

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., *for itself and on behalf of its members*, JAMEL NICHOLSON, and RUSEBELL WILSON, *individually and on behalf of a subclass of all other victims similarly situated seeking classwide injunctive relief*,

07-cv-2067 (NGG) (RLM)

ROGER GREGG, MARCUS HAYWOOD, and KEVIN WALKER, *individually and on behalf of a subclass of all other non-hire victims similarly situated*; and

CANDIDO NUÑEZ and KEVIN SIMPKINS, *individually and on behalf of a subclass of all other delayed-hire victims similarly situated*,

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK,

Defendant.
-----X

MONITOR'S TWENTY-NINTH PERIODIC REPORT TO THE COURT

TABLE OF CONTENTS

I. Executive Summary 1

II. Recruitment and Attrition Mitigation 10

 A. Candidate Processing 10

 1. Monitor Status Report Regarding CPAT Testing 10

 2. Candidate Processing to Date 12

 B. Attrition Mitigation 16

 1. Recent Training and Outreach to Candidates 16

 a) Statistics from CPAT Training 16

 b) Current and Recent Outreach to Candidates 19

 2. Long-Range Plans 21

 a) ORR Communication Plan 21

 b) Attrition Mitigation Programs 25

 3. Use of Data in Attrition Mitigation Initiatives 30

 C. Analyses of the Exam 7001 Recruitment Campaign 35

 1. After Action Report 37

 2. Cost Effective Analysis 37

 3. Recruitment Analyses Requested by the Monitor 39

 D. Assignment Issues 41

 E. Working Group 45

III. EEO 47

 A. EEO Staffing 47

 B. Policies, Messaging, and Training 48

 1. EEO Messaging Plan 48

 2. Other Messaging and Training Initiatives 51

C.	Compliance and Accountability.....	53
1.	Increased Accountability within the Chain of Command.....	53
a)	Performance Evaluations	53
b)	“Workplace Professionalism” Reporting.....	57
2.	Climate Survey.....	58
D.	Investigations	61
1.	The Monitor’s Report on FDNY EEO Investigations	61
2.	EEO Database	62
3.	Review of Investigations.....	64
IV.	Medical Exam-Related Issues.....	66
A.	Stairmill Test.....	66
B.	Psychological Exam.....	68
C.	Medical Exam Attrition Metrics	69
D.	Medical Exam Messaging.....	72
V.	Character Screening by the CID and PRB	73
VI.	Firefighter Exam	79
A.	Current Milestone: Technical Report.....	80
B.	Optional Survey Administered to Exam 7001 Candidates	82
VII.	Additional Issues.....	83

I. Executive Summary

This report summarizes activities relating to compliance by the City of New York (the “City”) with the Modified Remedial Order during the period from September 20, 2019, the date of the Monitor’s Twenty-Eighth Periodic Report (Dkt. # 1932), to May 5, 2020. The report also summarizes activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s authority as defined in the Modified Remedial Order. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

The report covers approximately seven months of activity, including periods both before and during the emergence of COVID-19 and the State’s PAUSE order. As reflected in part in the Court’s orders of December 13, 2019 (Dkt. # 1945) and January 14, 2020, the report was postponed for a series of reasons: to await and account for updated data and analyses from the City regarding candidate processing; to allow time for further submissions by the Parties and the Monitor regarding, and further efforts to resolve, issues relating to CPAT processing (as discussed in Part II.A.1); and most recently because of disruptions caused by the public health emergency. For future reports, the Monitor expects to resume submitting reports at the regular 90-day intervals provided in the Modified Remedial Order.

To different degrees in all areas subject to the Monitorship, the City’s work has understandably been either slowed or suspended in recent weeks by the public health crisis. Firefighters have been returned to emergency response duties from roles in recruitment and attrition mitigation; the City’s data analysis teams, which had been engaged in several Monitorship projects including climate survey analysis and retrospective assessments of the

Exam 7001 recruitment campaign, have been devoted entirely to COVID-19-related work; and other FDNY and City personnel (along with the Monitor's team and counsel for the United States and Plaintiffs-Intervenors) have been compelled to work remotely. Nevertheless, the Monitor and the Parties have continued to communicate during the emergency, continuing to work on Monitorship projects within the limitations imposed by the City's immediate need to respond to the crisis, taking stock of pending tasks and requests, and discussing the timelines on which work will continue when the emergency subsides. In addition, while the City has been compelled to focus some of its resources largely on the pandemic, the Monitor, the United States, and Plaintiffs-Intervenors have completed pending analyses and assessments and formulated and consolidated inquiries and requests for the City to address when relevant personnel are able to return to work on Monitorship projects.

The Monitor's team appreciates the FDNY's and the City's efforts at this difficult time – both in confronting the public health and logistical challenges of the emergency, and in keeping the Monitor informed, responding to requests for information, and continuing work under the Modified Remedial Order.

In addition to the reduction of work on Monitorship initiatives during the emergency, the City has advised the Monitor that it has decided to temporarily suspend some initiatives and/or delay their completion (particularly for the remainder of the City's fiscal year, which ends June 30) in response to budget constraints. The Monitor has noted, and the City has acknowledged, that the City's obligations under the Modified Remedial Order are unchanged, including its obligation to fully fund work required for compliance. While the COVID-19 crisis may temporarily affect the allocation of City resources and may call for adjustments in the timing and details of some specific projects, and while it may prolong the overall timeline on which the City

fulfills its obligations, it has not altered the goals of the Modified Remedial Order or the standards the City must meet to achieve compliance. The Monitor plans to work with the City on revised plans and timelines for the City to fulfill its obligations notwithstanding the delays and constraints imposed by the emergency.

Part II of the report summarizes activities relating to the ongoing FDNY hiring process and related communications and attrition mitigation initiatives for candidates on the eligible list for Exam 7001 (the rank-ordered list from which candidates are called into the hiring process). The second Fire Academy class to include Exam 7001 candidates began November 12, 2019, and Part II includes updated data on candidate processing, CPAT¹ testing, and CPAT training through the appointment of this second Academy class. It also includes a summary of the FDNY's continuing efforts to communicate with candidates undergoing processing, and an update on attrition mitigation initiatives, including the Mentor program and the candidate portal.

Part II focuses particularly on the City's long-term plans for communications with candidates at different stages in the hiring process. In particular, as discussed in the Monitor's November 20, 2019 Status Report Regarding CPAT Testing, approximately two thirds of the candidates the City expected to call for processing off the Exam 7001 list have now undergone CPAT testing. Some in the post-CPAT group have already gone through further processing, while most await further screening.

¹ The Candidate Physical Ability Test, the second portion of the firefighter examination administered by the City's Department of Citywide Administrative Services ("DCAS"), follows the written examination and establishment of the eligible list. DCAS invites candidates to take two "practice" CPAT tests before taking the final test, and a candidate is deemed to have passed the CPAT by achieving a satisfactory performance on either of the two practice tests or on the final test.

Part II also discusses the City's attrition mitigation programs, focusing on the City's progress in implementing a series of Monitor recommendations for enhancements in programs and initiatives intended to ensure that candidates remain engaged, maintain their fitness, and properly prepare for the several steps in the hiring process.

Because of the COVID-19 crisis, the City has suspended candidate processing, cancelled the Fire Academy class scheduled to begin in April, and suspended its Fitness Awareness Program ("FAP"), and candidate Mentor program. In addition, the disruptions associated with the emergency will require substantial changes in the timing and content of the City's communications with candidates. The Monitor expects to work closely with the City and the other Parties as the hiring process resumes and a revised schedule of programs and communications takes shape.

Part II also reports on the Monitor's continuing efforts to ensure that the City makes appropriate use of data in designing and adjusting its attrition mitigation efforts as Exam 7001 candidates are processed, and in its retrospective evaluation of the Exam 7001 recruitment campaign, which is expected to inform the FDNY's plans for the next campaign. In October 2019, the City provided the Monitor and the other Parties with an updated and expanded version of its After Action Report and its Cost Effectiveness Report for the Exam 7001 campaign. As explained in detail in Part II, while the reports are extensive and contain some relevant data and findings, neither provides sufficient information or analysis to guide decisions about which recruitment initiatives should be the focus of the next recruitment campaign or how resources should be allocated.

Since the beginning of this year, the Monitor has worked with its experts and engaged directly with the City's data analysis teams to develop analyses that will allow the City to

determine the effectiveness of specific recruitment activities and events in improving black and Hispanic representation among candidates with adjusted final average scores² high enough to be called for post-exam processing. For the past several weeks the COVID-19 emergency has made the City's data personnel unavailable for this project. However, the Monitor is continuing to review initial analyses provided by the City in response to the Monitor's recommendations before the emergency, to review data provided by the City to date, and to seek additional information from the City. The United States and Plaintiffs-Intervenors have also provided initial feedback on the analyses and proposed next steps.

The City's efforts to generate informative attrition analyses to guide its attrition mitigation initiatives also continue to exhibit substantial deficiencies. The City's most recent report on attrition among Exam 7001 candidates (dated December 27, 2019) provides basic metrics on rates of voluntary attrition and disqualification at different stages of the hiring process, but it omits any assessment of the effect of specific FDNY attrition mitigation programs – either individually or in combination. The City has indicated that it plans to use a data “dashboard” (which the City demonstrated at a December 9, 2019 meeting with the Monitor and the other Parties) to run additional analyses. However, the City has not yet provided any reports of analyses linking its attrition mitigation programs to candidate outcomes for Exam 7001 candidates.

Part III reports on activities relating to the FDNY's EEO function. Although the City has continued to make progress toward compliance with its EEO-related obligation under the Modified Remedial Order, considerable work remains to be done in several key areas, and the

² The adjusted final average score incorporates the candidate's score on the written exam and additional bonus points based on factors including, for example, New York City residency.

effectiveness of some measures previously implemented remains to be confirmed. Notably, since the last report, the City has conducted a long-pending comprehensive workplace climate survey for the FDNY. The survey was launched on October 18 and completed on November 15, 2019 – administered in four overlapping eight-day stages to four groups of FDNY battalions; and response rates appear to have met or exceeded expectations. However, the process of analyzing and acting upon the results of the survey was still in its early stages when the COVID-19 emergency required the City to suspend work on the analysis, as the relevant personnel were compelled to turn their attention entirely to projects relating to the public health crisis.

In the area of EEO messaging, as previously reported, the City has yet to provide the Monitor and the other Parties with a satisfactory long-range EEO messaging plan, as the brief chart it provided on August 13, 2019, before the Monitor's last report, lacked essential elements. The City had indicated that it planned to develop a more detailed and extensive plan based on the results of the climate survey, analysis of which has been suspended. The City has also provided some additional details on near-term messaging plans in follow-up communications. But even as supplemented, its most recent plan does not articulate a comprehensive messaging strategy or describe the content of planned messaging over the long term. The Monitor has asked the City to continue to provide updates on EEO messages and will continue to work with the City and the other Parties towards a comprehensive messaging plan. In a related development, on a recent call with the Monitor, the City announced the launch of a new FDNY training platform (planned since 2018), and it indicated that a new online EEO training module for the platform was near completion – which the Monitor has requested and plans to review.

In two other important areas, EEO investigations and officer performance evaluations, the Monitor has continued to evaluate the City's performance and offer recommendations for

improvements to ensure the FDNY's practices are consistent with its EEO-related obligations under the Modified Remedial Order. But more work remains to be done, and more data is needed, before the Monitor can determine whether the steps the City has taken in these areas have had the desired effects.

Regarding investigations, at an October 18, 2019 meeting with the City, and in follow-up communications memorializing the discussions, the Monitor presented a detailed review of its comments on recent EEO cases, and recommended specific steps for the City based on the comments, including targeted training, guidance, and instructions. The City responded to the Monitor's recommendations in a February 13, 2020 message, accepting some and voicing objections to others; and the Monitor plans to continue discussions with the City regarding the Monitor's proposals and the unresolved issues.

At the same October 18, 2019 meeting, the Monitor also suggested modifications in the FDNY's implementation of the EEO metric in officer performance reviews – which was first introduced for evaluations performed in 2018. The Monitor's suggestions include steps to expand the role of the EEO Office in gathering, evaluating, and transmitting information for use in officer ratings, along with additional guidance to raters intended to ensure recognition of superior officer performance in EEO-related areas. The Monitor plans to continue to evaluate the operation of the EEO metric, and has asked the City to provide data from the 2019 round of officer reviews – which were the first to evaluate a full year of activities for each officer (2018).

Part IV reports on efforts to reduce disparate impact on black and Hispanic candidates in the Medical Exam and to ensure that the FDNY's medical screening process is job-related and otherwise compliant with applicable laws.

As recounted in previous reports, following allegations of disparate impact in the stairmill component of the FDNY medical examination, the City commenced a study to develop a new test, and considered input from the Monitor, the other Parties, and their experts. The Fire Department's Bureau of Health Services ("BHS") began using the new stairmill test on October 17, 2019; and the City has provided updates on candidate results from the new test, which will be analyzed for disparate impact. The City has also provided the opportunity for candidates to be tested using the new stairmill test if they were reserved or disqualified by the old stairmill test and not otherwise disqualified. The Monitor and the Parties are continuing to analyze data from this ongoing initiative.

Part IV also reports on candidate attrition and continuing disparate impact in the Medical Exam, based on the City's latest attrition report (dated December 27, 2019), which includes data for approximately 1,500 candidates who have been scheduled to take or have taken the Exam 7001 Medical Exam. Part IV also recounts the City's work, in consultation with the Monitor and the other Parties, to update messaging related to the Medical Exam.

Part V reports on continuing efforts by the Monitor and the Parties to determine whether the FDNY's character review process (conducted by the Candidate Investigation Division ("CID") and the Personnel Review Board ("PRB")) has an adverse disparate impact on black and/or Hispanic candidates, and whether further reforms in the process are required. As discussed in previous reports, the City has accepted some of the Monitor's most recent proposals for further changes in character review procedures, and in the information and instructions provided to candidates; and since the last periodic report, those changes have been implemented. However, the City largely rejected any further changes in the substantive criteria that govern the

CID's referral of candidates to the PRB, taking the position that any additional changes should be made only if analyses of outcomes for Exam 7001 candidates show disparate impact.

Since the Monitor's last periodic report, discussions have focused on statistical analyses of the character review process, as the Monitor and the Parties have worked to identify and refine the analyses the City must employ to detect disparate impact as hiring proceeds from the Exam 7001 eligible list. On November 1, 2019, the City completed its response to the Monitor's request that it explain and provide statistical support for several criticisms the City had offered of the Monitor's analysis of character review outcomes from the Exam 2000 process. The Monitor has considered the City's objections (along with related input from the other Parties); and on February 13, 2020, the Monitor circulated a response summarizing key issues, with a view to convening a meeting with the Parties on remaining issues once relevant City personnel are able to turn their attention back to analytical issues relating to the Monitorship.

Part VI discusses the Technical Report produced by the City's testing experts, PSI Services LLC ("PSI"), which describes the development, administration, and analysis of the results of Exam 7001 (the open competitive exam given in September and October 2017). Part VI also discusses the City's re-administration of the Exam 7001 survey and the results circulated on February 28.

Part VII lists a range of additional issues addressed by the Monitor and the Parties during the period covered by this report.

II. Recruitment and Attrition Mitigation

A. Candidate Processing

1. Monitor Status Report Regarding CPAT Testing

Pursuant to the Court's direction at the October 3, 2019 status conference, and after receiving submissions from the Parties, on November 20, 2019 the Monitor filed its report on the pace at which the City has processed candidates for the CPAT, and on related issues concerning the City's decision making and the implications of the CPAT schedule for candidate attrition. Status Report Regarding CPAT Testing (Dkt. # 1940) ("CPAT Testing Report"). The report addressed issues raised by Plaintiffs-Intervenors and the United States regarding an apparent acceleration in CPAT processing – issues on which they, and the Monitor, had sought explanations and exchanged communications with the City before the conference.

As the CPAT Testing Report explains in detail, the Monitor reported that the pace at which the City calls candidates for the CPAT has in fact accelerated by comparison with the processing of Exam 2000 candidates: to date, the City has called up more than two thirds of the candidates it expected to reach on the Exam 7001 list (far more than at the comparable stage for Exam 2000), and (at least before the COVID-19 emergency) it planned to call the remainder in 2020. The Monitor noted that

an appropriate process would have included an assessment of the potential effects of accelerated CPAT testing on candidate attrition (at the CPAT stage and at later stages, and in consultation with the EEO Office); specific consideration of the increased burdens on recruitment resources in the early stages of the Exam 7001 list (and how to address them); and the development of specific initiatives and communications directed to the greatly increased numbers of candidates who would wait for a variety of long periods after the CPAT to enter further stages of the hiring process.

