UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES H., ISRAEL F., AND MALIK Z. on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.,*

Defendants.

Civil Action No. 1:21-cv-00997 (CJN)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE JOINT MOTION TO LIFT THE STAY AND FOR PRELIMINARY APPROVAL OF THE SETTLEMENT AGREEMENT

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INTRODUCTION

Plaintiffs Charles H., Israel F., and Malik Z., and Defendants the District of Columbia, District of Columbia Public Schools (DCPS), and the Office of the State Superintendent of Education (OSSE) (collectively, "the Parties"), jointly move this Court to lift the stay on the case (Minute Order of September 26, 2022) and for preliminary approval of the Settlement Agreement, filed as Exhibit 1 to the Parties' Joint Notice Lodging the Settlement Agreement with the Court, ECF No. 191-1, settling the claims in the above-captioned class action lawsuit. The Parties also jointly move for an order directing issuance of the settlement notice to the class (*id*., Ex. 1 to the Settlement Agreement, ECF No. 191-2) and scheduling a Fairness Hearing.

This Settlement Agreement concerns the delivery of special education and related services for high school students at the Department of Corrections' Central Detention Facility and the Correctional Treatment Facility (together, "the DOC Facilities"), from March 2020 through now. The relief provided for in this Settlement Agreement will ensure that Defendants provide current high school students at the DOC Facilities their education and related services. It will also provide compensatory education to students who missed their education and services from March 2020, to the Effective Date of the Settlement Agreement, namely, September 22, 2023.

The Settlement Agreement is the product of robust, arm's-length negotiations spanning over fourteen months and addresses all of the issues raised in the Complaint by Plaintiffs. For the reasons set forth below, the Settlement Agreement is fair, reasonable, and adequate, and merits preliminary approval. The Parties, therefore, request that this Court grant preliminary approval of the Settlement Agreement, approve the notice to be provided and the method for the provision of such notice, and issue an order scheduling a Fairness Hearing.

STATEMENT OF FACTS

I. PROCEDURAL HISTORY

The Parties provide below a summary of the proceedings most germane to the proposed settlement. Plaintiffs filed this class action lawsuit on April 9, 2021. ECF No. 4. The Complaint alleges that the Defendants systemically failed to provide or otherwise ensure the provision of federally mandated special education and related services to students detained in the DOC Facilities during the COVID-19 pandemic. *See* ECF No. 44-3.[1] Furthermore, the Complaint alleges that this constitutes a failure to provide a free appropriate public education (FAPE) and violates the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794(a), the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, federal and local implementing regulations, and the District of Columbia Human Rights Act (DCHRA), D.C. Code § 2-1401. *Id.*

On April 12, 2021, Plaintiffs filed a motion for preliminary injunction (ECF No. 12). On June 16, 2021, the Court granted the preliminary injunction, provisionally certified the class, and ordered Defendants within 15 days to provide the plaintiff class "with the full hours of special education and related services mandated by their Individualized Education Programs ('IEPs') through direct, teacher-or-counselor-led group classes and/or one-on-one sessions, delivered via live videoconference calls and/or in-person interactions." Order, ECF No. 37; Memorandum Opinion, ECF No. 38. The preliminary injunction also required Defendants to provide reports every thirty days to keep the Court updated on their compliance. *Id.*

[1] *See* Minute Order, August 5, 2021, approving the filing of the Second Amended Class Action Complaint for Declaratory, Injunctive, and Other Relief, ECF No. 44-3.

Plaintiffs moved to certify the plaintiff class on April 12, 2021 (ECF No. 11) which Defendants opposed (ECF No. 57). On August 26, 2021, Defendants filed a motion to partially dismiss the Second Amended Complaint as to all of the claims except Claim 1 which alleged that the District violated the IDEA by failing to implement the plaintiff class's IEPs (ECF No. 60), which Plaintiffs opposed (ECF No. 66). On October 18, 2021, Plaintiffs moved to hold Defendants in contempt for failing to comply with the preliminary injunction (ECF No. 72) which Defendants opposed (ECF No. 76). Plaintiffs then sought and were granted leave to supplement their contempt motion with information related to recently filed status reports. ECF No. 82; Minute Order, December 13, 2021. The Court heard oral argument on these three motions on February 8, 2022.

