3%). Of the 198 counted payment-related Orders, 137 were Unimplemented (69.2%) and 61 were Timely Implemented (30.8%).

The following table is a summary of the results of our assessment of Second Quarter Orders by type of relief:

Type of Relief	Unimplemented Orders	Timely Implemented Orders	Total Orders	Percentage Unimplemented	Percentage Timely Implemented
Service	69	171	240	28.7 %	71.3%
Payment	137	61	198	69.2%	30.8%
Total	206	232	438	47.0%	53.0%

Appendices A and B provided with the Independent Auditor's Second Quarterly Report include lists by case number of the 438 Orders analyzed during the Second Quarter that were Unimplemented and Timely Implemented, respectively. In addition, Appendix C provided with the Second Quarterly Report lists by case number the 105 Second Quarter Orders determined to be Uncounted.

B. Action Item Summaries

1. First Benchmark Period Action Item Summary

Daylight analyzed 1,493 Action Items determined to be within the scope of the First Benchmark Period. The 1,493 First Benchmark Period Action Items included 1,164 counted Action Items. Our analysis determined that 419 of the 1,164 counted Action Items were Unimplemented (36.0%) and 745 were Timely Implemented (64.0%).

The 1,164 counted Action Items included 828 service-related and 336 payment-related Action Items. Of the 828 counted service-related Action Items, 202 were Unimplemented (24.4%) and 626 were Timely Implemented (75.6%). Of the 336 counted payment-related Action Items, 217 were Unimplemented (64.6%) and 119 were Timely Implemented (35.4%).

The following table is a summary of the results of our assessment of the counted First Benchmark Period Action Items by type of relief:

Type of Relief	Unimplemented Action Items	Timely Implemented Action Items	Total Action Items	Percentage Unimplemented	Percentage Timely Implemented
Service	202	626	828	24.4%	75.6%
Payment	217	119	336	64.6%	35.4%
Total	419	745	1,164	36.0%	64.0%

Of the 419 Unimplemented Action Items, 222 (53.0%) of the Action Items appear to have been implemented after the final due date. Daylight also determined that 96 of these were service-related and 126 were payment-related. We could not ascertain whether 197 (47.0%) of the 419 Unimplemented Action Items were ever implemented or implemented at a later date because there was insufficient information in the record to make such a determination at the time Daylight performed its analyses. These 197 Action Items were comprised of 106 service-related items and 91 payment-related items.

In addition, Daylight determined that 329 of the 1,493 total First Benchmark Period Action Items were Uncounted as follows:

- 23 Action Items were timely appealed by the DOE;
- 9 timely appealed Action Items for which settlements were reached prior to SRO determination;
- 220 Action Items for which the DOE had made a substantial showing of attempts to reach the parent and attempts to obtain compliance with the parent's obligations under the Order;
- 17 Action Items that required the DOE to take action that was factually impossible to implement in a timely manner; and
- 60 Action Items for which the DOE was required to provide a service designated as a shortage area and instead offered an appropriate substitute service.

2. First Quarter Action Item Summary

Daylight analyzed 335 Action Items determined to be within the scope of the First Quarter. The 335 First Quarter Action Items included 259 counted Action Items and 76 Uncounted Action Items. Our analysis determined that 102 of the 259 counted Action Items were Unimplemented (39.4%) and 157 were Timely Implemented (60.6%).

The 259 counted Action Items included 200 service-related and 59 payment-related Action Items. Of the 200 counted service-related Action Items, 72 were Unimplemented (36.0%) and 128 were Timely Implemented (64.0%). Of the 59 counted payment-related Action Items, 30 were Unimplemented (50.8%) and 29 were Timely Implemented (49.2%).

The following table is a summary of the results of our assessment of the counted First Quarter Action Items by type of relief:

Type of Relief	Unimplemented Action Items	Timely Implemented Action Items	Total Action Items	Percentage Unimplemented	Percentage Timely Implemented
Service	72	128	200	36.0%	64.0%
Payment	30	29	59	50.8%	49.2%
Total	102	157	259	39.4%	60.6%

Appendices C and D provided with the Independent Auditor's First Quarterly Report list the 259 Unimplemented and Timely Implemented First Quarter Action Items, respectively. In addition, Appendix E provided with the First Quarterly Report lists the 76 First Quarter Action Items determined to be Uncounted.

3. Second Quarter Action Item Summary

Daylight analyzed 1,158 Action Items determined to be within the scope of the Second Quarter. The 1,158 Second Quarter Action Items included 905 counted Action Items and 253 Uncounted Action Items. Our analysis determined that 317 of the 905 counted Action Items were Unimplemented (35.0%) and 588 were Timely Implemented (65.0%).

The 905 counted Action Items included 628 service-related and 277 payment-related Action Items. Of the 628 counted service-related Action Items, 130 were Unimplemented (20.7%) and 498 were Timely Implemented (79.3%). Of the 277 counted payment-related Action Items, 187 were Unimplemented (67.5%) and 90 were Timely Implemented (32.5%).

The following table is a summary of the results of our assessment of the counted Second Quarter Action Items by type of relief:

Type of Relief	Unimplemented Action Items	Timely Implemented Action Items	Total Action Items	Percentage Unimplemented	Percentage Timely Implemented
Service	130	498	628	20.7%	79.3%
Payment	187	90	277	67.5%	32.5%
Total	317	588	905	35.0%	65.0%

Appendices E and F provided with the Independent Auditor's Second Quarterly Report list the 905 Unimplemented and Timely Implemented Second Quarter Action Items, respectively. In addition, Appendix G provided with the Second Quarterly Report lists the 253 Second Quarter Action Items determined to be Uncounted.