CPAT Testing Report at 15-16.

As set forth in detail below and in the CPAT Testing Report, the Monitor has urged the City to make a further attempt to develop a comprehensive communication plan adapted to minimizing the potential cost, and maximizing the potential benefits, of its processing schedule.

After an exchange of correspondence on the docket, and following the January 27, 2020 status conference, the Monitor and the Parties agreed upon a formal briefing schedule for submissions to the Monitor on the CPAT processing issue; and on March 20, 2020, the United States and Plaintiffs-Intervenors submitted their positions. Specifically, the United States formally requested that the Court (1) issue a finding that the City's decisions regarding CPAT processing violated Paragraph 16 of the Modified Remedial Order; (2) direct the City to accurately memorialize all steps in its entry-level firefighter selection process and to produce that memorialization to the Parties and the Monitor for review and comment before finalization; and (3) impose such other sanctions as the Court deems appropriate. Plaintiffs-Intervenors similarly requested that the Monitor recommend that the Court make a finding that the City violated Paragraphs 16 and 19 of the Modified Remedial Order, and that the City did not provide adequate notice of its intentions in altering the processing of candidates for the CPAT. Plaintiffs-Intervenors also requested a recommendation that the Court order shortfall retesting of black candidates, targeted outreach, and a demonstration that the City is in compliance with Paragraph 19 before it is permitted to administer the CPAT to further candidates. On April 6, 2020, the City requested an extension of time for its response to the Parties' submissions, to May 29, 2020, because of the COVID-19 pandemic, and the Monitor granted the City's request. The Monitor is reviewing the submissions from the United States and Plaintiffs-Intervenors while it

awaits the City's submission.³ In the interim, the Monitor will continue to remain available to the Parties to the extent they continue to discuss a potential resolution to the issues raised.

In addition to these efforts to adjudicate or resolve the disputes between the Parties, the Monitor has simultaneously engaged in extensive discussions with the City and the other Parties regarding the recommendations in the Monitor's CPAT Testing Report and other measures intended to mitigate any potential adverse effect, and to take advantage of any benefit, that the accelerated CPAT schedule may produce in attrition among non-traditional candidates who have passed the CPAT. Those initiatives are discussed in Part II.B below.

2. Candidate Processing to Date

The second Fire Academy Class to be appointed from the Exam 7001 eligible list entered the Academy on November 12, 2019 and graduated in March (ahead of schedule because of the COVID-19 emergency). The City reports that as of April 30, 2020 the composition of the firefighter force is as follows:

Black	817	9.8%
Hispanic	1291	15.4%
White	5956	71.2%
Asian	196	2.3%
Native American	9	0.1%
Other	91	1.1%
Total	8360	100%

Because of the COVID-19 crisis, the City has suspended candidate processing and cancelled the Fire Academy class that had been scheduled to begin in April 2020.

³ On March 25, 2020, the status conference was adjourned from March 26, 2020 to May 12, 2020.

On December 27, 2019, the City provided the Monitor and the other Parties with a set of attrition metrics showing voluntary attrition and disqualifications at each stage of the hiring process for members of different demographic groups through the appointment of the second Academy class.⁴ The following figures based on the City's report show candidate attrition overall and attrition in the CPAT stage of the hiring process – cumulatively for candidates in both rounds of processing to date:

- a) Candidates called off the list for processing (beginning with CPAT)
 - (1) Black: 864 (17.2% of total candidates called off list)
 - (2) Hispanic: 1,310 (26.1%)
 - (3) White: 2,560 (50.1%)
 - (4) Total: 5,023⁵

- b) Representation in first two Academy classes (candidates who have successfully completed processing and were appointed)⁶
 - (1) Black: 70 (11.6%)
 - (2) Hispanic: 125 (20.8%)
 - (3) White: 370 (61.6%)
 - (4) Total: 601

- c) Total voluntary attrition (candidates who dropped out at any stage of the process, including the CPAT)
 - (1) Black: 320 (37.0% of black candidates called for processing)
 - (2) Hispanic: 449 (34.3% of Hispanic candidates called)
 - (3) White: 847 (33.1% of white candidates called)

⁴ “Voluntary attrition” means that a candidate did not proceed to the next required step for some reason, as opposed to being disqualified by the FDNY.

⁵ Figures do not include candidates who have temporarily declined appointment or are ineligible.

⁶ It should be noted that the group of candidates *not* appointed includes candidates who continue to undergo processing and who may be appointed to later classes, in addition to those who have dropped out of the process or been disqualified. For the steps in the hiring process other than the CPAT (especially the Medical Exam), these “pending” candidates represent a substantial percentage of candidates in processing; and the rates of attrition for those steps and for the process as a whole may change significantly as pending candidates either drop out or obtain final results.

- d) Total disqualifications (candidates disqualified at any stage of the process, including CPAT)
 - (1) Black: 85 (9.8% of black candidates called for processing)
 - (2) Hispanic: 121 (9.2% of Hispanic candidates called)
 - (3) White: 127 (5.0% of white candidates called)

- e) Total attrition (at any stage of the process, including CPAT)
 - (1) Black: 405 (46.9% of black candidates called for processing)
 - (2) Hispanic: 570 (43.5% of Hispanic candidates called)
 - (3) White: 974 (38.0% of white candidates called)

- f) CPAT voluntary attrition (candidates who did not appear for the CPAT)⁷
 - (1) Black: 297 (34.4% of black candidates invited for testing)
 - (2) Hispanic: 420 (32.1% of Hispanic candidates invited)
 - (3) White: 784 (30.6% of white candidates invited)

- g) CPAT failures (among candidates in each group who appeared for the test and obtained a result)⁸
 - (1) Black: 488 pass; 76 fail (13.5% failure rate, 86.5% pass rate)
 - (2) Hispanic: 770 pass; 111 fail (12.6% failure rate, 87.4% pass rate)
 - (3) White: 1,640 pass; 122 fail (6.9% failure rate, 93.1% pass rate)⁹

⁷ Corresponding figures for Exam 2000 candidates were 34.1% (black), 35% (Hispanic), and 31.6% (white). Accordingly, the disparity in voluntary attrition between black and white candidates at the CPAT stage is slightly larger than it was for Exam 2000 candidates. It should be noted, however, that this comparison includes Exam 2000 candidates called much later in the life of their eligible list. The comparison is thus imperfect, because candidates called up early in the life the list are presumably more likely to appear for each stage of processing than those called off the list later.

⁸ A small number of candidates in each demographic group are reported as “pending” in the CPAT results. The rate of CPAT failures and the corresponding CPAT pass rate have been calculated excluding the pending candidates.

⁹ The corresponding pass rates for Exam 2000 candidates were 88.6% (black), 93.0% (Hispanic), and 94.8% (white). Thus, the pass rates among all groups of candidates were slightly lower than for Exam 2000; and the disparities between white and Hispanic candidates and between white and black candidates are both larger than for Exam 2000. According to all three tests of statistical significance used in the City’s report, both the black/white and the Hispanic/white disparities in outcomes are statistically significant.

- h) Total CPAT attrition
 - (1) Black: 373 (43.2%)
 - (2) Hispanic: 531 (40.5%)
 - (3) White: 906 (35.4%)

As these figures indicate, rates of voluntary attrition and disqualification for black and Hispanic candidates continue to exceed those for white candidates. As it was for Exam 2000 candidates, the CPAT is associated with more candidate attrition than any other stage in the process (combining voluntary attrition with disqualifications), although it should be noted that the volume of voluntary attrition at the CPAT stage may be attributable in part to its position as the first step in the overall hiring process following the written exam.¹⁰ In addition, also as it was for Exam 2000, attrition at the CPAT stage is the largest contributor to the overall disparity in attrition between groups. Accordingly, the City must continue to augment its efforts to address the disparities and ensure that candidates are kept informed, motivated, and prepared for the CPAT. As discussed above, the majority of projected reachable candidates on the Exam 7001 list (those whose scores make them likely to be called off the list for processing) have already been called for CPAT testing; but many remain to be called for the CPAT; and the City must ensure that its communications and candidate resources are fully and appropriately deployed to minimize attrition, and disparities in outcomes between racial and ethnic groups, in this remaining subset of candidates. In addition, given the disparities in attrition that have already appeared among Exam 7001 candidates, it is essential for the City to take all practicable

¹⁰ The overall hiring process incorporates the firefighter exam (written exam followed by CPAT) and several phases of post-exam screening, including CID intake, the Medical Exam, and character review.

steps to minimize further attrition among the candidates, especially non-traditional candidates,¹¹ who have successfully cleared the CPAT stage of the screening process.

B. Attrition Mitigation

The Monitor has continued to work intensively with the City on initiatives intended to mitigate attrition among non-traditional firefighter candidates. The discussion below provides (1) a summary of the City's efforts since the last report to maintain candidates' engagement and help them prepare for the different steps in the hiring process and (2) an account of the City's longer-range plans and its progress in implementing the Monitor's recommendations (including those in its CPAT Testing Report) for improvements in its candidate communications and attrition mitigation programs.

1. Recent Training and Outreach to Candidates

a) Statistics from CPAT Training

As previously reported, the City's analyses of data from the Exam 2000 hiring process show a strong correlation between CPAT training, especially attendance at multiple sessions, and success on the CPAT. Monitor's Twenty-Fifth Periodic Report (Dkt. # 1877) at 16. Figures from the first two rounds of CPAT testing for Exam 7001 candidates reflect similar correlations. But for reasons that are unclear, rates of attendance, and rates of multiple-session attendance, have been lower for Exam 7001 candidates than for Exam 2000 candidates.

Cumulatively for Rounds 1 and 2, out of all candidates invited, 54.6% of black candidates, 51.9% of Hispanic candidates, and 43.6% of white candidates attended at least one

¹¹ The City has generally rejected proposals (including suggestions by Plaintiffs-Intervenors) for attrition mitigation programs specifically for black and Hispanic candidates. But it is hoped that programs offered to all candidates will have the effect of reducing disparities by closing gaps between groups in resources and preparation.

training session.¹² These figures include results from the new training facility at FDNY headquarters at Metrotech, which was established at the suggestion of the Court to augment training at the Fire Academy facility on Randall's Island. *See* Monitor's Twenty-Eighth Periodic Report at 13. The supplemental training location offered two training sessions per week (with capacity for up to 200 trainees per session) from August 7, 2019 until the end of CPAT testing on September 7, 2019. A total of 40 candidates appeared for training sessions at that facility (although the City reports that some of those 40 candidates chose to train on Randall's Island instead).

The City's figures for Exam 7001 continue to indicate a positive correlation between attendance at CPAT training, especially multiple-session attendance, and successful completion of the CPAT. Candidates who attended multiple sessions had lower rates of both voluntary attrition and disqualification, and attendance at multiple sessions was also associated with narrower disparities between demographic groups in both voluntary attrition and disqualifications. The following figures show the rate of voluntary attrition, the rate of disqualification, and the overall rate of qualification (the rate at which candidates appeared for and passed the CPAT) by demographic group for candidates with different levels of CPAT training attendance.¹³

¹² These figures are close to the corresponding numbers for Exam 2000 candidates, which show 52% attendance for black candidates, 53% for Hispanic candidates, and 47% for white candidates.

¹³ The rate of disqualifications is calculated as a percentage of candidates who appeared for testing; the overall qualification rate is calculated as a percentage of all candidates invited for testing, including a small number of candidates listed as pending in the City's figures.

Candidates	Voluntary Attrition	Disqualification	Overall Qualification
NO TRAINING SESSIONS			
Black	63.8%	19.3%	28.8%
Hispanic	57.7%	22.3%	32%
White	51.5%	11%	42.6%
ONE TRAINING SESSION			
Black	20%	21.5%	62.2%
Hispanic	16.4%	14.3%	71.2%
White	7.1%	7.4%	85.7%
TWO TRAINING SESSIONS			
Black	13.5%	11.5%	76.6%
Hispanic	11.3%	12.1%	77.4%
White	3.9%	2.4%	93.1%
THREE TRAINING SESSIONS			
Black	5.2%	9.6%	85.7%
Hispanic	4.8%	7.5%	88.1%
White	2.3%	2.9%	94.3%
THREE OR MORE TRAINING SESSIONS			
Black	2.2%	6.8%	91.2%
Hispanic	2.6%	4.5%	93%
White	1.2%	3.2%	95.5%

Although, as noted above, the cumulative rates at which candidates attended at least one CPAT session in Rounds 1 and 2 were similar to the rates for Exam 2000, the rates of attendance at multiple sessions have been lower for Exam 7001 candidates than for Exam 2000 candidates. Cumulatively for Rounds 1 and 2 of Exam 7001, 26.2% of black candidates (compared to 32% in Exam 2000), 26.2% of Hispanic candidates (compared to 34%), and 19.8% of white candidates (compared to 27%) invited to training attended three or more training sessions.¹⁴

The rate at which candidates who appeared for at least one training session went on to attend three or more sessions is also lower for all groups than it was for Exam 2000 candidates.

¹⁴ One possible explanation, advanced by the City, for the disparity between the Round 1 and Exam 2000 figures for multiple-session attendance was that candidates in high score bands at the top of the eligible list, presumed to be highly motivated, may be more likely to have engaged in private training. That rationale may be less applicable to Round 2.

Cumulatively for Exam 7001 candidates thus far, 47.9% of black candidates, 50.5% of Hispanic candidates, and 45.4% of white candidates who attended at least one session attended three or more. The corresponding figures for Exam 2000 were 51.9% for blacks, 52.9% for Hispanics, and 47% for whites. Given this decline, and the apparent importance of multiple training sessions for candidate success, the Monitor encourages the City to continue and, if possible, augment its efforts to emphasize the benefits of multiple-session attendance and to explore the reasons for the decline. As reported by the City, its communications with the first two groups of candidates to be called for the CPAT have included messages conveying the importance of repeated trainings, and the training sessions themselves incorporate similar messaging. The City should continue these communications and expand upon them if necessary to ensure that candidates are made aware of the benefits of repeated attendance.

b) Current and Recent Outreach to Candidates

In the most recent update of its candidate communication plan (circulated October 24, 2019¹⁵) and in continuing discussions since the last periodic report, the City reported that the FDNY's Office of Recruitment and Retention ("ORR") was continuing to communicate with candidates by text, email, and phone to remind them of appointments, to follow up with candidates after appointments, and to publicize recruitment resources and events.

Communications also publicize "Worth the Wait" videos, firefighter stories, and other resources available on the JoinFDNY website. Where applicable, ORR's communications include links to

¹⁵ As discussed below, the City also provided the Monitor with a brief excerpt from its communications plan on February 20, 2020, with entries in a more detailed format than that of the October 24, 2019 version. But that document (which included entries only for January 2020) was provided only as a sample of the format in which the City currently maintains the plan for internal use – not as a full account of its planned communications.

relevant content, an approach the Monitor has encouraged. In addition to broadly disseminated email and text communications, candidates also receive calls from Recruitment Coordinators, including African-American and Hispanic Coordinators, assigned to maintain engagement with candidates in particular demographic groups.

Prior to March, candidates called up for the CPAT were invited to join the Mentor program and the Fitness Awareness Program (“FAP”) (described in detail in previous reports). On April 6, 2020, the City advised the Monitor and the Parties that the ongoing COVID-19 emergency and related budgetary issues would require changes in several of its attrition mitigation initiatives – including the suspension of the FAP and the Mentor program. The Monitor expects that the FAP will resume when the health emergency abates. But the City has advised that the Mentor program may be suspended for the remainder of the City’s fiscal year (*i.e.*, through June 30, 2020).¹⁶ Other modifications in the City’s attrition mitigation activities may be warranted in light of the suspension of the hiring process and the cancellation of the April Academy class.

In addition to the Mentor program and the FAP, candidates were provided with access to the candidate portal, which allows candidates to track and manage their progress through the steps of the hiring process.¹⁷ The features of the portal include notifications of appointments and

¹⁶ Following the suspension of the Mentor program, the City has made some arrangements for ORR to maintain contact with mentees, discussed below.