On February 16, 2022, this Court found Defendants in contempt of the Preliminary Injunction and ordered specific relief. *See* Order ("Contempt Order"), ECF No. 101. The Court ordered that Defendants submit individualized plans "on how to rectify the hours deficit of each student" enrolled at the DC Jail complex high school for the period between September 1, 2021 and January 31, 2022, and that by March 15, 2022, Defendants "shall have a remote-learning system fully operational for all students . . . to such a degree that students may be provided their required special-education services via live videoconference calls." *Id.*, p. 4. The Court also ordered that "the IDEA eligibility of all students is extended beyond their 22nd birthday for the amount of time necessary to ensure that they receive the education that they would have received had Defendants complied immediately with the Preliminary Injunction." *Id.*, p. 5.

After the Contempt finding, the Parties made numerous filings. Defendants filed their plans to compensate students for the education and related services that were not provided during the contempt period, *see* ECF Nos. 109, 110, 116, 117, and Plaintiffs moved to enforce the Contempt Order related to the plans. *See* ECF Nos. 111, 115, 119. On April 19, 2022, Defendants

moved to clarify or, in the alternative, to modify the Preliminary Injunction and Contempt Orders. ECF No. 118. Plaintiffs opposed this motion. ECF No. 120. The Court heard oral argument on these post-Contempt motions on June 21, 2022, and the Parties subsequently consented to referral of the case to a Magistrate Judge for mediation.

Pursuant to a minute order on June 30, 2022, the case was referred to Magistrate Judge G. Michael Harvey for settlement discussions and the Parties were ordered to file monthly status reports with this Court. Upon entering mediation, multiple motions remained pending, including Plaintiffs' motion for class certification (ECF No. 11), Defendants' motion for partial dismissal (ECF No. 60), and several motions relating to the preliminary injunction and the Contempt Order (ECF Nos. 111, 118, 119, 127). On September 26, 2022, the Court stayed this case in a Minute Order, including the pending motions, while the Parties continued mediation.

The Parties met with Magistrate Judge Harvey for fifteen mediation sessions in total between August 2022 and May 2023. *See* Second Declaration of Kathleen L. Millian, Ex. 1, ("Second Millian Decl.") para. 7. During these sessions, the Parties engaged in extensive negotiations which at times included Defendants' client representatives and a relevant third party to provide additional relevant information. The Parties exchanged dozens of draft settlement documents. On November 28, 2022, the Parties filed a joint motion for a protective order to facilitate the exchange of sensitive personal information in ongoing mediation efforts, including information concerning absent class members. *See* ECF 154. After fourteen months of negotiations, the Parties have now reached the proposed settlement.

II. SUMMARY OF THE SETTLEMENT

The Settlement Agreement (ECF No. 191-1) includes changes to policy, practices, and procedures that Defendants have agreed to implement over its term and programs for the delivery

of contempt and other compensatory education, in exchange for a release of Plaintiffs' claims. Damages are not part of the proposed Settlement Agreement. However, Plaintiffs' counsel will receive an award of attorneys' fees and costs. The following is a summary of the material terms of the Settlement Agreement.

A. The Settlement Class

The Settlement Class consists of two subclasses: the Injunctive Relief Subclass and the Compensatory Relief Subclass. ECF No. 191-1, para. 37. Persons comprising the Injunctive Relief Subclass are those who, on or after the Effective Date of September 22, , 2023, (a) are entitled to receive special education and/or related services under the IDEA and its federal and local implementing regulations, and (b) are enrolled in the High School at the DOC Facilities. *Id.*, para. 24. Persons comprising the Compensatory Relief Subclass are those who (a) are entitled to relief under the Court's Order of February 16, 2022, ECF No. 101; and/or (b) for any period between March 24, 2020 through August 31, 2021 and/or February 1, 2022 through the Effective Date of September 22, 2023, , 2023, were (i) entitled to receive special education and/or related services under the IDEA and its federal and local implementing regulations, and (ii) enrolled in the High School at the DOC Facilities. *Id.*, para. 6. Plaintiffs have filed an unopposed Motion for Rule 23 Certification of the Settlement Class. ECF No. 192.

B. Duration

The term of the Settlement Agreement is from the date of the Parties' execution of the agreement, namely, September 22, , 2023, to August 1, 2025. *See* ECF No. 191-1, para. 145. The Court retains jurisdiction to enforce or construe the Settlement Agreement throughout its term. *Id.*, paras. 145, 147, 173, 181. However, the Parties have agreed that if there is a pending motion to enforce or construe the Settlement Agreement on the date that the Settlement Agreement

terminates, then the termination of the Settlement Agreement does not affect the Court's jurisdiction to adjudicate the pending motion(s), order appropriate relief, and if relief is granted, ensure compliance with any resulting order(s). *Id.* The Parties have also agreed that the termination of the Settlement Agreement does not affect the Settlement Class Members' entitlement to Contempt Relief or Compensatory Services Awards issued pursuant to this Settlement Agreement. *Id.*, para. 146.