III. Daylight's Methodology

A. Introduction

Daylight's assessment of the Total Orders and Total Action Items for the First Benchmark Period was performed based on requirements established in the Stipulation, documentation provided by the DOE or made accessible to Daylight via access to the DOE technology systems, and regular update calls with the Parties.

B. Overview of Daylight's Methodology

Daylight met individually and jointly with the Parties to discuss and clarify its responsibilities pursuant to specific provisions of the Stipulation, held meetings with DOE personnel to understand their processes and protocols, performed walkthroughs and limited testing of certain DOE processes, and obtained access to the DOE technology systems to gather supporting documentation regarding the implementation of Action Items prior to commencing its Injunctive Relief Subclass analysis. Moreover, several meetings were focused on customizing Daylight's case management platform and reporting capabilities.

Section III of the Independent Auditor's First and Second Quarterly Reports presented an overview of the processes and protocols Daylight utilizes to analyze Action Items and Orders.

C. Update Meetings with the Parties and GCG

Daylight updates the Parties on the status of its review and discusses documentation and data requests, as well as selected aspects of its methodology and process through regularly scheduled bi-weekly conference calls from Daylight's office. Participants on these calls include Daylight personnel, the Parties and representatives from the Garden City Group, the Claims Administrator for the Compensatory Relief task. There were approximately 15 update calls scheduled during the First Benchmark Period.

IV. Detailed Findings and Observations

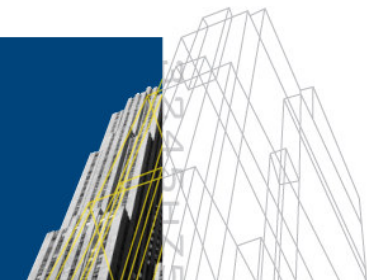
A. Implementation of Action Items by Category

Daylight reviewed the 1,164 counted First Benchmark Period Action Items and noted that the top three most frequently identified categories were Speech and Language Therapy (175 Action Items or 15.0%), followed by Occupational Therapy (143 Action Items or 12.3%) and Tuition (109 Action Items or 9.4%).

The categories with the highest percentage of Unimplemented Action Items with respect to the total number of counted Action Items within the category were SEIT (84.3%), ABA Services (68.9%) and Tutoring (64.5%).

The following table sets forth the top 15 Action Item categories based on the number of counted Action Items:

Action Item Category		Total Counted Action Items	% Total Counted Action Items	# Timely Implemented by Category	% Timely Implemented by Category	# Unimplemented by Category	% Unimplemented by Category
1	Speech and Language Therapy	175	15.0%	128	73.1%	47	26.9%
2	Occupational Therapy	143	12.3%	111	77.6%	32	22.4%
3	Tuition	109	9.4%	63	57.8%	46	42.2%
4	Physical Therapy	79	6.8%	62	78.5%	17	21.5%
5	SEIT	70	6.0%	11	15.7%	59	84.3%
6	Reconvene Hearing or Meeting	63	5.4%	44	69.8%	19	30.2%
7	Transportation	50	4.3%	34	68.0%	16	32.0%
8	Offer Placement	48	4.1%	38	79.2%	10	20.8%
9	ABA Services	45	3.8%	14	31.1%	31	68.9%
10	Counseling	36	3.1%	26	72.2%	10	27.8%
11	Special Ed. Teacher Support Services (SETSS)	33	2.8%	15	45.5%	18	54.5%
12	Tutoring	31	2.7%	11	35.6%	20	64.5%
13	Private Evaluations	30	2.6%	20	66.7%	10	33.3%
14	Nickerson Letter	30	2.6%	25	83.3%	5	16.7%
15	Reinstate/Remain in Pendency Placement	23	2.0%	21	91.3%	2	8.7%
	Remaining Categories with Less than 23 Action Items each	199	17.1%	122	61.3%	77	38.7%
	TOTAL	1,164	100%	745	64.0%	419	36.0%



B. Implementation Statistics by Borough

Daylight analyzed the 1,164 total counted First Benchmark Period Action Items to determine which Boroughs had the highest percentage of Unimplemented and Timely Implemented Action Items. The Bronx and Staten Island had the highest percentages of Unimplemented Action Items, with 40.8% and 39.8%, respectively, while Manhattan had the highest percentage of Timely Implemented Action Items with 69.7%.

The following table identifies the number of Action Items by Borough, listed by the percentage of Unimplemented Action Items:

Borough	Total Counted Action Items	Timely Implemented Action Items	% Timely Implemented	Unimplemented Action Items	% Unimplemented	Unimplemented - Completed After Final Due Date	Unimplemented - No Record of Implementation
Bronx	245	145	59.2%	100	40.8%	62	38
Staten Island	329	198	60.2%	131	39.8%	60	71
Brooklyn	110	70	63.6%	40	36.4%	21	19
Queens	134	91	67.9%	43	32.1%	18	25
Manhattan	346	241	69.7%	105	30.3%	61	44
TOTAL	1,164	745	64.0%	419	36.0%	222	197

V. Limitations

The conclusions, observations and assessments detailed in this report are based on Daylight's methodology and the procedures performed. Had Daylight performed additional procedures or testing, it is possible that its conclusions, observations and assessments could be different. Daylight also relied on information provided by the DOE and AFC during the course of its work.

VI. Conclusion

Daylight has continued with its analysis of the Injunctive Relief Subclass Orders and Action Items relating to subsequent reporting periods.