¹⁷ On February 14, 2020, the City circulated figures showing the numbers of candidates participating in the Mentor program, the FAP, and the candidate portal. But the significance of the figures was unclear because the City’s disclosure did not specify whether it showed participation among all Exam 7001 candidates at any time (including, for example, candidates who have been appointed, dropped out, or been disqualified) or whether it focused on a subset of candidates. In subsequent communications the City clarified that its figures reflected participation only among candidates who remain in active processing. Accordingly, the Monitor asked the City to provide updated figures including the number of candidates in

upcoming ORR events; copies of forms given to candidates showing required steps and documents they must submit to CID and BHS; a progress bar displaying completed, pending, and upcoming screening steps; resources such as guidelines and forms; and a feature allowing candidates to send emails via the portal to assigned CID investigators and Mentors.¹⁸

In addition to these continuing programs, in November 2019 the FDNY began rolling out a series of fitness tip videos (now fully launched) with guidance intended to help candidates improve and maintain fitness and prepare for the physical components of the FDNY screening process – notably the CPAT and the stairmill component of the Medical Exam. Unfortunately, however, although the Monitor had advocated the development of online fitness resources for at least the past year,¹⁹ the tips were launched too late to be of use to any of the more than 5,000 Round 1 and Round 2 candidates as they prepared to take the CPAT.

2. Long-Range Plans

a) ORR Communication Plan

Since at least early 2019, the Monitor has urged the City to develop a comprehensive long-range plan for candidate communications “covering the life of the list, including when and how the FDNY will communicate with . . . candidates likely to be called off the list in each year

active processing for relevant demographic groups, for use in calculating the rates of participation. The City provided a further set of figures on May 4, which the Monitor is reviewing.

¹⁸ Since the last periodic report, clarifying earlier descriptions, the City has advised that the portal does not include actual copies of candidate correspondence, although it does contain copies of the Candidate Discharge Report and the Requirements and Reminders Notice, both of which detail any additional medical testing candidates need to obtain and all of the medical and background investigation documents they still need to provide. In addition, although the portal includes scheduling information for candidate appointments, it does not include a rescheduling feature: candidates who wish to reschedule appointments must communicate directly with the relevant FDNY unit (*e.g.*, CID or BHS).

¹⁹ See Monitor’s Twenty-Eighth Periodic Report at 15; Monitor’s Twenty-Fifth Periodic Report at 21.

of its life, and what messages it will deliver at what times.” Monitor’s Twenty-Fifth Periodic Report at 19. As discussed in detail in the Monitor’s previous reports, the City’s plan must be “appropriately tailored to candidates who will begin processing at different times, pass through it on different schedules, and (if appointed) enter Academy classes at different times.” Monitor’s Twenty-Eighth Periodic Report at 18; *see also* Monitor’s Twenty-Seventh Periodic Report (Dkt. # 1910) at 6; Monitor’s Twenty-Sixth Periodic Report (Dkt. # 1896) at 18-20. In its last report, the Monitor noted that the plan “should include (and specify the content of) more frequent and more varied messaging specific to candidates at different levels on the list” and that the City should provide “additional detail, including additional samples or descriptions of the content of planned communications, which will enable the Monitor to assess how messages change over time and fit into overall plans.” Monitor’s Twenty-Eighth Periodic Report at 19. Critically, the Monitor also asked the City to update its plan “to account for the schedule of CPAT testing and the City’s estimate of the lowest reachable score on the Exam 7001 list.” *Id.* The need for a long-range plan with messaging and programs tailored to differently situated groups of candidates is even more pressing now than it originally appeared given the City’s accelerated schedule of CPAT processing, which has produced a large number of candidates who will wait different periods for further processing. Delays in candidate processing associated with the COVID-19 emergency will also further complicate messaging and heighten the importance of long-range planning.

The plan most recently provided by the City, on October 24, 2019, fell short of the requirements the Monitor outlined. Especially given the large volume of candidates who have already gone through CPAT testing, the plan failed to show sufficient differentiated messaging for groups of candidates who will wait different periods before being invited for further

processing and potentially appointed to Academy classes.²⁰ Two of the potential benefits that the City has emphasized in defending its accelerated schedule of CPAT processing are that more candidates gain access sooner to candidate resources and that candidates may feel a greater sense of engagement once they have cleared the CPAT in addition to the written exam. For the City to fully realize those benefits and reduce candidate attrition (especially among non-traditional candidates), it is essential for it to have an appropriate plan for connecting candidates to resources and leveraging their engagement.

The October 2019 plan listed various notifications and reminders referring to the different phases of the screening process; and it included some messages publicizing “Worth the Wait” videos and candidate resources such as the candidate portal, fitness tips, and the Mentor program. The City has also provided the Monitor with some samples of the notification and reminder communications, along with samples of the “Reflection Activities” materials (intended to reinforce candidate commitment) and a fitness planning card. However, the plans produced to the Monitor to date are neither extensive enough nor sufficiently detailed or precise to show satisfactorily how the City intends to communicate with differently situated candidates over the long term.

Most fundamentally, as set forth in its October 2019 plan, the City’s schedule for communications with candidates in each round of processing was simply not long enough. For example, the listed communications for Round 2 candidates were scheduled to end in April of

²⁰ The City has confirmed that although CPAT testing was conducted in large groups, candidates who passed the CPAT will undergo further processing (CID intake, the Medical Exam, and character review) in smaller groups at intervals as needed to fill the pipeline for Academy classes.

2020, despite the fact that many Round 2 candidates, even before the COVID-19 emergency, were not projected to enter an Academy class (if appointed) until at least mid-2021, and in some cases potentially not until 2022.²¹ Critically, the October 2019 plan also did not appear to differentiate between groups of candidates within rounds of processing based on their projected processing schedules for further processing. Finally, the plan did not include sufficient guidance focused specifically on preparation for the post-CPAT steps in the hiring process, including the Medical Exam, character review, and obtaining and providing required documents to the CID. For example, the plan should indicate how candidates will be encouraged to maintain fitness for the Medical Exam and provided with guidance and resources that will help them do so; and it should show how and when candidates will receive appropriate reminders, guidance, and information needed for them to navigate the character review process. Among other things, the plan should provide for messaging (in which the City already engages to some extent) directing candidates to resources in these areas already available on the JoinFDNY website or from other FDNY sources.²²

As part of its work with the City to address the implications of accelerated CPAT testing, the Monitor has renewed its request for a truly long-range, fully detailed, appropriately tailored communication plan. And in addition to the recommendations set forth in its CPAT Testing

²¹ In previous discussions regarding its plans, the City has indicated that the list of communications will simply be repeated in future years. But if that is the City's approach, the plan is still facially inadequate, as it would fail to provide for different communications with a given candidate in the first year of his or her wait to be appointed and in the second or third year.

²² As the City notes, once called for further post-CPAT processing, candidates progress through the screening steps at different rates; and consequently, to some extent, its communications with candidates must include individualized messages that cannot be included in a large-scale, long-range plan. However, the need to complement general reminders, encouragement, and guidance with individualized messaging does not eliminate the need for such larger-scale communications targeting specific groups of candidates, especially before they enter the post-CPAT phases of screening.

Report, the Monitor has suggested that the City consult with ideas42, an outside vendor the City has consulted on other aspects of recruitment and candidate perception, on messaging strategies and techniques (including the appropriate frequency and content of messages) for sustaining candidate engagement and preparation over the long term. The City reports that it has pursued those consultations.

On February 20, 2020, the City provided the Monitor with a sample spreadsheet excerpt listing communications from January 2020, along with a series of sample communications, to illustrate the somewhat more detailed format used internally by the City to plan communications. The sample provided some examples of communications targeting broad sub-groups of candidates defined by list numbers; but in order to assess the City's efforts to develop an appropriately tailored plan, the Monitor will need to review the City's entire plan in its fully detailed format, and it has asked that the City provide its full pre-COVID-19 communications plan for review (with the understanding that the timing and content will need to be revised) – along with estimates of the times at which list-number groups of candidates will be called for further processing. In addition to communications aimed at the post-CPAT group of candidates, the Monitor also expects that ORR's plans will continue to incorporate messaging, resources, and events intended to maintain engagement and preparation among the candidates who have yet to be called up for CPAT testing – *e.g.*, communications encouraging candidates to view fitness tips and other candidate resources on JoinFDNY; reminders regarding appointments; communications emphasizing the importance of attending multiple CPAT training sessions; and follow-up communications with no-shows and following CPAT practice sessions.

b) Attrition Mitigation Programs

In addition to engaging with the City regarding its overall communications plan and related strategic considerations, the Monitor has also followed up on several recommendations

regarding specific attrition mitigation programs and activities – focusing particularly on programs targeting the large group of post-CPAT Exam 7001 candidates. Key activities include the FAP and other fitness maintenance initiatives, the Mentor program, and outreach by Recruitment Coordinators. While some of these activities have had to be suspended or curtailed during the COVID-19 emergency, the Monitor expects the City to continue implementing the Monitor’s recommendations as circumstances permit.

Fitness Programs – The Monitor has recommended that the City consider modifying or expanding the FAP to adjust to the needs of candidates with different waiting periods. Because later stages of screening, including the Medical Exam and the Run, test candidates’ capacity for exercise, and because the Fire Academy itself requires a high level of fitness, it is essential for candidates to maintain their fitness while they wait to proceed with post-CPAT processing. At present, candidates can repeat the FAP, which currently consists of six sessions held over a three month period, at levels of intensity intended to be tailored to each participant’s level of fitness. The City also advised that a stairmill component has recently been added to the basic elements: push-ups, pull-ups, sit-ups, and a run. The members of each FAP group are encouraged to maintain contact with one another over the course of the program. And although instructors do not know in advance about the status and wait time of participants, they are instructed to make individualized inquiries and tailor programs based on individual needs – and to give different messages to differently situated groups. (A senior commander delivers an initial message to the groups.)

Although the option of taking multiple iterations of the FAP makes some provision for candidates with long waiting periods, the Monitor has recommended that the City consider customizing the program further for such candidates – for example, by developing new content

rather than having the cycle repeat, by grouping candidates according to their expected wait times for post-CPAT screening, and/or by offering longer schedules with more sessions. Even if the City chooses not to offer a more diverse selection of FAP courses, the Monitor has recommended that the messaging to FAP participants should be further systematized so that instructors are directed to deliver messaging encouraging people to complete the program multiple times in applicable cases. As noted above, the FAP is currently suspended because of the COVID-19 emergency, but the City reports that ORR will resume its work with the Fitness Unit when the emergency subsides.

Before the COVID-19 emergency, in connection with discussion of stairmill training and CPAT training, the City advised the Monitor that it was seeking a permanent, transit-accessible training site that could serve as a fitness-maintenance facility for candidates who have passed the CPAT and as an additional site for CPAT training. The Monitor and the other Parties supported the City's plan, and the Monitor also urged the City to locate a temporary space if necessary pending a more permanent solution. At the onset of public health crisis, the City had not identified a suitable location, and the City recently advised the Monitor that its efforts to find a site have been suspended indefinitely. On an April 30 conference call with the Monitor and the other Parties, citing likely fiscal constraints, the City reported that it does not plan to establish a permanent alternate training site for the remainder of Exam 7001 processing. The City stated that an interim site remains a possibility, though the City has no immediate plans for one. The Monitor urges the City to reconsider this position, and will discuss it with the City and the other Parties.

If the City follows through on its expressed intention to abandon the training-site plan, it will be essential for it to identify equivalent means of providing candidates with access to fitness

resources and training. As noted above in Part II.B.1.a , CPAT training (especially multiple-session attendance) is associated with higher pass rates for non-traditional candidates, and reduced disparities in pass rates between groups; and as noted in previous reports, the City's own analysis found a correlation between participation in the FAP and higher pass rates on the Medical Exam for black and Hispanic candidates. *See* Monitor's Twenty-Sixth Periodic Report at 21. Given the value of these programs in reducing attrition among non-traditional candidates, it is vital for the City to provide candidates with access sufficient to realize the programs' full benefit; and the transit-accessible training site was intended to make an important contribution in that area.

The Monitor expects to work with the City further to ensure that all candidates, including non-traditional candidates, can participate fully in the fitness programs designed to prepare candidates for the hiring process and the Academy.

Mentoring – As noted above, in an April 6, 2020 message to the Monitor and the other Parties, and in a subsequent call April 16, the City advised that the Mentor program, at least in its previously described form, had been suspended, and that it may remain suspended at least for the remainder of the City's fiscal year (*i.e.*, June 30, 2020). As far back as July 2013, the City affirmed that the program was "at the heart" of its attrition mitigation efforts. City of New York's Recruitment Report (Dkt. # 1166) (July 15, 2013). The Mentor program plays an important role by attempting to make available to all candidates (including non-traditional candidates) some of the guidance and encouragement otherwise available only to (predominantly white) candidates with friends and family in the FDNY. And recently the City has cited the potential for bringing more candidates into the Mentor program sooner as a potential benefit of its accelerated schedule of CPAT testing. Any long-term suspension or curtailment of the

program threatens to reduce the City's attrition-mitigation capabilities at a critical time in the Exam 7001 hiring process – when it is most vital for them to be maximized. If the Mentor program remains suspended for more than a brief period, it will be important for the City to undertake alternative measures to fill the role that the Mentor program has been intended to play in providing guidance to candidates and maintaining their engagement. On an April 30, 2020 conference call with the Monitor and the other Parties, the City discussed initial plans for ORR personnel to operate as mentoring teams to maintain connections with mentees; and subsequently the City reported that it has advised mentees that they should make inquiries via a mentorship email address so that any concerns can be addressed by a team of mentors. However, the City has not yet described the full scope, staffing, or other details of this interim arrangement to the Monitor or the other Parties, including whether and how it overlaps with the activities of Recruitment Coordinators. The Monitor has asked the City to provide additional information as it becomes available.

Before the current emergency prompted the suspension of the program, the City had advised the Monitor that it was developing an application that would allow Mentor activities to be tracked and reported, and the Monitor had encouraged the City to expedite development of this capability. Even if the Mentor program remains suspended for a time, the Monitor expects that work on the application will proceed so that it can be available when the program restarts, and the City has advised that it hopes to continue its work in this area once the emergency stay at home orders associated with the COVID-19 emergency are lifted.

Recruitment Coordinators – As discussed in Part II.B.1(b) above, ORR has continued to utilize Recruitment Coordinators to maintain a level of personal engagement with candidates. Since the second round of CPAT testing was completed, the Coordinators have focused on

communications with candidates who have passed the CPAT and are awaiting further processing. Before the current emergency, the African-American Coordinator team comprised six full-time positions. Although the Coordinators have had to return to front-line duty as firefighters during the emergency, they are expected to return to ORR activities once the emergency subsides. Especially given the suspension of the Mentor program, it will be important for the City to ensure that Coordinator staffing and activities are sufficient to engage closely with candidates in or awaiting further processing. The City has confirmed that Coordinator activities are tracked in the same ARCS database that ORR uses to track and manage its more broad-based communications with candidates, and the Monitor has asked the City to provide periodic exports of ARCS data reflecting Coordinator communications, so that the Monitor can effectively assess their contribution to candidate engagement. The City is working on producing the requested reports.

3. Use of Data in Attrition Mitigation Initiatives

The Monitor has previously emphasized that the City must gather and analyze data on candidate attrition in the several stages of the screening process, along with data showing the effectiveness of attrition mitigation initiatives and communications, and that it must use its analyses to guide its attrition mitigation efforts as Exam 7001 hiring proceeds. *See, e.g.*, Monitor's Twenty-Fifth Periodic Report at 22-23. The opportunity for the City to make effective adjustments in its initiatives as screening proceeds (at least with respect to pre-CPAT communications and programs) has been limited by the accelerated schedule of CPAT processing: two thirds of the candidates the City expected to call off the list had been invited to testing before attrition figures for the first round of candidates became available in June of 2019. Nevertheless, it remains vital for the City to conduct informative analyses and use them in

crafting attrition mitigation communications and initiatives, both for the candidates who remain to be called for processing and for those who have passed the CPAT.