C. Appointment of a Third-Party Auditor

The Settlement Agreement provides for the appointment of Grace M. Lopes as a Third-Party Auditor to evaluate, report on, and manage ongoing compliance with the Settlement Agreement. *See* ECF No. 191-1, Section IX(A); *see also id.*, paras. 131, 133. Ms. Lopes is highly qualified to serve as the Third-Party Auditor based on her knowledge and experience in serving in similar roles as Court Monitor or Special Master in other systemic reform litigation in the District of Columbia. Ms. Lopes' experience is outlined in her curriculum vitae which is attached as Exhibit 2.

Ms. Lopes will have access to a wide variety of documents and information including policies, practices, records, and data collected. *Id.*, para. 135(a)-(d), (j)-(n). Ms. Lopes will also have access to relevant areas of the DOC Facilities, the ability to observe, among other things, the delivery of education and certain related services, and the ability to interview students, instructional staff and DOC staff. *Id.*, para. 135(e)-(i).

Ms. Lopes will report to the Parties on Defendants' compliance with the Settlement Agreement on a quarterly basis and the Parties will meet with Ms. Lopes at least quarterly. *Id.*, paras. 136, 138. If the auditor makes findings of noncompliance, she will develop targeted, non-binding remedial measures and suggested timelines for the completion of such remedial measures

by Defendants. *Id.*, para. 136(b). The Parties will utilize the Settlement Agreement's dispute resolution process for disputes related these remedial measures. *Id.*, para. 137. If a dispute cannot be resolved by the Parties, Ms. Lopes' reports may be submitted to the Court. *Id.*, para. 149. Defendants will pay Ms. Lopes' costs for her work under the Settlement Agreement. *Id.*, para. 140.

D. Policy, Practices, and Procedural Changes

Under the Settlement Agreement, Defendants agree to implement or continue implementing a range of policy, practices, and procedural changes to fully implement students' IEPs regardless of the students' housing placement at the DOC Facilities. *See* ECF No. 191-1, Section II(A)-(C). Examples of these provisions are highlighted below.

The Settlement Agreement (Section II(B)(1)) requires the current Memorandum of Agreement (MOA) among the Department of Corrections, OSSE, and Maya Angelou Public Charter School-Academy (MAPCS-A), for the High School at the DOC Facilities, and future such MOAs, to include the following:

- Require that the LEA at the DOC Facilities provide all students with FAPE. ECF No. 191-1, para. 50(h).
- Include certain provisions related to the education of students who turn twenty-two (22) years of age while enrolled in the High School at the DC Jail. *Id.*, para. 50(b)-(c).
- Define the School Day as at least six (6) hours. *Id.*, para. 50(a).
- Require that the District provide the space, staff, devices, technology, and/or tools necessary to effectuate the MOA. *Id.*, para. 50(d).
- Reflect OSSE's monitoring responsibilities as described in the Settlement Agreement and the obligations of both DOC and the LEA at the DOC Facilities to cooperate with OSSE to effectuate those monitoring responsibilities. *Id.*, para. 50(f).

The Settlement Agreement also requires DOC to make policy, practices, and procedural changes related to student movement, housing assignments, and the security clearance process. *See* ECF No. 191-1, Sections II(B)(2) and (C)(4)-(5). These include the following:

- Ensure that, absent a legitimate safety or security concern, students will be made available for instruction and related services regardless of housing location and that all students, including those in Restrictive Housing, are permitted to attend in-person instruction, and provided an escort if necessary. *Id.*, paras. 54, 72.

- Document instances when a student has not received their needed escort to attend school. *Id.*, para. 54.

- Ensure that all students are screened on a monthly basis to determine their eligibility for housing in the Correctional Treatment Facility (CTF) (where education can be provided more readily), and that those eligible are housed in CTF when possible and appropriate. *Id.*, para. 57.

- Prioritize, to the extent possible, the applications for security clearance of newly hired or contracted educational staff and Service Providers. *Id.*, para. 75.

The Settlement Agreement requires DOC to make policy, practices, and procedural changes related to educational and related services technology. *See* ECF No. 191-1, Sections II(B)(2) and (C)(1). These include the following:

- Ensure the availability of technology necessary to provide virtual instruction and related services. *Id.*, paras. 55(b), (h).

