

L.V. v. D.O.E.

03 Civ. 9917 (RJH)

Stipulation and Agreement of Settlement

**Independent Auditor's Post Corrective Action Third
Quarterly Report**

December 3, 2010



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I. Introduction

On December 12, 2003, 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 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.

The Stipulation 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”).

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



The following table is a summary of the final reports issued by Daylight in conjunction with the Injunctive Relief Subclass:²

Report Issued	Date Issued
Gap Period Report	August 6, 2008
First Quarterly Report	January 9, 2009
Second Quarterly Report	June 11, 2009
First Benchmark Report	June 11, 2009
Post Corrective Action ³ First Quarterly Report	April 9, 2010

Daylight was acquired by Navigant Consulting, Inc. (“Navigant”) after close of business on May 14, 2010. As part of the agreement between Daylight and Navigant, all work has continued to be performed by the same team of analysts, project managers and engagement leaders.

Navigant submitted its finalized Post Corrective Action Second Quarterly and Post Corrective Action First Benchmark Reports on August 13, 2010. The current report focuses on Navigant’s review of Injunctive Relief Subclass Orders and summarizes our analysis of the Total Orders and Total Action Items that were part of the post corrective action third Quarterly Measurement Period (“PCA Third Quarter”) and includes Orders issued between February 1, 2010 and May 3, 2010.

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

² Pursuant to Sections I.1.r. and I.1.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.10.a. of the Stipulation, “If the DOE fails to meet the First Benchmark or Second Benchmark at the required date...the DOE must, within three months of issuance of the final Benchmark Report notifying the parties of the missed benchmark, formulate and implement a Corrective Action Plan designed to correct the problems that caused the DOE to miss the benchmark at issue.”



II. Executive Summary and Statistical Overview

During the PCA Third Quarter, Navigant determined that the DOE Timely Implemented⁴ 57.8% of Service Orders;⁵ 72.2% of Service Action Items; 53.7% of Payment Orders;⁶ and 55.9% of Payment Action Items during this timeframe.

The following table summarizes the counted PCA Third Quarter Orders and Action Items by type of relief:

	Service Orders	Payment Orders	Service Action Items	Payment Action Items
Timely Implemented	52 (57.8%)	36 (53.7%)	153 (72.2%)	62 (55.9%)
Unimplemented⁷	38 (42.2%)	31 (46.3%)	59 (27.8%)	49 (44.1%)
Total	90	67	212	111

⁴ “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.

⁵ 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.

⁶ 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.

⁷ 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. Navigant 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.

In addition, Navigant determined that 24 Orders and 53 Action Items issued during the PCA Third Quarter were Uncounted.⁸ There were 66 Orders issued during the PCA Third Quarter that did not include Action Items, such as Orders of Dismissal and Orders where the parent's relief was denied.

Further, Navigant identified eight Orders (comprising 19 Action Items) and 26 additional Action Items where the DOE was not required to implement the Action Items because they were beyond the scope of review. These Action Items were beyond our scope of review for multiple reasons, including but not limited to: Action Items for which the parent refused an ordered service, Action Items that were implemented pursuant to a prior Order, or where a required payment was made in conjunction with a previously analyzed Action Item.⁹

⁸ Pursuant to Section I.1. 11 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.

⁹ A complete list of these Orders and Action Items will be provided to the Parties.

III. Implementation of Service Action Items by Category

Navigant reviewed the 212 counted Service Action Items and noted that the top three most frequently identified categories were Speech and Language Therapy (29 Action Items or 13.7%), followed by Offer Placement (22 Action Items or 10.4%) and Reconvene Hearing or Meeting (20 Action Items or 9.4%).

The categories with the highest percentage of Unimplemented Action Items with respect to the total number of counted Service Action Items within the category were CSE Evaluation (63.6%), followed by Correspondence (43.7%) and Counseling (40.0%).

The following table sets forth the top 10 Service Action Item categories based on the number of counted Action Items:

Action Item Category		Total Counted Service Action Items	% Total Counted Service Action Items	# Timely Implemented by Category	% Timely Implemented by Category	# Unimplemented by Category	% Unimplemented by Category
1	Speech and Language Therapy	29	13.7%	24	82.8%	5	17.2%
2	Offer Placement	22	10.4%	18	81.8%	4	18.2%
3	Reconvene Hearing or Meeting	20	9.4%	12	60.0%	8	40.0%
4	Correspondence	16	7.5%	9	56.3%	7	43.7%
5	Occupational Therapy	15	7.1%	12	80.0%	3	20.0%
6	Transportation	14	6.6%	11	78.6%	3	21.4%
7	Counseling	13	6.1%	8	61.5%	5	38.5%
8	CSE Evaluation	11	5.2%	4	36.4%	7	63.6%
9	Nickerson Letter	11	5.2%	11	100.0%	0	N/A
10	Private Evaluations Ordered	8	3.8%	6	75.0%	2	25.0%
	Remaining Categories with 7 or Less Action Items	53	25.0%	38	71.7%	15	28.3%
	TOTAL	212	100%	153	72.2%	59	27.8%



IV. Implementation of Payment Action Items by Category

Navigant reviewed the 111 counted Payment Action Items and noted that the top three most frequently identified categories were Tuition (34 Action Items or 30.7%), followed by ABA Services (24 Action Items or 21.6%) and Tutoring (10 Action Items or 9.0%).

The categories with the highest percentage of Unimplemented Action Items with respect to the total number of counted Payment Action Items within the category were Private Evaluations Ordered (71.4%), followed by Tutoring (60.0%) and Speech and Language Therapy (50.0%).

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

	Action Item Category	Total Counted Payment Action Items	% Total Counted Payment Action Items	# Timely Implemented by Category	% Timely Implemented by Category	# Unimplemented by Category	% Unimplemented by Category
1	Tuition	34	30.7%	28	82.4%	6	17.6%
2	ABA Services	24	21.6%	15	62.5%	9	37.5%
3	Tutoring	10	9.0%	4	40.0%	6	60.0%
4	Private Evaluations Ordered	7	6.3%	2	28.6%	5	71.4%
5	Speech and Language Therapy	6	5.4%	3	50.0%	3	50.0%
	Remaining Categories with 5 or Less Action Items	30	27.0%	10	33.3%	20	66.7%
	TOTAL	111	100%	62	55.9%	49	44.1%

V. Limitations

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

VI. Conclusion

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