As set forth in the Monitor's Twenty-Seventh Periodic Report (at 16-17), on May 14, 2019 the Monitor sent the City a series of recommendations regarding analyses of candidate attrition and attrition mitigation measures. The Monitor recommended that the City's Exam 7001 analyses should include all the principal components in its previous analysis of Exam 2000 attrition (which the City had provided in October 2018) – including rates of voluntary and involuntary attrition for each group at each hiring step and for participants (and non-participants) in each of the FDNY's retention programs (*i.e.* the FAP, CPAT training, and other initiatives). The Monitor also recommended more time-frame-specific or list-number-specific analyses of voluntary attrition, disqualifications, and the impact of attrition mitigation initiatives – to facilitate comparisons between Exam 7001 processing rounds and comparable rounds of processing for Exam 2000. Along with the United States and Plaintiffs-Intervenors, the Monitor also suggested that the City include calculations of statistical significance where it found disparities in attrition between demographic groups. The Monitor also suggested that the City's analysis should include additional, and more detailed, examinations of the effect of training, communications, and other attrition mitigation measures – including correlations between the number of training or practice sessions attended, or the time elapsed since the last session attended, and success on a given screening test. Monitor's Twenty-Seventh Periodic Report at 16-17. The Monitor also recommended that the City examine the different contributions that different portions of multi-part screening tests (including the CPAT) make to candidate disqualifications.

The City recently responded to the Monitor's recommendations and the comments from the other Parties²³ – accepting the majority of the Monitor's suggestions for analyses of Exam 7001 candidate processing data, including analyses correlating communications, training, and attrition mitigation initiatives with voluntary attrition and disqualifications; however, the City still has not performed (or, at least, has not yet reported to the Monitor) many of the recommended analyses.²⁴ The Monitor responded to the City with additional requests and recommendations on April 27, 2020, while acknowledging that the timing of the City's further responses may be affected by the diversion of resources resulting from the COVID-19 emergency.

The attrition reports the City has provided so far for Exam 7001 processing (the first on June 18, 2019 and the second on December 27, 2019) omit a number of important analyses that could be used to assess the effectiveness and guide the deployment of the FDNY's attrition mitigation initiatives. Notably, for example, the City's reports omit some potentially informative elements of the Exam 2000 analysis (for example, analyses correlating attrition rates with mitigation initiatives such as the Mentor program and the FAP). The December 27, 2019 report includes calculations of statistical significance for disparities in outcomes between groups (as suggested by the Monitor and the other Parties); however, it does not include any regression

²³ The City responded on February 13, 2020 to the Monitor and on December 5, 2019 to the United States and Plaintiffs-Intervenors. In an August 8, 2019 email, the City indicated it would provide responses in September 2019. But in response to subsequent queries and reminders, the projected delivery was repeatedly postponed.

²⁴ In recent discussions, the Monitor and the other Parties have followed up on suggestions that the City provide data and perform analyses focusing on separate components of the CPAT and CPAT training and practice sessions. The City is currently examining whether and how the necessary data can be obtained and analyzed.

analyses attempting to isolate factors in attrition, which the City has indicated it plans to provide using data from the optional survey of Exam 7001 candidates. In addition, the City's reports provide no assessment of statistical significance regarding disparities in voluntary attrition; they do not provide separate attrition figures for all the components of the Medical Exam; and they do not include any calculation of statistical significance for the overall hire/disqualification rates in the character review portion of the process.

The City's efforts to construct systems that would allow ORR and other FDNY personnel to identify and respond to trends in candidate attrition are still a work in progress, even though the need to establish such systems has long been emphasized by the Monitor. *See, e.g.*, Monitor's Twenty-Fifth Periodic Report at 22-23. The City previously advised the Monitor that it planned to construct a "dashboard" that would allow ORR to monitor attrition on an ongoing basis, and that would enable ORR to assess the correlation between individual attrition mitigation initiatives and rates of voluntary and involuntary attrition, *see* Monitor's Twenty-Eighth Periodic Report at 22-23. At a December 9, 2019 meeting, the City provided a demonstration of the dashboard's capabilities, and in its February 13, 2020 response to the Monitor's recommendations, the City confirmed that it plans to use the dashboard to conduct several of the recommended analyses. However, as of the point when the current health crisis suspended all non-COVID-19-related data analyses, the City had not reported any results to the Monitor beyond those included in its December 27, 2019 report.

The ORR dashboard allows users to view attrition metrics for each stage of the hiring process, updated daily from the Department's Consolidated Candidate Tracking System ("CCTS"), which was described in detail in previous periodic reports. *See, e.g.*, Monitor's Twenty-Fifth Periodic Report at 29-30; Monitor's Twenty-First Periodic Report at (Dkt. # 1803)

21-22. For example, the dashboard shows fully updated voluntary attrition rates and pass rates for the CPAT, the Medical Exam, and the character review phase of the hiring process. However, although the dashboard's ability to display fully updated information in some categories in near-real time represents an advance on previous data management capabilities, at least as demonstrated it did not display or include in its calculations several important categories of information. While it showed rates of voluntary attrition and disqualification for the Medical Exam as a whole, it did not show such rates for the separate components of the Exam. In addition, most significantly for its use as a tool in ORR decision making, the dashboard did not yet include data from the Mentor program, the FAP, the candidate portal, or other attrition mitigation programs and initiatives. Although it includes basic data on CPAT training attendance, at least as demonstrated the dashboard also did not show numbers or percentages of candidates who attended multiple sessions or correlate multiple session attendance with attrition and disqualification rates.²⁵ In sum, based on current information, neither the attrition analyses produced by the City to date nor the ORR dashboard includes even the range of analyses that the City performed in its report on the Exam 2000 list.

Once the current emergency subsides, the Monitor will continue to work with the City, with input from the other Parties, to ensure that it performs appropriate analyses on an ongoing basis and uses them to guide its attrition mitigation efforts.

²⁵ As discussed in Part II.B.1.a above, in subsequent communications the City has provided the Monitor with figures showing results for candidates who attended different numbers of training sessions, from which the Monitor was able to calculate rates of voluntary attrition and disqualification.

C. Analyses of the Exam 7001 Recruitment Campaign

A central goal of the Modified Remedial Order and the Monitorship is for the City to establish a sustainable process for recruiting and retaining non-traditional firefighter candidates. *See* Modified Remedial Order ¶¶ 31-36.²⁶ For the City to accomplish that goal, it must conduct effective, informative analyses of its recruitment campaigns to determine the most productive and cost-effective means of attracting non-traditional candidates likely to achieve reachable scores on the firefighter examination and ultimately be appointed as firefighters. To that end, the Monitor has consistently emphasized the need for the City to perform an effective after action analysis of its recruitment activities, and to retain the necessary data (including data on candidates, on communications, and on budgets and resource allocation) that would allow it to perform such an analysis. For the City's recruitment campaigns to be truly effective on a continuing basis, it must be able to assess and modify its activities based on well designed analyses that produce actionable conclusions. But the retrospective reports on the Exam 7001 campaign produced by the City to date do not provide actionable insight, and the City must now work intensively, in close consultation with the Monitor, to produce analyses capable of informing its strategies and tactics for the next recruitment campaign.

As described in the Monitor's previous reports, the City provided the Monitor and the other Parties an initial "After Action Report" in November 2018. The Report contained a large volume of informative data and some analyses of the FDNY's recruitment activities, but it

²⁶ The Court specifically found that a policy or practice that "fails to adequately recruit black persons to become firefighter candidates serves to maintain and perpetuate the effects of the City's discrimination against black firefighter candidates." Findings of Fact (Dkt. # 741) at 33.

omitted critical components necessary for an actionable analysis, including, among other things, useful data about the City's budgeting, a breakout of reachable from not reachable candidates, and an assessment of the City's digital and traditional-media advertising campaigns. See Monitor's Twenty-Sixth Periodic Report at 22-24. The Monitor provided the City with its comments on this first After Action Report on May 1, 2019, and the City advised that it would take account of those comments, along with comments from the Parties (circulated April 30, 2019), in an expanded and revised report on its recruitment campaign.²⁷ See Monitor's Twenty-Seventh Periodic Report at 18-19; Monitor's Twenty-Eighth Periodic Report at 23-24. The City provided the Monitor and the Parties with its updated After Action Report (dated September 27, 2019) on October 2, 2019, and on October 23, 2019, it provided the Monitor and the Parties with its Cost Effective Analysis for Exam 7001 Recruitment Campaign (the "Cost Effective Analysis"). Plaintiffs-Intervenors communicated their comments on the Cost Effective Analysis and the After Action Report on November 20 and 22, 2019, respectively; the United States added its comments on November 26, 2019.

²⁷ As stated in the Monitor's Twenty-Seventh Periodic Report at 19,

In addition to extensive recommendations concerning specific analyses, the Monitor offered several general recommendations including the following: (1) the City should ensure that the analysis assesses the impact of each initiative or category of recruitment activity on different demographic groups, so that the analysis can be used to identify effective strategies specifically for recruiting black and Hispanic candidates; (2) the report should assess the ability of each category of activity to attract minority candidates with "reachable" scores (*i.e.* candidates likely to be called off the eligible list); (3) the report should assess whether each activity resulted in greater representation of minorities among those candidates with reachable scores; and (4) the report should include regression analyses to identify to what degree multiple variables are driving the results of a particular initiative.

Both the other Parties and the Monitor have identified numerous weaknesses and omissions in the City's reports, and the Monitor has been working closely with all concerned, in consultation with its experts, to oversee the City's efforts to address their concerns and generate useful analyses.

1. After Action Report

The City's revised After Action Report includes a broad range of analyses correlating recruitment contacts, applications, test-takers, and reachable scores with factors such as geography, race, and the type and location of initial recruiting contact. It expands upon the analyses in the initial report, articulates a number of findings, and offers some regression analyses – responding in part to the Monitor's recommendations. However, the report continues to exhibit a number of deficiencies. Most critically, the After Action Report fails to achieve the essential purpose of the analysis: determining and comparing the effectiveness of different recruitment activities, events, and types of communication *in the targeted recruitment of non-traditional candidates who achieved a reachable scores on Exam 7001*. In order to provide useful guidance for the next campaign, the City's analysis must measure effectiveness by this key criterion – identifying the events and activities that produce the largest groups of reachable candidates in which black and Hispanic candidates are most heavily represented.

The Monitor expects that the City may be able to remedy this omission with further appropriately focused analyses; it has begun to work with the City and the other Parties to identify appropriate analytical objectives; and before the COVID-19 emergency the City had begun to perform a number of analyses requested by the Monitor.

2. Cost Effective Analysis

The City's Cost Effective Analysis also suffers from a serious flaw – the City's failure to collect data that would allow it to attribute internal FDNY expenditures to specific recruitment

activities and events. The Cost Effective Analysis itself describes two critical limitations: (1) that cost information for FDNY events is limited to overtime expenditures for firefighter and fire officer personnel and (2) that linking expenditures (namely firefighter and fire officer overtime expenses) to specific FDNY events “was not always possible.” As the City further explains, “[t]his issue of not being able to directly link overtime expenditures to specific events means that the cost effective analysis is unable to be event-based.” *Id.* Because of this limitation, the City’s analyses did not draw any conclusions based upon the cost effectiveness of any particular event or type of event for the entire recruitment campaign for Exam 7001. The City can perform, and has performed, analyses showing its costs for each month of the campaign. But it states that it “do[es] not know in any given month specifically which FDNY event or combination of events was most cost effective,” and instead knows only “*which month(s)* produced the most cost effective outputs.” *Id.* (emphasis in original).

The Monitor is deeply concerned by the City’s failure to track its costs in sufficient detail, especially given the Monitor’s consistent, longstanding focus on the importance of budgeting as an essential component of the after action analysis, which the City has acknowledged. *See, e.g.*, Monitor’s Eighteenth Periodic Report at (Dkt. # 1734) 3, 15-16. In recent discussions the Monitor and the other Parties have made further inquiries to determine whether more precise data is available, whether more useful analyses can be performed with existing data, and whether gaps in the available data can be bridged with inferences or informed estimates. Both Plaintiffs-Intervenors and the United States have identified experts to facilitate their participation in these discussions.

The Cost Effective Analysis also includes assessments of activities conducted by the Hodes, the vendor engaged by the City for its digital, radio, and outdoor advertising campaigns.

Although Hodes's tracking of cost data appears to have been more detailed, and permits a more precise attribution of costs to specific activities, these analyses are complicated by a different limitation – that only a minority of initial contacts or “lead captures” in the digital campaign chose to disclose demographic information.

3. Recruitment Analyses Requested by the Monitor

In their comments on the City's reports, the United States and Plaintiffs-Intervenors both asked the Monitor to appoint an outside consultant to manage the City's efforts to produce new, acceptable analyses. Although the Monitor did not appoint such a consultant to work directly with the City, it has worked with its own experts (including one newly engaged expert) to specify the requirements for the City's further analyses and engage with the City's experts to ensure that the necessary analyses are conducted as expeditiously as possible.

At a meeting on December 9, 2019, the Parties and the Monitor participated in an initial discussion of possible further analyses. In mid-January 2020, the Monitor began work with its subject matter experts to develop data searches and analyses for the City to conduct in order to determine the effectiveness and cost effectiveness of the various recruitment initiatives undertaken during the Exam 7001 campaign. At a February 14, 2020 meeting with the City, the Monitor outlined a first set of specific data queries for the City to perform to determine which events (defined by type, timing, and location) and which advertising methods were most successful both in attracting numbers of reachable non-traditional candidates and in increasing

the percentage of non-traditional candidates in the overall pool of reachable candidates.²⁸ The City agreed to perform the Monitor's suggested queries and provide results on a rolling basis.²⁹

At the same meeting, the Monitor also suggested methods for preparing an informed estimate of the cost of event types – including, for example, surveying recruitment event planners to identify a range of event costs and a more detailed understanding of ORR budgeting for recruitment events in the Exam 7001 campaign. And the City indicated that it would seek such alternate methods for determining costs. The Monitor also suggested that, if it can be obtained, additional data from Hodes showing the effectiveness of various media types and touchpoints with recruitment contacts should be included in the analysis. Finally, the Monitor suggested that the City conduct a small number of focus groups of non-traditional Exam 7001 firefighters to learn which, if any, recruitment initiatives had influenced their decision to take Exam 7001.

On February 28 and March 5, the City provided the Monitor with its first and second sets of responses to the Monitor's first set of data search requests. On March 6, the Monitor and all Parties met to discuss next steps in recruitment analysis, including the establishment of weekly meetings to work through recruitment analyses and to provide insight and advice for the next campaign. The United States and Plaintiffs-Intervenors have hired their own experts and plans were made for weekly discussions. Unfortunately, the Monitor and Parties were unable to

²⁸ The most successful events and techniques achieve both goals: attracting large numbers of reachable non-traditional candidates and attracting groups of reachable candidates containing a high percentage of non-traditional candidates.

²⁹ On February 19, the Monitor discussed with the other Parties the recruitment data and analyses it requested from the City on February 14.

conduct any calls after the March 6 meeting before the City advised that it needed to suspend work on recruitment data analysis planning because of the pandemic.

Although the City's recruitment work is suspended while its data personnel devote their time and efforts to COVID-19 tasks, the Monitor and the other Parties have continued to analyze the data received from the City and to seek ways to estimate the City's past recruitment costs. Although the Monitor and other Parties understand that the City may not be able to respond immediately, all agree that there is a pressing need to create a data-driven strategic plan before the next recruitment campaign, and the City has agreed that the Monitor and other Parties should continue to work together and to send requests to the City, even if the City is unable to respond at once. With that understanding, the United States and Plaintiffs-Intervenors sent requests to the City on March 20 and April 28 respectively, and the Monitor sent a second set of requests on March 25.

D. Assignment Issues

As discussed in detail in the Monitor's previous periodic reports, Plaintiffs-Intervenors have raised issues regarding the City's compliance with Paragraph 1(d) of the Disparate Treatment Settlement, which requires the City to give "New York City residents who graduate from the Fire Academy first priority for placement into a fire company within the Division in which they live, to the extent reasonable, practicable, and consistent with operational needs"; and the Monitor has undertaken an investigation of Plaintiffs-Intervenors' concerns. Monitor's Twenty-Fourth Periodic Report (Dkt. # 1861) at 18. The Monitor's investigation proceeded through a series of Monitor requests for information and City responses, as the Monitor sought to verify the specific operational reasons the City relied upon in denying such requests from firefighters in the classes that were the subject of Plaintiffs-Intervenors' original inquiry. Monitor's Twenty-Seventh Periodic Report at 20. The City responded most recently to the

Monitor's inquiries on June 25, 2019. Based on the information provided by the City, the Monitor has been unable to confirm whether all assignments in the relevant Academy classes complied with the Intent Settlement. In the cases where the City denied firefighter requests for placement in their home divisions, it has invoked operational reasons or needs of the Department in general terms; but because of the way records were maintained at the relevant time, it cannot identify for the Monitor the specific operational justification that the City deemed sufficient in each case.