- Ensure that there are enough working Education Tablets for every enrolled student, plus sufficient replacements. *Id.*, paras. 55(a), 60(a).

- Ensure that each student who needs an Education Tablet is offered one prior to the beginning of the School Day and has access to it for the entirety of the School Day and after as needed to complete assigned tasks. *Id.*, para. 55(c).

- Implement all necessary infrastructure and policy changes to enable students to access the intranet and Education Tablets for educational and related services purposes, regardless of the student's housing placement at the DOC Facilities, with limited exceptions. Ensure that all students can access the intranet at a speed sufficient to participate in virtual instruction and related services (unless they are housed in an area that is excepted from this requirement). *Id.*, paras. 59, 60(b).

- Ensure an upper limit on the number of days that an Education Tablet can be removed from a student for health or safety purposes and ensure that the removal

of a student's tablet does not alter Defendants' obligations to provide education consistent with the student's IEP. *Id.*, para. 55(d).

The Settlement Agreement requires Defendants to make policy, practices, and procedural changes related to instruction and related services delivery. *See* ECF No. 191-1, Section II(C)(1)-(3). These include the following:

- Ensure that instruction and related services are provided to all students in accordance with their IEPs regardless of housing placement. *Id.*, paras. 62, 67.
- Ensure that the LEA at the DOC Facilities has a sufficient number of qualified staff positions funded and available to be filled to satisfy the specified obligations in this Settlement Agreement. *Id.*, para. 63.
- Ensure that all related services available in-person whenever practicable and appropriate and ensure that these services are provided in locations with necessary privacy and confidentiality safeguards. *Id.*, paras. 68-69.
- Ensure documentation of when a student does not attend class or related services. *Id.*, paras. 65, 70.
- Ensure the availability of make-up instruction and related services when obligated. *Id.*, paras. 66, 71.

The Settlement Agreement also contains provisions related to the funding of the LEA at the DOC Facilities, including that $165,672.43 will be made available to MAPCS-A for the hiring of additional teachers and staff and an agreement that Defendants will seek budget enhancements to cover the LEA at the DOC Facilities' reasonable anticipated costs for the upcoming academic year. ECF No. 191-1, Section II(C)(6).

E. Contempt Relief

The Settlement Agreement includes obligations related to those members of the Compensatory Education Subclass who are entitled to relief under the Court's Order of February 16, 2022, ECF No. 101 ("Contempt Relief"), who have not yet received all the relief to which they are entitled nor graduated from high school. *See* ECF No. 191-1, Section V; *see also id.*, para. 82(a). These students will receive new Compensatory Service Award letters, *id.*, para. 82(a), and

outreach from Defendants to assist with identifying providers and arranging for receipt of services. *Id.*, para. 82(c)-(g).

Defendants will allow these students to convert their awards to an Educational Expense Award, equivalent to the monetary value of the services at the time redeemed and to be used on educational expenses. *Id.*, para. 88. The awards expire three years after the date of issuance. *Id.*, para. 84. However, there are specified circumstances under which awards may be tolled including for periods of incarceration, or reincarceration following release, depending on specified conditions. *Id.*, paras. 85-86.

Defendants also have related record keeping, documentation, document-sharing, and reporting obligations to Plaintiffs' counsel and the Third-Party Auditor during the term of the Settlement Agreement. *Id.*, para. 89.

F. Compensatory Education

The Settlement Agreement obligates Defendants to provide Compensatory Education awards to members of the Compensatory Education Subclass who were at the High School between March 24, 2020 through August 31, 2021, and/or February 1, 2022 through the Effective Date of September 22, 2023. *See* ECF No. 191-1, Section VI; *see also id.*, para. 90. These students will be offered the option to receive this award as either Compensatory Services or an Educational Expense Award, equivalent to the monetary value of the services at the time redeemed and only to be used on educational expenses. *Id.*, para. 96. Defendants will review eligible students' relevant records and make determinations as to each student's Compensatory Education Award using the agreed-upon calculations for specified time periods. *Id.*, paras. 91-93; ECF No. 191-4, Data Sources and Sample Calculations for the Calculation of Compensatory Services Awards (Exhibit 3 of the Settlement Agreement).