In the course of these inquiries, the Monitor directed the City to establish systems that would reliably memorialize the specific reasons for denying home division requests from New York City residents; and the City undertook to prepare revised and expanded guidelines for probationary firefighter appointments. *See* Monitor's Twenty-Seventh Periodic Report at 20. The City provided the updated guidelines to the Monitor and the other Parties on June 24, 2019. Monitor's Twenty-Eighth Periodic Report at 25. The Monitor and Plaintiffs-Intervenors offered comments and raised some concerns about the guidelines, with the Monitor offering a series of revisions intended to clarify the guidelines and ensure compliance with the home division requirement of the Intent Settlement. On November 21, 2019, the Monitor convened a conference call with the Parties to discuss the guidelines,³⁰ and the City agreed to make revisions

³⁰ The Monitor had originally requested a meeting (in a July 25, 2019 message to the Parties) to address issues relating to the home division requirement and the issues raised by Plaintiffs-Intervenors (discussed below) regarding firefighter assignments to different fire companies. Monitor's Twenty-Eighth Periodic Report at 26. The City objected, contending that the proposed topics were not within the scope of the Monitorship. *Id.* In a September 25, 2019 message to the Parties, the Monitor noted its role in resolving disputes arising under both the Intent Settlement and the Modified Remedial Order, and asked the Parties to confirm the existence of live disputes on the assignment issues, and identify the disputed issues. Plaintiffs-Intervenors responded with a list of issues on October 3, 2019; the City responded on October 11, and the call was convened on November 21, 2019.

that would more clearly prioritize the home division requirement. The City circulated draft revised guidelines on November 27, 2019, which provided some of the needed clarification; and the Monitor provided further suggested revisions on February 13, 2020, intended to eliminate any ambiguities regarding the implementation of the home division requirement and ensure that the City conducts appropriate analyses of firefighter assignments – to confirm compliance with both the home division requirement and applicable law. The City initially declined to implement the Monitor’s most recent proposed revisions, asserting that further changes would require an additional round of review by relevant FDNY leadership, and that the proposed changes do not justify re-opening its approval process. But on a conference call with the Monitor and the other Parties on April 30, 2020, the City advised that it would give further consideration to the Monitor’s proposed revisions.

The City’s assignment guidelines require that reasons relied upon in denying home division requests must be specifically recorded, and the Monitor plans to request and review those records as assignments proceed for Exam 7001 Academy classes, in order to confirm that the reasons invoked by the City are consistent with the Intent Settlement. On an April 16, 2020 conference call, the City confirmed that it had conducted assignments for the most recent Academy class (which left the Academy in March, ahead of schedule because of the COVID-19 emergency) in accordance with its current guidelines, and that it had reviewed the assignments for compliance with the home division requirement.

As previously reported, Plaintiffs-Intervenors have raised additional concerns relating to firefighter assignments, including assignments to engine and ladder companies and to busier fire companies – allegations which Plaintiffs-Intervenors contend demonstrate potential unlawful discrimination or retaliation under the Modified Remedial Order, and which are also relevant to

the Order's focus on the importance of an effective EEO office within the FDNY. *See* Monitor's Twenty-Fourth Periodic Report at 18-19. On July 16, 2018, the Monitor remanded the issues to the FDNY EEO Office based on the City's assertions that the EEO Office should handle such an investigation, with instructions to complete an investigation within 90 days (including certain topics specified by the Monitor) and to report to the Monitor on the outcome of the investigation within 120 days. After protracted delays, discussed in detail in the Monitor's previous report, the City provided the Monitor with the report of its investigation on May 24, 2019. Monitor's Twenty-Eighth Periodic Report at 25-26. The City's memorandum stated its findings and conclusions on one set of issues (whether objective factors support the view that some fire company assignments identified by Plaintiffs-Intervenors are preferable to others), but did not describe any investigation or findings regarding the Plaintiff-Intervenors' claims of discriminatory disparities in assignments.³¹ *Id.* On August 29, 2019, the City also provided a one-paragraph summary of its investigation of the company-assignment issue to the Plaintiffs-Intervenors and the United States. *Id.*

In its October 3, 2019 letter identifying disputed issues, Plaintiffs-Intervenors asserted that the City's investigation regarding fire company assignments failed to demonstrate its ability to conduct adverse impact analyses and "take steps to remedy adverse impact that may be identified," and they asserted that Priority Hire candidates who were assigned to engine companies and less busy companies are entitled to relief. The City disagreed, and on the November 21, 2019 call, given the apparent impasse in discussions between the Parties, it was agreed that the Parties would set a briefing schedule to formally present the issues to the Monitor

³¹ The City assumed, for the purposes of the report, that the asserted disparity existed.

for its recommendations.³² However, in subsequent communications, the City and Plaintiffs-Intervenors advised the Monitor that they have engaged in further discussions and exchanges of information in an effort to resolve the dispute, and they have postponed setting a briefing schedule pending those discussions. Plaintiffs-Intervenors and the City continue to work together to review firehouse assignments in an effort to resolve the dispute amicably. The Monitor will continue to receive updates on the progress of those further discussions.

E. Working Group

The Monitor has continued to provide oversight for the City's work on initiatives relating to the Working Group established under the Disparate Treatment Settlement. The Working Group Committee was established with the goal of "creat[ing] educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters." Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e). As discussed in the Monitor's previous reports, the City's initiatives under the Working Group Committee have primarily consisted of the FDNY Fire Cadet program and the FDNY Explorers program.

Over the past several months, the City has continued to engage in recruitment and other preparatory activities for the Fire Cadet program, along the timeline that it previously provided to the Monitor. *See* Monitor's Twenty-Sixth Periodic Report at 25-26. However, in an April 6, 2020 message, the City advised the Monitor and the other Parties that the Cadet Program has

³² The City's October 11, 2019 response to Plaintiffs-Intervenors included disparate impact analyses of fire company assignments pursuant to its recently adopted assignment criteria (in use for Exam 7001 candidates), but it has not conducted such an analysis for the assignments that were the subject of Plaintiffs-Intervenors' original challenge. The City has represented that it will conduct disparate impact analyses "as a matter of course" under the new guidelines; and on the April 6, 2020 conference call the City advised the Monitor and the other Parties that it had conducted disparate impact analyses of assignments for the class that recently graduated from the Fire Academy.

been delayed until at least July 2022 because of the COVID-19 emergency. The City confirmed that it remains committed to holding the program in conjunction with the next promotional examination, and the Monitor expects the City to continue work on the program once the emergency subsides; but the timeline for further steps in establishing the program is now uncertain.

Previously, in an update provided December 27, 2019, the City reported that a Uniformed Academy Director was hired in April 2019; the Civilian Academy Directory started on October 15, 2019; a full-time light duty Lieutenant had been assigned to assist with recruitment; Cadet Advisors had been selected and had received recruitment and mentor training. Since then, recruitment efforts have continued; information sessions were conducted between January and March 2020; the City's vendor has continued work on creation of a personality assessment instrument; and the City has awarded a contract to a test administration vendor.

In an update provided before the current public health emergency, the City confirmed that it had continued its FDNY Explorers program initiative over the previous several months.³³ As of December 27, 2019, the City reported that there were 179 Explorers and 45 active Post Advisors; and the City reports that those numbers had not changed substantially as of the issuance of emergency rules associated with the pandemic.

³³ As discussed in prior reports, the Explorers program provides training and mentoring at posts associated with New York City high schools in diverse neighborhoods. See Monitor's Nineteenth Periodic Report (Dkt. # 1761) at 17-18.

III. EEO

A. EEO Staffing

As previously reported based on information provided by the City, the FDNY EEO Office is now fully staffed – comprising 16 attorneys (including the Assistant Commissioner, two Deputy Directors, Investigative Attorneys and contract attorneys) and six non-attorney staff. Monitor’s Twenty-Eighth Periodic Report at 28-29. Before the last periodic report, the City advised the Monitor that investigators had a caseload of five to 10 cases – reduced from a caseload of 15 to 20 cases in the latter half of 2018. *Id.* at 29.

The City has also continued to provide the Monitor and the other Parties with updates on its efforts to bring the EEO Counselor program up to full strength. EEO Counselors are firefighters and officers who act as liaisons between the firefighter force and the EEO Office – answering questions, providing advice regarding procedures, and (where appropriate and under supervision) assisting the EEO Office with the handling of complaints. The program was launched in January 2018 with the appointment of a group of 18 Counselors and with plans for a total of 25-30 Counselors from Fire Operations. Monitor’s Twenty-Fourth Periodic Report at 29. Through a hiring process initiated in the spring of 2019, the FDNY added a group of 31 new counselors from Fire Operations. As reported by the City on January 22, 2020, taking account of some turnover among the Counselors (resulting from promotions, retirements, transfers, and other changes), the total number of Counselors is currently 35 (of whom 22 are white, 11 Black, 1 Asian, and 1 Hispanic). As previously reported, the new group of Counselors included firefighters, addressing a concern expressed by the Monitor and the other Parties that the initial group included Fire Operations officers but no firefighters. Monitor’s Twenty-Seventh Periodic Report at 25. And twelve of the 35 current Counselors are firefighters. Training for the new

Counselors, originally planned for September 2019, was postponed to avoid conflicts with their schedules, and two rounds of training took place November 13-15 and December 12-13, 2019.

B. Policies, Messaging, and Training

1. EEO Messaging Plan

The Monitor has continued to encourage the City to develop a comprehensive, long-term EEO messaging plan with specific provisions for communicating a variety of EEO messaging through a full range of channels. The Monitor has urged the City to create such an integrated plan, and the City has recognized the need to do so, since at least mid-2017. *See* Monitor's Twenty-First Periodic Report at 29-30. But the City has not yet provided a satisfactory plan; and, as previously reported, its most recent attempt to do so, a two-page outline provided August 13, 2019, lacks essential details.³⁴ The plan contains no discussion of messaging strategy or goals and fails to lay out a schedule for messages on different subject matters to be communicated over the long-term. It describes the subject matter of planned messaging in only general terms – identifying the topics of only two sets of planned messages, and providing sample communications only for the first topic that the FDNY planned to address (the FDNY's social media policy); and although the plan does provide for messaging to be communicated in person by officers³⁵ (an initiative long advocated by the Monitor and urged by the Court), the

³⁴ In directing the City to provide the plan, the Monitor had asked that it include a schedule for regular communications on EEO issues – including the timing, substantive descriptions, and examples of content for posters and other EEO communications the City planned to issue.

³⁵ The City's August 13 plan also did not specify the ranks of officers who would be involved or the frequency of communications. The City has subsequently advised the Monitor and the other Parties that messages will be delivered by Deputy Chiefs at least semi-annually, and that where appropriate the officers will join in delivering additional quarterly messages as part of the EEO Office's program of rotating messaging. The Monitor had previously suggested that Battalion Commanders should be involved in the dissemination of EEO messages, but in the first instance the Monitor is prepared to leave

plans for officer communications (like the overall plan) do not identify the succession of different messages that the officers would be expected to communicate over time. The plan specifies a single set of communications by officers on the social media policy (in February 2020) and further communications on “various topics” that the EEO Office planned to issue in April 2020 (the first of a planned series of quarterly communications). The April round of communications was postponed because of the COVID-19 emergency.

In a December 5, 2019 letter responding to questions and criticisms from the Plaintiffs-Intervenors, the City listed a set of broad goals for its EEO messaging, stating that its goals were to

(1) clearly reaffirm the FDNY's commitment to providing equal opportunity in all facets of employment; (2) educate employees of their workplace rights and responsibilities; and (3) increase employee awareness of EEO Office functions, procedures and services that can contribute to the FDNY's goals of ensuring a professional and operationally effective workplace.

While this statement of generic goals confirms that the FDNY plans to cover a full range of standard EEO issues, it does not indicate how the Department plans to focus or prioritize its communications within these broad categories or use them to achieve those goals in the specific context of the FDNY and its culture. The City's letter provides limited further insight on particular subject matters or content, and it provides no timeline for the development of further messaging. The City indicated in its letter that the next anticipated round of rotating subject matters will focus on “information on EEO functions, procedures, and services” intended in part to address misconceptions on the role of the EEO Office. But it has not specified which functions will be highlighted or how.

to the City the decision as to which ranks should be involved, and will proceed to evaluate the effectiveness of the officer-delivered messaging as the initiative is rolled out.

In addition, on December 13, 2019, the City circulated a set of materials generated in connection with the activities of the Chief Diversity and Inclusion Officer (“CDIO”) (whose position was created as part of the Disparate Treatment Settlement).³⁶ The materials include a series of Diversity and Inclusion newsletters; displays regarding diversity events and topics such as Black History Month; and a diversity-related training presentation from the FDNY Officers Management Institute (“FOMI”), which provides training on various topics to senior FDNY Chiefs. These materials provide some additional assurance that the FDNY is making an effort to communicate with its workforce on EEO-related topics; and the FOMI materials appear to represent a sincere attempt to provide senior officers with some additional guidance on broad themes of diversity and inclusion (beyond their regular EEO training). However, the City still has not indicated how the CDIO materials are, or will be, integrated into a coordinated messaging plan or how they will contribute to delivering specific EEO messages to all relevant audiences within the Department.

The City has said it intends to develop a more comprehensive and detailed plan based on the results of the climate survey. But while the climate survey is expected to provide the basis for improved messaging strategies and content, completion of the survey is not an essential prerequisite for the development of a comprehensive EEO messaging plan³⁷; and the Monitor remains concerned that the City’s EEO messaging efforts to date have lacked clear goals and

³⁶ The materials were provided in response to a Monitor request, which followed up on the City’s previous production of a list of then recent CDIO activities on July 25, 2019. *See* Monitor’s Twenty-Eighth Periodic Report at 34-35.

³⁷ If it were, the City would presumably have undertaken the survey much sooner than it did, and on its own initiative, rather than at the insistence of the Monitor. *See* Monitor’s Twenty-Fifth Periodic Report at 42-44 (chronicling interactions leading to the City’s decision to proceed with the survey).

have not been undertaken pursuant to a work plan that would ensure the regular dissemination of a variety of key messages. In addition, because of the current public health emergency and the resulting diversion of analytical resources away from the climate survey, the timeline for producing findings from the survey has had to be extended – delaying the development of any EEO messaging based on those findings. The Monitor has asked the City to identify and provide any additional messaging it has developed or plans to communicate under its current, limited plan (while data from the climate survey is being analyzed) and to work diligently with the Monitor and the other Parties to develop a satisfactory plan as soon as the public health emergency abates and results from the survey become available.

2. Other Messaging and Training Initiatives

The Monitor is also concerned that progress on other, specific messaging and training initiatives, to which the City had previously committed, has been delayed or (apparently) completely stalled – even before the impact of the current emergency. The FDNY’s work on video messages for its program of “voice announcement messaging” has produced no further messages since the program was launched in September 2018 with a video message from the Commissioner in support of the EEO Policy. At that time the City committed to developing additional content, Monitor’s Twenty-Sixth Periodic Report at 29; Monitor’s Twenty-Seventh Periodic Report at 26; and in November 2018 it reported that additional videos for the program were in production, Monitor’s Twenty-Sixth Periodic Report at 29. But no additional video messages have been provided pursuant to the Monitor’s standing request to receive them as they become available. The City reports that work on additional videos had been proceeding before the COVID-19 crisis but is now suspended, along with other training activity, because of the emergency.

The FDNY's work on a new online training platform for the Department, and new EEO content for that platform, has also been characterized by long delays. The City initially outlined plans for the new platform in a March 10, 2018 message; and in early 2019, it anticipated that the new system would be launched in the spring of 2019. Monitor's Twenty-Sixth Periodic Report at 30. Before the Monitor's Twenty-Seventh Periodic Report, the City had revised that projection to the summer of 2019. Monitor's Twenty-Seventh Periodic Report at 26-27. That projection also was not met. However, on a February 27, 2020 call, the City advised the Monitor and the other Parties that the system had been launched, and that an EEO training module for the new platform would soon be provided to the Monitor for review.³⁸ The City has also advised that the new system includes mechanisms for verifying firefighter attendance and retention of program content, which the Monitor had previously recommended. *See* Monitor's Twenty-Seventh Periodic Report at 27; Monitor's Twenty-Eighth Periodic Report at 33. The Monitor has previously requested that the City provide a demonstration of the system once launched, along with any new EEO content made available on the new platform. Monitor's Twenty-Seventh Periodic Report at 27; Monitor's Twenty-Eighth Periodic Report at 33. Completion of the new EEO training module has been delayed by the COVID-19 emergency, but the Monitor expects to obtain and review the new materials and to receive a demonstration of the system as soon as practicable once the public health emergency subsides.

Also in the area of training, the Monitor plans to follow up on its re-assessment of FDNY officer training on EEO topics. Prior to the last periodic report, the Monitor requested and

³⁸ The City projected that it would circulate the new training module by April 3. But in more recent communications since the escalation of the public health emergency, the City advised that completion of the module has been delayed.

received the FDNY's current EEO training materials for officers. The Monitor and its experts reviewed the materials to determine whether they should be modified or supplemented in view of the larger, proactive role and increased accountability that the Monitor has recommended for officers in EEO messaging and compliance. Based on the Monitor's review, the current training materials appear to provide appropriate guidance on several aspects of officers' EEO-related responsibilities, including the duty to recognize and report potential violations. But the Monitor believes it may be appropriate for the FDNY to supplement the materials with a separate training module providing guidance on the management of diverse workplaces. The Monitor has discussed this concept with the City in general terms and plans to provide specific recommendations shortly. Such additional training may help address concerns expressed by counsel for the officers' union, the UFOA, in discussions with the Monitor (held at the Court's suggestion since the last periodic report).³⁹

C. Compliance and Accountability

1. Increased Accountability within the Chain of Command

a) Performance Evaluations

The Monitor has continued discussions with the City regarding the implementation of the EEO metric added to officers' performance reviews in 2018.⁴⁰ As previously reported, in connection with its assessment, the Monitor requested and received from the City several

³⁹ The FOMI training module discussed above may represent a useful starting point for this broader diversity training. The Monitor plans to follow up with the City to determine how broadly that training is currently administered and whether it might be adapted to deliver practical training in managing diverse workplaces to junior as well as senior officers.

⁴⁰ The metric was first introduced for Lieutenants' reviews in February 2018, and later in 2018 as a component of performance reviews for Captains. Monitor's Twenty-Fourth Periodic Report at 32; Monitor's Twenty-Third Periodic Report (Dkt. # 1844) at 29.

categories of relevant materials, including a compilation of EEO rating data from performance evaluations conducted in 2018, a set of sample evaluations, and the instructions given to raters. Monitor's Twenty-Seventh Periodic Report at 29-30.⁴¹ As part of its review, the Monitor also considered information about EEO matters (EEO complaints and inquiries directed to the EEO Office, updated by the City as of July 5, 2019), to identify instances where the EEO Office might have possessed information relevant to the EEO performance metrics, and to assess whether and how that information was reflected in evaluations. The Monitor continues to believe, and has repeatedly noted, that it is essential for the EEO Office to be an active participant in the performance review process and to provide input in every instance where it possesses or can gather information relevant to an officer's EEO performance (including his or her communication of EEO messages, relevant information from firehouse inspections, failures to report violations or potential violations, failures to cooperate with the EEO Office, or negligent oversight and supervision of firefighters within his or her command). *See* Monitor's Twenty-Sixth Periodic Report at 33; Monitor's Twenty-Seventh Periodic Report at 29; Monitor's Twenty-Eighth Periodic Report at 35. The City has previously represented that the EEO Office provides input in such cases. Monitor's Twenty-Sixth Periodic Report at 33; Monitor's Twenty-Seventh Periodic Report at 29; Monitor's Twenty-Eighth Periodic Report at 35.

At an October 18, 2019 meeting on EEO issues, the Monitor and City discussed the performance review process and Monitor recommendations intended to improve its effectiveness in capturing both deficient and superior officer performance. The Monitor also posed a series of specific queries (at the meeting and in a pre-meeting email dated October 14, 2019) regarding

⁴¹ The materials included no personal identifying information and were not shared with the other Parties.

evaluations connected to particular workplaces where EEO violations occurred, or where investigative materials provided to the Monitor raised questions about officer conduct or management practices. The Monitor's recommendations, developed in consultation with its experts and based on a review of best practices, included (1) a suggestion that the EEO Office incorporate reviews of management supervisory practices relevant to EEO compliance in its investigations of alleged or potential EEO and hazing violations – using investigations as opportunities to evaluate officer practices and to identify either superior performance or areas for improvement, and (2) a suggestion that the FDNY consider providing additional, detailed guidance on the distinction between satisfactory and superior reviews under the EEO metric. As originally formulated, based on discussions with the officers' union (UFOA), the metric contemplated specific criteria for recognizing superior performance in EEO; but the current instructions to raters provide guidance only as to the criteria for a "satisfactory" rating. By clarifying the distinction between satisfactory and superior ratings, the FDNY could make the EEO metric a more effective tool for identifying and incentivizing proactive commitment to EEO compliance, diversity and inclusion. The Monitor memorialized its recommendations in a memorandum to the City on December 11, 2019; and the memorandum was circulated to the United States and Plaintiffs-Intervenors (who had not attended the October 18 meeting) on January 24, 2020, once the City confirmed that it had no objection on confidentiality grounds to the Monitor's disclosing the memo to the other Parties.

The City responded to several of the Monitor's recommendations in a February 13, 2020 email. In response to the Monitor's recommendation that the EEO Office include reviews of management practices in EEO investigations, the City indicated that such reviews would be incorporated in EEO investigations "in situations where some specific indication of a failure of a

supervisory function or role is indicated.” Responding to the Monitor’s suggestion for precision and consistency in the distinction between “satisfactory” and “superior” ratings, the City asserted that its current guidance to raters makes the necessary distinctions. The Monitor has followed up with the City in an April 27, 2020 message to clarify the circumstances in which the EEO Office will review management practices, and to obtain any additional guidance that the City has provided to raters on the distinctions between ratings. The Monitor’s follow-up message also included a reminder to the City to respond to the Monitor’s specific questions regarding evaluations covering workplaces with EEO issues.

Because officers did not become subject to evaluations with the EEO metric until October 2017 (following the completion of the 2017 round of officer training on EEO issues), the evaluations performed in 2018 covered an abbreviated review period encompassing only a portion of the previous year. For this reason, and because, as previously reported, some 500 officers mistakenly received 2018 reviews that did not include the EEO metric,⁴² the first round of evaluations that will include a full year of performance for every officer, and thus the first round that will provide a representative data set showing the metric’s operation, is the 2019 round. The City is currently working to comply with the Monitor’s outstanding request for data and samples from this 2019 cycle. It had originally projected that the materials would be provided by mid-January. But that projection has been repeatedly postponed. Before the current public health emergency suspended work on the Monitor’s request, the City’s latest projected delivery date was April 10. Accordingly, the Monitor expects that the City will be able to provide the requested materials shortly after the relevant personnel can resume work on the

⁴² Monitor’s Twenty-Seventh Periodic Report at 30.

production.

On a related issue, the Monitor has worked successfully with the Parties to address disagreements regarding the categories of performance review data that the City should collect and provide to the Monitor. The City has confirmed that it will collect demographic data and years of service for all rated officers, in addition to overall performance ratings, ratings under the EEO metric, and data showing the operational units of rated officers. The Monitor and the Parties have also continued to discuss the form in which the City will share performance review data and related analyses with the Parties. As an interim step, the Parties agreed that the City would share a set of statistical analyses without disclosing information on individual reviews, and that the other Parties would consider whether additional analyses are needed and whether and to what extent they wish to pursue a request for more granular data. The City produced the statistical summary on January 2, 2020. The United States responded with a series of follow-up queries on April 15, 2020, which the City is considering.

b) “Workplace Professionalism” Reporting

The Monitor has continued to follow up on inquiries and requests for production relating to the City’s workplace professionalism reporting program, in which officers meet regularly with their superiors to discuss issues (including EEO issues) affecting workplace professionalism. Monitor’s Twenty-Seventh Periodic Report at 30-31. On July 2, 2019, the Monitor asked the City to produce records generated by the reporting system to date. The Monitor gave the City the option of producing either (1) all such records to date or (2) all records reflecting EEO or hazing concerns identified in the conferences and reports, plus a sample of 30 additional reports. The Monitor’s original request called for production by the end of July. On August 26, 2019, the City advised the Monitor that workplace professionalism reports to date did not include “reports of EEO violations or of a similar nature,” but it was not clear from the City’s response whether

the City's search included reports reflecting all "EEO or hazing concerns," which the Monitor had requested. Before the previous periodic report, the Monitor asked the City for further confirmation and renewed its request for sample reports. On December 12, 2019, the City confirmed that its prior search had encompassed the full scope of the Monitor's request and that no responsive records had been located. The Monitor requested that the City update its search and production to include any responsive materials generated since the City's previous response; and the City has advised the Monitor that a review of materials through the end of 2019 identified none within the scope of the Monitor's request.

2. Climate Survey

In October 2019, following discussions in which the Parties and the Monitor either resolved or set aside disagreements regarding target response rates and other issues, the City launched its long-pending workplace climate survey of all FDNY firefighters. The survey was administered in four overlapping stages, from October 18 to November 15, 2019, to four groups of battalions, with firefighters in each group given eight days to complete the survey. The survey was supported by a messaging campaign including an announcement from the Fire Commissioner; video announcements from senior management; posters and handouts; and messages delivered personally by officers within the firehouses and via the FDNY's internal electronic platform. Monitor's Twenty-Eighth Periodic Report at 40. Communications also included outreach by the Vulcan Society to its membership.

Throughout the administration period, the City circulated regular updates on response rates to the Monitor and the other Parties pursuant to plans agreed upon before the launch – plans which provided for supplementary messaging and other measures in the event that response rates fell below expectations. In fact, response rates met or exceeded expectations for each of the administration groups and for the survey overall. As previously reported, the survey was

administered with a commercially available survey tool, but the City is using its own resources (including resources from the Mayor's Office of Data Analytics ("MODA")) to analyze the results. Monitor's Twenty-Sixth Periodic Report at 34. The FDNY will not have access to raw data and will receive analyses prepared by MODA that ensure the anonymity of respondents is maintained. Monitor's Twenty-Eighth Periodic Report at 38. The City has confirmed that the EEO Office will be involved in setting the goals of the analyses and have the opportunity to pose follow-up queries. Monitor's Twenty-Sixth Periodic Report at 34; Monitor's Twenty-Eighth Periodic Report at 40. But the EEO Office will not have access to raw survey data and will not be able to link answers to specific individuals within the Department.

The City has worked closely with the Monitor and the other Parties, through multiple calls and drafts circulated within a small working group, to create an Analytics Plan and a schedule for MODA's analysis of the survey data. On November 27, 2019, the Monitor and the Parties (including experts for the United States and the Monitor, and including the City's data analytics team) conducted a conference call to discuss the plan and address a series of questions and recommendations from the United States' expert. The discussion focused largely on suggestions by the United States' expert and by the Monitor that the initial phase of analysis should incorporate several specific areas of focus that are overwhelmingly likely to be informative – including response rates for each question broken down by demographic group and by location. Following the call, on December 4, 2019, the United States circulated a summary of the recommendations discussed at the meeting, along with a list of open questions on several technical issues relating to the form in which survey data will be maintained and presented. The City responded on December 30, 2019, and the Parties and the Monitor had follow-up calls on January 22 and February 5, 2020. On February 20, the City circulated an updated Analytics

Plan, which divided the analysis into ten phases with completion deadlines for the successive phases between February 7 and June 19, 2020.

As provided in the Analytics Plan, the City circulated MODA's Phase 2 Data Review Summary Report on February 21. MODA reported that there were 4,562 complete and partial responses to the survey and that all 49 FDNY numbered battalions and Special Operations Command ("SOC") units and all demographic groups are represented in the survey data. MODA also reported that there did not appear to be significant survey response anomalies. The Monitor and the other Parties circulated comments on February 27, and these were discussed on a working group call on February 28. MODA was to circulate additional analyses and other information requested during the call so that the group could make informed decisions about some threshold issues, but this work was suspended due to a relocation of the MODA office and the subsequent COVID-19 pandemic.

Although the plan was for a final survey report to be completed by June 19, the exigencies of the pandemic have put the climate survey analysis schedule on hold. The Monitor anticipates that, once work resumes, a further 18 to 20 weeks of work will be needed to complete all the analyses and reports contemplated by the plan. Following the completion of the analytical phase, the City's next crucial task will be to develop a plan of action based on the results, including (but not limited to) a comprehensive, strategically coherent plan of EEO messaging, as discussed above.

D. Investigations

1. The Monitor's Report on FDNY EEO Investigations

Since the last periodic report, the Monitor has continued work on its report on FDNY EEO investigations, pursuant to the Court's order.⁴³ Since the Court first directed the Monitor to prepare its report on FDNY EEO investigations, the staffing of the FDNY EEO Office has increased, and the Office has initiated or continued to implement a number of reforms in its investigative practices. In consultation with the Court, the Monitor has postponed filing the report to observe and account for the effect of the increased staffing and revised practices on the conduct and duration of EEO investigations. In the intervening time, the Monitor has requested and received a series of updated data sets from the City showing the outcomes and durations of investigations conducted by the EEO Office. Also in the intervening period, the Monitor has shared a series of drafts of the report with the Parties – which included the Monitor's analyses of factors bearing upon the duration of EEO investigations, along with Monitor recommendations for steps intended to improve the efficiency and reduce the duration of EEO investigations; and

⁴³ Pursuant to the Court's November 17, 2017 Order, the report covers the FDNY EEO Office, its staffing, its investigative procedures, and its performance in the completion of EEO investigations – with a particular focus on the duration of investigations as measured against the presumptive 90-day time limit for investigations set forth in the City's EEO guidelines and the FDNY's own EEO Policy. In relevant part, the Court's Order stated as follows:

The court monitor is respectfully DIRECTED to provide the court with a report on the New York City Fire Department's Equal Employment Opportunity ("EEO") Office. This report should address, in particular, (1) how the EEO Office investigates and resolves complaints; (2) how the staffing of the office has changed over time; and (3) the speed with which the office investigates and resolves complaints.

In addition to the topics specified in the Court's November 17, 2017 Order, the report includes a discussion of data produced by the City, in response to the Court's direction at the March 13, 2018 status conference, showing the rate at which complainants and respondents in EEO investigations have been reassigned to desk duty, and the duration of those assignments.

the City has implemented some of those recommendations. In the interim, the Monitor has reviewed newly produced data and plans to include a discussion in an updated draft of the report.

2. EEO Database

The Monitor, in consultation with its experts, has continued to work with the City and the other Parties on proposed modifications in the FDNY's EEO case management database – most recently demonstrated at an April 17, 2019 meeting of the Monitor and the Parties. As noted in the Monitor's previous reports, while recent changes improved the database's capabilities as a scheduling, planning, and supervisory tool, as of the Monitor's last report, it still lacked some important features needed to facilitate the analysis of patterns and trends across cases. For example, the database did not include dedicated fields for interim remedial measures, or for instances where complainants or respondents are detailed or reassigned. Monitor's Twenty-Seventh Periodic Report at 36-38. Such items were maintained only in a free-text activity log. *Id.* In addition, while the database includes standard terms for the general subject-matter categories of EEO complaints (*e.g.*, race, gender, religion, retaliation), it does not include standard searchable fields for specific types of alleged conduct (*e.g.*, food tampering, gear tampering, verbal harassment). At the April 17, 2019 meeting and in subsequent correspondence in June of 2019, the City agreed to consider adding to the list of searchable fields in the database, and it circulated a revised list of database fields on October 21, 2019. However, the City's revised list did not include the available values for the added fields, and in part for that reason it was unclear which of the additional fields proposed by the Monitor and the other Parties had been included. On a call with the Parties on November 7, 2019, the Monitor issued a follow-up request for an expanded list including the available values for each field. The City provided the expanded disclosure on December 9, 2019 and responded to follow-up questions from the Monitor on subsequent calls.

As reflected in the City's most recent list, the fields available in the case management database still do not include a standard field or values for specific types of conduct, nor do they include a dedicated field for details, reassignments, or other types of interim action. The Monitor plans to continue to work with the City to ensure that the EEO Office has appropriate mechanisms for recording and tracking these categories of information – either in the database or by other means. Both the United States and Plaintiffs-Intervenors have provided comments and questions to the Department on the database fields it circulated.