Defendants will provide notice and outreach to class members to assist them in obtaining their compensatory education awards, including the issuance of explanatory Compensatory Education Award letters to all students, and assisting with identifying providers and arranging for receipt of services. *See* ECF No. 191-1, paras. 97-99. The awards expire three years after the date of issuance. *Id.*, para. 101. However, there are specified circumstances under which awards may be tolled including for periods of incarceration, or reincarceration following release, depending on specified conditions. *Id.*, paras. 102-103.

Defendants will allow these students to convert their awards to an Educational Expense Award, equivalent to the monetary value of the services at the time redeemed and to be used on educational expenses. *Id.*, para. 96. Defendants also have related record keeping, documentation, document-sharing, and reporting obligations, including documenting and reporting each student's choice between Compensatory Services and the Educational Expense Award, to Plaintiffs' counsel and the Third-Party Auditor. *Id.*, para. 97(e).

Defendants will also offer additional educational and support programs for those students who aged out of IDEA eligibility between March 24, 2020 and the Effective Date of September 22, 2023, and satisfy other specified criteria. *Id.*, paras. 106-109.

The Settlement Agreement contains additional provisions related to the delivery and oversight of the Contempt and Compensatory Education awards. Defendants will identify at least one dedicated Compensatory Education Outreach Coordinator to oversee the relief and conduct outreach, provide assistance, develop a system for tracking data related to this relief, and adhere to payment processing, dispute resolution, and reporting obligations. ECF No. 191-1, Section VII. If the Parties dispute a denial of an educational expense, then the Parties will engage in a specified dispute resolution process which involves the Third-Party Auditor if it arises during the term of

this Settlement Agreement, and the Special Education Mediation process offered by OSSE's Office of Dispute Resolution if it arises after the termination of the Settlement Agreement. *Id.*, para. 121.

G. Data, Reporting, and Review

Defendants will collect data on various educational metrics, including but not limited to, students' credits, educational rates, graduation rates, and receipt of specialized instruction and related services hours, throughout the entire term of the Settlement Agreement. *See* ECF No. 191-1, Section IX(B). Defendants are required to submit specified monthly reports to the Plaintiffs and the Third-Party Auditor demonstrating compliance with the requirements of this Settlement Agreement. *Id.*, paras. 141-143.

H. OSSE Monitoring

The Settlement Agreement obligates OSSE to monitor the provision of special education at the High School and to provide the results of monitoring to Plaintiffs' counsel and the Third-Party Auditor. *See* ECF No. 191-1, Section III. OSSE is required to engage in quarterly monitoring reviews that alternate between desktop and on-site monitoring and these reviews must include, among other things, a representative sample of students from across each housing category (including general housing, restrictive housing, protective custody, special medical units, pre-detention hearing unit, etc.). *Id.*, para. 80(b)-(d). OSSE is also required to convene at least quarterly meetings with DOC and the LEA to provide oversight of compliance with the IDEA and MOA. *Id.*, para. 80(a).

I. Dispute Resolution

If disputes arise between the Parties concerning compliance with the Settlement Agreement, then the Parties will follow a prescribed dispute resolution process. *See* ECF No. 191-

1, Section XI. The Parties have agreed that, before seeking relief from the Court, any disputes over enforcement or construction of the Settlement Agreement will first be brought to the other Party and Third-Party Auditor for negotiation and then the Parties will move the Court for referral to the Circuit Court Mediation Program, unless one of the Parties opts out of mediation. *Id.*, paras. 148-149. In the event the Parties are unable to resolve a dispute, the Court retains jurisdiction over this action and motions to enforce or construe the Settlement Agreement as described. *See Id.* paras. 145, 147, 173, 181.

J. Attorneys' Fees and Costs of Counsel for the Plaintiff Class through the Term of the Settlement Agreement, Except For Certain Enforcement Motions

The Settlement Agreement provides that Defendants will pay Plaintiffs in the amount of $2,500,000 for all litigation costs, including attorneys' fees, through the Expiration Date, except for certain enforcement motions. *See* ECF No. 191-1, paras. 151, 152. In conformance with Rule 23(h), Plaintiffs will soon file an unopposed motion for an award of the agreed-upon amount.

K. Additional Provisions

The Settlement Agreement includes other miscellaneous provisions not described here, including the Parties' agreement that the Settlement Agreement is not a consent decree (ECF No. 191-1, para. 164) and their agreement that, to the extent the Prison Litigation Reform Act, 18 U.S.C. § 3626(a) is applicable, this Settlement Agreement complies in all respects with that statute. *Id.*, para. 182.

LEGAL STANDARD FOR PRELIMINARY APPROVAL OF A CLASS ACTION SETTLEMENT UNDER FEDERAL RULE 23

For the Court to grant preliminary approval of a settlement of a class action and send notice of the proposed settlement to the class, the moving parties must show that the court "will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of

judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(i) to (ii). *See also* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:10 (6th ed. 2023). Rule 23(e)(2) authorizes a court to provide final approval to a proposed settlement that binds class members "only after a hearing" and "only on finding that [the settlement] is fair, reasonable, and adequate" after a consideration of four factors. These four factors are whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Preliminary approval "lies within the sound discretion of the court." *Richardson v. L'Oreal USA, Inc.*, 951 F. Supp. 2d 104, 106 (D.D.C. 2013) (citation omitted). "The exercise of this discretion, however, is constrained by the 'principle of preference' favoring and encouraging settlements in appropriate cases." *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 103 (D.D.C. 2004) (quoting *Pigford v. Glickman*, 185 F.R.D. 82, 103 (D.D.C. 1999)).

ARGUMENT

I. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT AGREEMENT.

All four factors under Rule 23(e)(2) weigh in favor of the conclusion that the proposed Settlement Agreement is fair, reasonable, and adequate. Furthermore, additional factors weigh in favor of granting preliminary approval including the opinion of the experienced counsel who negotiated the settlement and the unanimous support of named Plaintiffs. The Court should therefore preliminarily approve the Settlement Agreement.

A. The Class Representatives and Class Counsel Adequately Represented the Class.

Courts evaluate the involvement of the class representatives during settlement negotiations and the experience of class counsel to determine whether absent class members have been adequately represented during the process. *See, e.g., Stephens v. Farmers Rest. Grp.*, No. CV 17-1087 (TJK), 2019 WL 2550674, at *6 (D.D.C. June 20, 2019) (finding this factor supported when the class representatives "made clear that they were at all times during the mediation aware of their role representing the interests of those individuals and the various tradeoffs of reaching a settlement as opposed to proceeding to trial" and class counsel had "extensive experience" in class actions of the relevant claims).

Here, the named Plaintiffs' interests are aligned with those of the absent class members, and they are dedicated to their role representing absent class members' interests. *See* Second Millian Decl., paras. 3, 13; *see also* Declaration of Charles H., ECF No. 11-13, paras. 26-27; Declaration of Israel F., ECF No. 11-14, paras. 29-30; Declaration of Malik Z. (redacted), ECF No. 25-3, para. 17. Named Plaintiffs have been engaged throughout the mediation process, communicating with counsel to receive status updates and guidance, and have provided feedback on proposed settlement terms. *See* Second Millian Decl., para. 13.

Likewise, class counsel has adequately represented the class. The experienced and dedicated lawyers from School Justice Project, Washington Lawyers' Committee for Civil Rights, and Terris, Pravlik & Millian, LLP, participated in every mediation session. *See* Second Millian Decl., para. 7. These lawyers have experience litigating complex civil rights class action lawsuits in federal court, including those brought under the IDEA and Rehabilitation Act. *See id.*, para. 2; Declaration of Kathleen L. Millian, ECF No. 11-16, paras. 5, 7-9; Declaration of Zenia Sanchez Fuentes, ECF No. 11-17, paras. 4, 6; Declaration of Sarah Comeau, ECF No. 11-19, paras. 5-9;

Declaration of Jonathan Smith, ECF No. 11-20, paras. 5-8. Over the course of the settlement negotiations, class counsel provided guidance to the named Plaintiffs on the proposed settlement terms and the tradeoffs of reaching a settlement as opposed to proceeding to trial, and the named Plaintiffs relied on class counsel's advice. *See* Second Millian Decl., para. 13. In addition, throughout the settlement negotiations, class counsel continued to investigate the claims, gather data and information from Defendants, and continue to be committed to providing all necessary resources to litigate this matter and "fairly and adequately represent the interests of the class," Fed. R. Civ. P. 23(g)(l)(B), as they have done in the more than two years of litigating this case and negotiating the proposed settlement. *Id.*, paras. 4-5.