As previously reported, the City has declined to include data from firehouse inspections and officers' performance reviews in the EEO database, Monitor's Twenty-Eighth Periodic Report at 43. In addition, in its current form, although the database records whether a case has been referred to BITs,⁴⁴ it does not track the activities of BITs in cases referred to it by the EEO Office.⁴⁵ Even if these categories of information are not tracked in the database, the Monitor believes it is essential for the City to demonstrate that it maintains them in a form that facilitates easy and reliable cross-referencing with information from EEO cases and inquiries. In particular, it is important for the City to be able to connect all the findings and remedial actions associated with a given matter, including those generated by BITs and other units in addition to the EEO Office; and the City should also ensure that it has appropriate mechanisms for tracking

⁴⁴ The Bureau of Investigations and Trials, the Department's disciplinary unit, prepares charges, conducts investigations, and prosecutes disciplinary cases for violations of Department policy including hazing and workplace violence. It also imposes discipline in EEO cases investigated by the EEO Office and thus cooperates with the EEO Office in enforcing EEO policies within the Department.

⁴⁵ The City has confirmed that the activities of EEO investigators in joint investigations with BITs are recorded. But the activities of BITs investigators are not. Nor are the activities, findings, or disciplinary outcomes associated with BITs's handling of cases referred by the EEO Office where it has substantiated a violation.

EEO Office input in performance evaluations, and for cross-referencing inspections and evaluations with other EEO activities (such as targeted messaging and training) in a given workplace. The Monitor will also continue to follow up with the City to ensure these capabilities are in place.

3. Review of Investigations

The Monitor has continued to receive, review, and comment on intake documents and closing memoranda from EEO investigations that the City has identified as requiring substantial investigative activity in fire suppression matters.⁴⁶ The goal of the review is to comment on the FDNY EEO Office's investigative process, as the Modified Remedial Order does not provide for Monitor relief in individual EEO cases.

As noted in previous reports, in a June 6, 2017 set of recommendations, the Monitor identified a number of deficiencies in the FDNY's EEO investigative practices, based on an historical review of complete investigative files. *See, e.g.*, Monitor's Twenty-Second Periodic Report (Dkt. # 1821) at 32-33. Although the EEO case materials reviewed more recently show improvement in some areas, and generally appear to reflect an effort by the EEO Office to conduct more thorough investigations, the Monitor has continued to observe and comment on some of the same deficiencies in recent cases. Monitor's Twenty-Seventh Periodic Report at 39-

⁴⁶ In an initial, retrospective production of multiple cases, provided in 2017, and more recently in response to a December 12, 2018 request, the City has also provided the Monitor with some full investigative files in addition to intake and closing documents. A summary of the City's productions of EEO case materials appeared in the Monitor's Twenty-Seventh Periodic Report at 39-41. As previously noted, the Monitor's comments and suggestions on draft memoranda are intended to provide the EEO Office with guidance in adhering consistently to investigative best practices; and the Monitor does not dictate results in particular cases or require the City to obtain Monitor approval before issuing findings. *See* Monitor's Twenty-Third Periodic Report (Dkt. # 1844) at 31. However, in some instances, the City has conducted additional investigation based on comments made by the Monitor. Monitor's Twenty-Fifth Periodic Report at 49.

40; Monitor's Twenty-Eighth Periodic Report at 44. At the October 18, 2019 meeting on EEO topics, the Monitor and the City discussed the Monitor's comments on recent cases in depth, and the Monitor identified what it viewed as important recurring issues that the City should address in its investigative practices – including the need for consistent and rigorous analysis of motive in mixed motive cases, for more systematic analyses of witness credibility, and for greater consistency and thoroughness in identifying potential violations and sources of evidence. The Monitor proposed that specific discussions of these recurring issues should be included in updated investigator training materials (which the City was then in the process of developing) and in the regular updates on legal and practice issues that investigators receive from the Assistant Commissioner. The Monitor has also suggested that the City adopt forms, checklists, and procedures to regularize the process by which investigators gather and analyze evidence, and the manner in which they present it in investigative memoranda. The Monitor provided the City with a set of forms and instructions used by the military, for the City to consider using as a model or starting point for its own materials. While the City continues to disagree with a number of the Monitor's observations, contending that the problems identified by the Monitor either never existed or have been cured by recent improvements, at the October 18, 2019 meeting it agreed to consider reinforcing the practice points raised by the Monitor in training and other communications with investigators. The Monitor memorialized its recommendations in a memorandum to the City on December 11, 2019.⁴⁷ The City responded to the Monitor's recommendations in a February 13 email – accepting some and declining others. The City's

⁴⁷ As noted above, the memorandum was circulated to the United States and Plaintiffs-Intervenors on January 24, 2020, once the City confirmed that it had no objection on confidentiality grounds to the Monitor's disclosing the memo to the other Parties

response confirmed its general agreement to provide additional guidance to investigators on specific investigative topics; on the systematic analysis of evidence; and on clearer, more comprehensive reports of investigative findings. However, the City declined to adopt the Monitor's recommendation that the City develop forms or checklists to facilitate consistently thorough and systematic analysis of evidence. The Monitor responded to the City on April 27, 2020, requesting further clarification regarding the instructions and materials the City has provided and plans to provide to EEO investigators. The Monitor expects to continue discussions regarding ways to improve the City's investigative practices, and to continue to evaluate the City's handling of individual cases via the Monitor's review of case files and closing memoranda.

The Monitor has also continued the process of contacting a selection of complainants to gather information regarding their experiences with the EEO Office, as discussed in previous reports. *See* Monitor's Twenty-Fourth Periodic Report at 37.

IV. Medical Exam-Related Issues

As noted in the Monitor's Twenty-Eighth Periodic Report, the City has reported that the Medical Exam, administered by the City's Bureau of Health Services ("BHS"), was the hiring step with the highest Exam 2000 disqualification rate. *Id.* at 46. The Medical Exam also had a disparate impact adverse to black and Hispanic Exam 2000 candidates. *Id.* at 45-46.

A. Stairmill Test

The stairmill test component of the Medical Exam is meant to ensure that candidates possess adequate cardiopulmonary fitness to perform safely as firefighters. Because the stairmill test had not been validated and statistical analyses indicated that it had a disparate impact, the City hired the vendor PSI to evaluate the stairmill. After conducting a study that evaluated the

oxygen cost of the FST and of different step rates on the stairmill, which was developed with input from the Monitor and other Party experts, the City selected a stairmill protocol to screen candidates that is substantially the same as the stairmill test protocol historically used by BHS. The primary difference distinguishing the revised test is that heart rate will no longer be measured during testing or used as a qualification criterion for successful completion of the stairmill test. BHS has been using the new stairmill test since October 17, 2019. The Stairmill Technical Report regarding PSI's study has been reviewed by all Parties, who have provided their comments to PSI, and the Monitor expects to provide its comments soon. While there continue to be differences of opinion among the experts, the Monitor expects that the Final Report will be finalized soon.

The City agreed to administer the new stairmill test to any Exam 7001 candidates who were disqualified solely by the old stairmill test or whose BHS status was reserved because they had not yet passed the old stairmill test – provided they were not otherwise disqualified. The City reported on April 2, 2020 that, of the 92 candidates to whom it offered this opportunity:

- 34 had passed the new test (2 are now firefighters, 22 were medically qualified, and 10 were qualified on the stairmill and were continuing in the medical process);
- 3 took the new test and were still in the stairmill process;
- 5 had not taken the new test, were still able to do so, and were either scheduled for appointments or had not responded to the offer to test;
- 4 had not taken the new test and may be able to do so, but must restart the entire medical process as their previous medical results had expired because they were more than one year old;
- 1 withdrew before taking the new test;
- 23 had declined (*i.e.*, had at least temporarily removed themselves from the eligibility list); and

- 22 were in various statuses not related to the stairmill (16 disqualified for reasons other than or in addition to stairmill, 1 appealed disqualification for something other than the stairmill, 4 whose list numbers had changed, and 1 on hold pending proof of bonus points).

The Monitor and the United States have asked for further information, including race/ethnicity, with respect to candidates in a number of the above categories, including those who have declined and those whose medical results have expired. The Monitor and the Parties will continue to review stairmill qualification data to determine whether there is continuing disparate impact in this component of the Medical Exam. The Monitor has also asked the City to clarify whether Exam 7001 candidates whose medical exam results were pending before the COVID-19 emergency will be subject to the one-year limit for medical testing or will have their time tolled.

B. Psychological Exam

As previously reported, in November 2018 the City revised its Psychological Exam protocol for Exam 7001 candidates. *See* Monitor’s Twenty-Sixth Periodic Report at 50-53; Monitor’s Twenty-Seventh Periodic Report at 47. The City now uses a shorter preliminary questionnaire, the SAMH, which candidates take at BHS on the same day as the Medical Exam. The Monitor informed the City on November 14, 2018 that it would not object to the City’s use of the new protocol, provided that the City develop a plan for conducting adverse impact analyses of future Psychological Exam outcomes. *See* Monitor’s Twenty-Sixth Periodic Report at 51-53. On December 6, 2018, the City sent the Monitor its “FDNY Firefighter Candidate BHS Testing Psychological Exam: Attrition Metrics and Adverse Impact Analysis Plan” (the “December 6 Plan”), which sets out the various analyses that will be conducted with the establishment of each firefighter class. *Id.* at 53. The City shared the December 6 Plan with the other Parties on February 13, 2019. It is the Monitor’s understanding that the City will continue

to perform the disparate impact analyses outlined in the December 6 Plan after every Academy class is filled. The City circulated new edits to the SAMH on December 31, 2019 and, after consultation with the Monitor and the other Parties, began to use the newly-revised instrument in early March.

C. Medical Exam Attrition Metrics

As reported in the Monitor's Twenty-Eighth Periodic Report, in its June 17, 2019 "Fire Department of New York City: Metrics to Assess Applicant Attrition From the Hiring Process For Exam 7001" (the "June 2019 Report"), the City provided medical testing data for the first group of Exam 7001 candidates, as of May 15, 2019. *Id.* at 46-48. On December 27, 2019, the City circulated its latest update of that report (the "December 2019 Report"). The December 2019 Report includes the City's medical testing data for Exam 7001 candidates, as of November 12, 2019. Although the two reports were produced six months apart, the December 2019 Report provides data for only 345 more candidates than the 1,157 for whom medical data was reported in the June 2019 Report. The December 2019 Report adds adverse impact analyses, which were not included in the June 2019 Report.

The December 2019 Report divides candidates who have appeared for the Medical Exam into four categories: "voluntarily attritted," "qualified," "disqualified," and "pending."⁴⁸ The City divides the Medical Exam into three components: the Physical Exam (which has multiple components), the Psychological Exam, and the Drug and Alcohol test. Candidates may appeal if they are disqualified for any of these three tests. Only candidates who have passed all three tests

⁴⁸ The City notes that some candidates' status may change as processing continues through the life of the list and that metrics will be definitive only upon expiration of the Exam 7001 list. For example, candidate status can change because candidates who fail to appear for processing may later reschedule, or because candidates may respond to a Notice of Proposed Disqualification.

are considered “qualified,” and candidates whose results are pending for any one of the three tests are considered “pending.” Candidates disqualified on any one of the three tests are considered “disqualified.” The December 2019 Report provides data for the Medical Exam overall and separately for the physical component (which the City defines in the report as including the drug and alcohol test) and the psychological component.

The City reports that, as of November 12, 2019, of the 1,502 candidates called for medical testing:

- *voluntary attrition*: 35 did not appear for at least one of their appointments (2.2% of white candidates, 3.8% of black candidates, and 2.0% of Hispanic candidates failed to report or left the process);
- *pending*: 35.0% of white candidates, 45.0% of black candidates, and 41.8% of Hispanic candidates remained in pending status;
- *qualified*: 64.5% of white candidates, 51.5% of black candidates, and 56.2% of Hispanic candidates had passed all components of the Medical Exam; and
- *disqualified*: 0.5% of white candidates, 3.5% of black candidates, and 2.0% of Hispanic candidates had been disqualified.

In the Monitor’s Twenty-Eighth Periodic Report, the Monitor pointed out, with respect to the data in the June 2019 Report, that, “[a]lthough these numbers are preliminary and very few candidates of any race/ethnicity had been disqualified as of May, there are nevertheless discrepancies in the numbers showing that, for every status save disqualification (for which the numbers may be too low to be significant) white candidates are doing better, black candidates are doing worse, and Hispanic candidates are somewhere in between.” *Id.* at 48. These discrepancies persisted through November 12, 2019, and the disparate impact analyses included in the City’s December 2019 Report reveal that, as of November 12, 2019, there was statistically significant disparate impact in the Medical Exam adverse to both black and Hispanic candidates. The overall Medical Exam qualification rate reflected disparate impact against both black and

Hispanic candidates. The physical portion of the Medical Exam, which the City defines as including the Drug and Alcohol Test, had a disparate impact against black candidates, and the psychological portion had a disparate impact against Hispanic candidates.⁴⁹ As of November 12, 2019, the voluntary attrition rate continued to be higher for black candidates than for white candidates, and the rate at which candidates remained pending – *i.e.*, without a final medical result – was 29% higher for black candidates than for white candidates (35% of white candidates were in pending status whereas 45% of black candidates were in pending status) and 19% higher for Hispanic candidates than for white candidates (41.8% of Hispanic candidates remained in pending status, as compared to the 35% of white candidates who were in pending status). Had the City not removed pending candidates from its calculation of the four-fifths rule, the analysis would have shown that, as of November 12, 2019, black candidates were qualified at only 79% of the rate at which white candidates had been qualified, and Hispanic candidates were qualified at 84% of the white rate. Seven black candidates and seven Hispanic candidates had been disqualified by the Medical Exam as of November 12, 2019, whereas only four white candidates had been disqualified, despite the fact that more than four times as many white candidates had taken the test as black candidates, and more than twice as many white candidates had taken the test as Hispanic candidates.

Although the Psychological Exam pass rate for Hispanic candidates was 98.6% as of November 12, 2019, the pass rate for white and black candidates was 100%. The fact that all

⁴⁹ In its report, rather than referring to a single “two standard deviations test,” the City used three alternate tests of statistical significance; but, in each area of disparate impact noted above (the overall Medical Exam for black and Hispanic candidates, the physical exam for black candidates, and the Psychological Exam for Hispanic candidates), all three of the City’s statistical tests showed statistically significant disparate impact.

three candidates disqualified by the Psychological Exam as of that date were Hispanic is statistically significant, as reported in the December 2019 Report. It is particularly problematic in light of the fact that there was no disparate impact in the Psychological Exam for Exam 2000 and that the City introduced a new psychological screening questionnaire for Exam 7001 candidates. In response to queries about the three disqualifications, however, the City has reported that the three Hispanic candidate psychological disqualifications were based on interactions with BHS physicians and not based on their responses to the SAMH screening. Nevertheless, the Psychological Exam has a disparate impact against Hispanic candidates, whether or not that impact is caused by the SAMH, and this requires the City's attention.

The City has not provided data showing which component(s) of the Medical Exam was/were responsible for the disparate impact the City reported as of November 12, 2019, but it has indicated its belief that the implementation of the new stairmill test in October will reduce it. An analysis by component must be undertaken as soon as the City no longer needs to devote its analytic resources to the COVID-19 crisis, and should be included in all future attrition analyses. It is also crucial that the City continue to focus its attention on reducing voluntary attrition from the Medical Exam and on helping black and Hispanic candidates move from pending status to qualified status. Tailored mitigation strategies will need to be implemented to reduce any negative impact the Medical Exam continues to have on black and Hispanic representation in Academy classes.

D. Medical Exam Messaging

The City, in consultation with the Monitor and the other Parties, has been updating Medical Exam messaging over the last several months.

Among the items updated are the Medical Exam Scheduling Letter, the Medical Notice of Proposed Disqualification, the Candidate Medical Exam Guidance (which now reflects changes

in the stairmill test, the Psychological Exam, and other aspects of the Medical Exam process), and the instructional stairmill video. The Guidance can be viewed on the Candidate Resources webpage and the candidate portal, and the video is available on the FDNY's YouTube channel.

Among the items still being finalized by the City, again in consultation with the Monitor and the other Parties, are the Medical Exam FAQs and two further Medical Exam instructional videos (one for the Pulmonary Function Test and one for the Medical Exam overall).