B. The Settlement Agreement Is a Product of Fair, Arm's-Length Negotiations.

Courts evaluate whether the settlement negotiations were "conducted fairly and without any undue pressure" as part of the process to determine if the settlement is a product of a fair, arm's-length negotiation. *Stephens v. Farmers Rest. Grp.*, 329 F.R.D. 476, 487 (D.D.C. 2019). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 565 F. Supp. 2d 49, 55 (D.D.C. 2008) (internal citations omitted). This presumption may be satisfied by informal discovery. *See, e.g.*, *Kinard v. E. Capitol Fam. Rental, L.P.*, 331 F.R.D. 206, 215 (D.D.C. 2019) (finding the presumption applied in a class action case that did not proceed to formal discovery); *In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 19, 21 (D.D.C. 2015) (same); *Richardson*, 951 F. Supp. 2d 104 at 107 (same); *cf. Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 26 (D.D.C. 2011) (formal discovery is not a prerequisite to preliminary or final settlement approval).

Here, Plaintiffs engaged in a significant factual investigation prior to the filing of suit, obtained critical information from Defendants' court-ordered monthly reports of compliance with the preliminary injunction beginning in July 2021, and obtained more information during the mediation. *See* Second Millian Decl., paras. 4-5. This process fully satisfies the standard for meaningful informal discovery. Prior to filing the Complaint and prior to entering mediation, Plaintiffs conducted a thorough investigation into the provision of special education at the High School at the DOC Facilities, including working with the named Plaintiffs; filing and litigating named Plaintiffs' administrative cases before OSSE's Office of Dispute Resolution during which key personnel from DCPS and DOC testified; communicating with dozens of other students and special education advocates with clients at the High School; and hiring and consulting with highly-qualified experts in the fields of special education in the correctional setting (Joseph Brojomohun-Gagnon, Ph.D.) and internet technology to support education in correctional facilities (Eden Nelson). *See id.*, para. 4. In addition, beginning in July 2021, Defendants submitted monthly status reports to the Court pursuant to the Preliminary Injunction which included the hours of specialized instruction and related services each student was receiving on a weekly basis and other information about student movement. *See* ECF No. 37. Plaintiffs regularly analyzed these reports. *See* Second Millian Decl., para. 5. During the mediation, Plaintiffs requested and obtained meetings with key District of Columbia personnel and third-party education providers to obtain specific information. *Id*., para. 9.

The negotiations that resulted in the Settlement Agreement were fair and involved no undue pressure. In June 2022, the Parties consented to enter mediation with the Honorable G. Michael Harvey. The settlement negotiations took place over fourteen months and involved fifteen half or full day settlement conferences with Magistrate Judge Harvey. *See* Second Millian Decl., para. 7.

During these sessions, the Parties engaged in extensive and adversarial negotiations and exchanged dozens of written proposals and responses which culminated in the complex and carefully negotiated Settlement Agreement presented to the Court today. *Id.*, paras. 7-8. At times, upon Plaintiffs' request, the settlement conferences included Defendants' client representatives and relevant third parties who provided additional information necessary to evaluate the proposed settlement terms. *Id.*, para. 9. On November 28, 2022, the Parties filed a joint motion for a protective order to facilitate the exchange of sensitive personal information in the ongoing mediation efforts and the litigation, which was granted. *See* ECF No. 157; *see also* Second Millian Decl., para. 10. Subsequently, Plaintiffs requested specific information from Defendants concerning absent class members to assist in the evaluation of the proposed settlement terms, and Defendants provided that information. *Id*.

The mediation process under the oversight of Magistrate Judge Harvey was thorough and fair and the resulting Settlement Agreement is the product of arm's-length negotiations between the Parties. Therefore, a presumption of fairness, adequacy, and reasonableness should apply, and this factor weighs in favor of preliminary approval.

C. The Relief Provided for the Class Is Adequate.

1. Both Parties Considered the Costs, Risks, and Delay of Trial and Appeal and Opted for a Settlement.

"Under this factor, courts typically compare[] the terms of the settlement with the likely recovery plaintiffs would attain if the case proceeded to trial, an exercise which necessarily involves evaluating the strengths and weaknesses of plaintiffs' case." *Kinard*, 331 F.R.D. 206 at 215-16 (internal citation and quotations removed); *see also* Manual for Complex Litigation § 21.62 (explaining that the "[r]easonableness [of a settlement agreement] depends on an analysis of the class allegations and claims and the responsiveness of the settlement to those claims"). This factor

has been called "the most important factor" a court considers when evaluating a proposed settlement, *see, e.g.*, *Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 8 (D.D.C. 2006), and the D.C. Circuit has stated that analyzing this factor is the court's "primary task" in evaluating a proposed class settlement. *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998).