The City continues to remind candidates in post-CPAT messaging about the physical requirements evaluated during the Medical Exam, to help ensure that candidates understand the need to maintain their physical fitness, even after they pass the CPAT.

V. Character Screening by the CID and PRB

The Parties and the Monitor, with the assistance of their expert consultants, have continued to consider the character review portion of the FDNY's hiring process, its impact on hiring from different demographic groups, and whether further reforms may be required to address disparities in outcomes.⁵⁰ Since the Monitor's last periodic report, communications have focused on statistical analyses of the character review process, as the Monitor and the Parties have worked to resolve issues relating to retrospective analyses of the Exam 2000 process, and to refine the analyses the City must employ to identify potentially unlawful disparate impact in outcomes for Exam 7001 candidates as current hiring proceeds.

⁵⁰ As previously reported in detail, beginning in 2012, in consultation with the Monitor and the other Parties, the City issued a series of guidelines for the CID and PRB; additional modifications to the guidelines were issued in mid-2016. Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 29-31; Monitor's Seventeenth Periodic Report (Dkt. # 1714) at 29-30. As noted in prior periodic reports, the revisions were agreed upon by the Parties with the understanding that they might be subject to additional changes based on further analysis. *Id.* at 30.

As described in detail in the Monitor's previous periodic reports, the Monitor performed an analysis of character review outcomes for Exam 2000 candidates, including candidates who were processed towards the end of Exam 2000 using procedures very similar to the ones currently in use.⁵¹ *See* Monitor's Twenty-Fifth Periodic Report at 59-60; Monitor's Twenty-Sixth Periodic Report at 57. The outcomes of that analysis indicated that the process in its current form could have an adverse disparate impact on disqualification rates, referral rates, and extended probation for black and Hispanic candidates compared to white candidates.

The Monitor's analysis of the relevant portion of the Exam 2000 data showed disparities in disqualifications for black and Hispanic candidates compared to white candidates, though the sample size of candidates in the relevant period of processing was too small to support a definitive conclusion on this point. *See* Monitor's Twenty-Fifth Periodic Report at 59-60; Monitor's Twenty-Sixth Periodic Report at 57. The Monitor's analysis showed statistically significant disparities between the rates of PRB referral for black candidates compared to white candidates and for Hispanic candidates compared to white candidates under the rules used in the later stages of Exam 2000 processing. The Monitor also concluded that, in the same later period of Exam 2000 processing, the rate at which black candidates were either (1) disqualified or (2)

⁵¹ As discussed below, since the expiration of the Exam 2000 eligible list, the City has agreed to a very small number of minor changes in criteria for PRB referral. The substantive rules governing the character review process in the later stages of Exam 2000 processing, and at the expiration of the list, are very similar to the current rules for Exam 7001 candidates.

As the Monitor reported in September 2015, analyses of the character review process as it existed at that time, which reflected a number of reforms under the Modified Remedial Order but pre-dated the 2016 round of changes, showed that minority candidates were referred by the CID to the PRB for further, discretionary screening (and potential disqualification) at a higher rate than white candidates. Analyses of the same data set also showed that minority candidates referred to the PRB were disqualified by the PRB at higher rates than white candidates who had been referred. *See, e.g.*, Monitor's Thirteenth Periodic Report at 20-21 (discussing findings).

hired with extended probation (combining the percentages for both results) exceeded the same rate for white candidates to a statistically significant degree. Monitor's Twenty-Sixth Periodic Report at 58. The Monitor also found differences between the processing times for candidates who had been referred to the PRB and for those who had not. *Id.* Given these analyses of referrals and outcomes under rules substantially very similar to those now in place, close and extended scrutiny of the Exam 7001 character review process is needed to confirm whether it produces disparate impact adverse to black or Hispanic candidates.

The City has offered several criticisms of the Monitor's analyses. Although the Monitor found statistically significant disparities in rates of PRB referral for black candidates compared to white candidates and for Hispanic candidates compared to white candidates, the City contends that referral to the PRB, in itself, does not disadvantage candidates (for example, by materially slowing their progress through the hiring process or by increasing rates of voluntary attrition). Monitor's Twenty-Sixth Periodic Report at 61. Similarly, the City believes that the disparity in rates of extended probation (applied to black candidates at a significantly higher rate than to white candidates) does not warrant further changes in the criteria for PRB referral. *Id.* The City has also taken issue with the Monitor's analysis of processing times for referred and non-referred candidates, suggesting that the Monitor's analysis, which focused on total processing time, did not account for some factors relating to the sequence of candidate processing and that the Monitor's findings may not accurately reflect the impact of referral on processing or isolate that impact from other factors. Monitor's Twenty-Seventh Periodic Report at 49. The United States and its expert have also raised questions regarding some of the Monitor's methodologies and findings.

On November 1, 2019, the City completed its response to a longstanding Monitor request⁵² for further explanations and statistical analyses supporting its objections to the Monitor's analysis. Previously, on June 14, 2019, the City had circulated to the Monitor and the other Parties a memorandum in support of its view that referral to the PRB, standing alone, does not impose a material burden on candidates. In its November 1, 2019 supplement, the City responded to the Monitor's findings and concerns regarding disparate rates of extended probation, and it provided answers to questions posed by the United States in an August 23, 2019 set of comments to the City's June 14, 2019 memorandum. Plaintiffs-Intervenors have also circulated further questions and raised issues (in a September 26, 2019 letter) in response to the City's June 14, 2019 memorandum, on topics including the potential effect of PRB referral on attrition and delays in hiring.

In addition to its comments on the Monitor's proposed analyses, the City has also produced an updated version of its own analysis of the character review process. The City's December 27, 2019 report on candidate attrition included updated metrics showing rates of PRB referral and disqualifications to date for Exam 7001 candidates who have entered the character review stage of processing, along with the City's calculations of the statistical significance of the metrics. The City's analysis includes separate calculations for the rate of referrals and the rate at which referred candidates are disqualified (or accepted) by the PRB; but it does not calculate, or assess the statistical significance of, any disparities in overall rates of qualification and disqualification among all candidates who have completed the character review process.

According to the City's analysis of results to date, there are significant disparities in referrals

⁵² The request was made initially at a December 2018 meeting with the Parties on the character review process. Monitor's Twenty-Seventh Periodic Report at 54.

between black and white candidates and between Hispanic and white candidates, but no other disparity in PRB outcomes rises to the level of statistical significance.

Before the current public health emergency, the Monitor had discussed plans to convene a meeting with all Parties to address the issues raised by the Parties' comments and to agree upon the appropriate statistical methods for identifying disparities in the impact of the character review process on different demographic groups of candidates. In preparation for the planned meeting, on February 13, 2020, the Monitor circulated its responses to the issues raised in the Parties' comments, along with a list of outstanding issues and follow-up queries for the Parties to address at or before the meeting. The United States and Plaintiffs-Intervenors responded to the Monitor on March 5 and March 16, 2020 respectively. But the City's response has been delayed because of the COVID-19 emergency. The Monitor expects that once the emergency subsides the City will be able to provide its responses, and the Monitor will proceed with its plans for a meeting on the remaining data analysis issues.

As noted in the Monitor's analyses and in its earlier recommendations for reforms in the character review process, potential adverse effects produced by the process include not only disqualifications, but also extended probation imposed as a condition of appointment,⁵³ delays in processing and appointment, and increased voluntary attrition. The goal of the planned meeting will be to determine the most appropriate and informative analyses for identifying material disparities between groups of candidates attributable to the character review process. For

⁵³As noted above, the City contends that extended probation does not impose a material burden on candidates, and in its November 1, 2019 comments on this aspect of the Monitor's findings, the City notes that, among firefighters appointed with extended probation from the Exam 2000 eligible list, very few were suspended or terminated during the extended portion of their probationary periods. However, the Monitor continues to believe that extended probation in itself may alter the terms and conditions of a firefighter's employment sufficiently to constitute a material adverse effect.

example, the Monitor and the Parties plan to consider when processing delays and voluntary attrition can be attributed to the character review process and when and how delays impose a material burden on candidates.

Although the City has agreed to adopt some changes proposed by the Monitor in character review procedures and in the instructions given to candidates, it substantially rejected the Monitor's suggestions for further changes in the criteria governing the CID's referral of candidates to the PRB, and it also rejected a set of detailed recommendations by the Monitor for procedures designed to encourage and structure PRB deliberations and to record the reasons for all PRB decisions. *See* Monitor's Twenty-Eighth Periodic Report at 56-57. As of the Monitor's last periodic report, the City had completed revisions in candidate instructions and internal manuals to implement the changes it had previously accepted. *Id.* at 58.

The respective positions of the City and the Monitor on the need for further reforms were discussed in detail in prior reports. *See* Monitor's Twenty-Sixth Period Report at 58-61; Monitor's Twenty-Seventh Periodic Report at 50-54; Monitor's Twenty-Eighth Periodic Report at 55-60. In the Monitor's view, given the potential for the character review process to produce an adverse disparate impact on black and/or Hispanic candidates, the City should take steps now to minimize the risk of disqualifications and other adverse impacts that are not based on demonstrably job-related factors. In declining to adopt further changes, the City has noted that substantial reforms have already been implemented and that the analyses conducted to date have not demonstrated the need for further changes; and it contends that changes in PRB referral criteria are not necessary because PRB review ensures that disqualifications are job-related. Monitor's Twenty-Sixth Periodic Report at 60.

As noted in previous reports and in numerous communications among the Monitor and the Parties, the Monitor has made it clear that if further analysis, based on sufficient statistical samples from Exam 7001 hiring, shows that the process has an adverse disparate impact on black or Hispanic candidates, the City will be required either to make further changes in the process (and show they are effective in eliminating disparate impact) or to validate the process as job-related; and in either case the City's timeline for establishing compliance with the Modified Remedial Order will be extended. *See, e.g.*, Monitor's Twenty-Sixth Periodic Report at 56. Also as previously noted, the City must, and has agreed to, maintain and analyze data as Exam 7001 candidates go through the character review process, in order to identify any adverse disparate impact on black or Hispanic candidates, along with the specific factors in the process that are producing such impact. *Id.*

VI. Firefighter Exam

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the computer-based test ("CBT") for the position of entry-level firefighter. Consistent with the provisions of the Modified Remedial Order, the City and its testing consultant PSI have continued to work in coordination with the Monitor, the other Parties, and their respective experts to analyze and report on the examination process. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman.

The Exam 7001 scores were released on June 13, 2018. The City established the Exam 7001 list on February 27, 2019, and the first class drawn from the list entered the Academy on May 13, 2019.

A. Current Milestone: Technical Report

As noted in the Monitor's Twenty-Eighth Periodic Report, the current step in the exam analysis and reporting process (Step 204, "Technical Report") required PSI to complete a report documenting all the steps taken in the development, administration, scoring, and analysis of Exam 7001. *Id.* at 60-61. PSI circulated its first draft of the report to experts for the Monitor and the other Parties on July 23, 2018. Previous periodic reports provide a description of PSI's report on its work, including its confirmatory job analysis, development of new exam forms, equivalency testing, exam administration, scoring, and analyses of results. *See* Monitor's Twenty-Fifth Periodic Report at 61-62; Monitor's Twenty-Sixth Periodic Report at 62-65. The Monitor and other Parties submitted comments on the report in August 2018. These comments are summarized in the same periodic reports. In December 2018, April 2019, and October 2019, PSI circulated further amended drafts, and the Monitor and Parties circulated further suggested edits.

As described in the Monitor's Twenty-Sixth Periodic Report, PSI's first draft of July 2018 projected adverse impact ratios for Exam 7001 based on assumptions that had been in place since PSI's 2012 Technical Report. The Monitor requested in August 2018 that an appendix be added to the Technical Report so that updates to these assumptions could be accounted for and more accurate hiring and adverse impact projections could be made. For example, the Monitor asked PSI to use final attrition data from Exam 2000 to update the projected attrition rate used in PSI's adverse impact projections for the Exam 7001 list; to make calculations based on the fact that candidates will be called off the Exam 7001 list for four years of Academy classes rather than three; and to reflect that any qualified candidates remaining after one Academy class has been filled are carried over by the FDNY to the next Academy class.

After discussions, the Monitor and Parties agreed to the appendix approach so that the body of the Technical Report would continue (a) to reflect the data upon which the Parties and the Monitor based their review of adverse impact ratios and other analyses in the months leading up to publication of the Exam 7001 list and (b) to be useful for direct comparisons to the technical report prepared for Exam 2000. The appendix would be useful as a more up-to-date projection of likely Exam 7001 outcomes and for comparisons that may be performed with respect to future exams.

PSI accommodated the Monitor's request in its second and all subsequent drafts, adding Appendix G, which provides projections – including adverse impact projections – based on assumptions more in line with actual City processing. The Monitor requested that frequent mention of Appendix G be made throughout the report, to make clear that the calculations in the body of the report do not reflect current realities. PSI similarly accommodated the United States' and Plaintiffs-Intervenors' requests for language in both the body of the report and the appendix to make clear that their June 2018 review of exam results and their agreement that the list be published were based on the only data and analyses available at the time -- those shown in the body of the report, generated using the old assumptions -- and not on the updated analyses shown in Appendix G. PSI agreed to include language in additional places to make these various distinctions as clear as possible.

PSI's latest projections in Appendix G and in the December 2019 Attrition Metrics Report show that the City will need to call only approximately 7,000 Exam 7001 open competitive candidates to fill the combined 2,576 seats in the eight classes projected to be drawn from the Exam 7001 list. Based on these projections, the City has determined that it will be processing candidates with an adjusted final average score of 99 when the list expires and will

not reach candidates with adjusted final average scores of 97, as originally projected. The Exam 7001 adverse impact ratios using the original assumptions were already worse (showing a greater disparity between black and white test-takers) than those seen for Exam 2000, and the adverse impact ratios using the updated assumptions are worse still.

In comments on the last draft of the Technical Report, the United States stated that, given the extent of revisions in the data and adverse impact projections it relied on when reviewing the method of use for Exam 7001, it cannot state that, had the United States then been presented with the data and projections now set forth in Appendix G, it would have taken the same position regarding the method of use of Exam 7001.⁵⁴ The United States further stated that, in light of the data and projections now shown in Appendix G, it does not agree that less discriminatory alternatives have been explored sufficiently to support a statement in the draft report that the exam complied with the Uniform Guidelines. Plaintiffs-Intervenors indicated their agreement with the United States. PSI agreed to remove the statement about compliance with the Guidelines, but PSI has not thereby agreed that the exam does not comply with the Guidelines. PSI circulated the final Technical Report on December 18, 2019.

B. Optional Survey Administered to Exam 7001 Candidates

As reported in the last periodic report, an optional survey was administered to Exam 7001 test-takers at the time of testing. Their responses have been aggregated and analyzed and have already been used by the City, including in its After Action Report. Because the survey was

⁵⁴ The United States and Plaintiffs-Intervenors agreed in May 2018 that the Exam 7001 list should be established, despite the disparate impact it created. The United States stated that it agreed because it was unable, after analyzing the results, to find a less discriminatory alternative method of use with equivalent validity. Plaintiffs-Intervenors indicated that, although they believed that an alternate method of use with equivalent validity might possibly be found, they did not want to delay the City's use of the list any further.

performed on a confidential and anonymous basis, however, the City was unable to tie specific answers back to specific individuals or their exam results or hiring outcomes. The City determined that this more specific information would be useful in informing attrition mitigation efforts and future recruitment. The City re-administered the survey (with some changes) to test-takers via email, and reports that it collected 13,362 valid responses between October 29 and December 13, 2019, with candidates' consent to connect their responses to their hiring outcomes. The City circulated a report of results on February 28, 2020, stating that it plans to use the collected data in statistical models to predict, mitigate, and explain candidate outcomes and attrition (both voluntary and involuntary) throughout the hiring process. The Monitor is reviewing the report and expects to ask for follow-up analyses soon.

VII. Additional Issues

On an ongoing basis, the Parties and the Monitor consider a range of issues and perform an array of additional tasks relating to enforcement of the Modified Remedial Order. During the period covered by this report, these activities have included the following:

- Discussions regarding individual candidates who are or claim to be entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- Addressing questions and disagreements among the Parties regarding the status of specific candidates and other issues that are not addressed elsewhere in this report and that fall within the Modified Remedial Order or Disparate Treatment Settlement;
- Frequent calls, meetings, and correspondence with the Parties regarding the full range of issues related to implementation of and compliance with the Modified Remedial Order; and