Plaintiffs submit that their legal position is strong and that they would ultimately succeed at trial. *See* Second Millian Decl., para. 12. Plaintiffs contend that the major legal and factual issues in the case concerning the District's liability to the Plaintiff class under IDEA had been resolved in Plaintiffs' favor at the preliminary stage in the Court's issuance of a preliminary injunction and the Contempt Order, *see* ECF Nos. 37, 38, 101, and Plaintiffs expect that the Court would reach the same conclusions after trial. *See* Second Millian Decl., para. 12.

Defendants deny the allegations in the operative Complaint and maintain valid defenses to the asserted claims. The Settlement Agreement is not an admission of liability, duty, or wrongdoing by Defendants or an admission that any policy, practice, or procedure violated federal or District of Columbia law.

However, the Parties ultimately have agreed "that it is in their mutual interest to move forward productively to resolve the issues raised in this class action lawsuit by means other than litigation and to enter into this Settlement Agreement." Settlement Agreement, ECF No.191-1, p. 1. It is in the best interests of the Plaintiff class to obtain the guaranteed negotiated relief far sooner than any relief that might come after discovery, lengthy pretrial proceedings, a trial, and potential appeal. *See* Second Millian Decl., para. 12; *cf. Abraha v. Colonial Parking, Inc.*, No. CV 16-680 (CKK), 2020 WL 4432250, at *8 (D.D.C. July 31, 2020) (finding this factor satisfied in a class action pending for four years whose class members were "minimum wage employees who live paycheck to paycheck" and who would receive "more certain and timely distributions through the

proposed settlement); *Luevano v. Campbell*, 93 F.R.D. 68, 89 (D.D.C. 1981) ("Even putting aside all consideration of the risks of litigation, the delay in providing relief to the class if this case were to be litigated is a factor strongly supporting the compromise reached by the parties."). As this Court found, "to a young, growing person, time is critical" and "a few months can make a world of difference" to these students. Memorandum Opinion of Preliminary Injunction Order, ECF No. 38, June 16, 2021, pp. 19-20 (citation omitted).

2. The Process for Distributing Relief to the Class Is Effective.

The Contempt and Compensatory Education award-processing procedures established by the Parties in the Settlement Agreement are effective and fair to the Settlement Class. The process does not require students to opt-in; rather, Defendants will review eligible students' relevant records and make determinations as to each student's Contempt and/or Compensatory Education Award using the agreed-upon standards or calculations. ECF No. 191-1, paras. 82, 91-93. Defendants are then obligated to issue letters to these students, *see id.*, paras. 82, 97, and conduct specified outreach depending on where the student is located; for example, whether the student resides in the community, or is detained at the D.C. Jail or in another correctional facility. *Id.*, paras. 82(c)-(f), 98-99. Defendants will utilize a Compensatory Education Outreach Coordinator to assist class members in obtaining their Contempt and Compensatory Education relief. ECF No. 191-1, paras. 111-112. These procedures will provide a reasonable and fair process for all Settlement Class members to receive their Contempt and/or Compensatory Education Awards without unnecessary difficulty or delay.[2] Therefore, this factor weighs in favor of preliminary approval.

[2] To ensure compliance with these provisions, which require the District to act promptly in providing educational supplies and services to the Plaintiff class, Defendants need procurement

3. Defendants Will Pay the Negotiated Attorneys' Fees and Costs of Plaintiffs' Counsel.

The Parties have negotiated that Defendants will pay Plaintiffs' attorneys' fees and costs in the amount of $2,500,000, subject to approval by the Court following a motion. ECF No. 191-1, para. 151. Plaintiffs will file an Unopposed Motion for an Award of Litigation Costs, Including Attorneys' Fees, no later than 30 days following the filing of this motion for preliminary approval of the settlement. *Id*., para. 151. The negotiated fees are fair and reasonable and will be paid by the Defendants, not the Plaintiff class. This factor weighs in favor of preliminary approval.

D. The Class Members Are Treated Equitably in the Settlement Agreement.

The overarching principle for this factor is "to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were similarly situated." 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:56 (6th ed. 2023).

The injunctive relief provided for in the proposed Settlement Agreement applies uniformly to all members of the Injunctive Relief Subclass. There are no potential conflicts among these subclass members, because there is no differential treatment between different class members or groups of class members.

With respect to the relief for the Compensatory Education Subclass, many forms of relief apply uniformly to all subclass members, such as the notice and outreach requirements to inform

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flexibility. As in other litigation, the Parties request that the Court waive District and federal procurement requirements, but only to the extent necessary to implement the terms of the proposed Settlement Agreement. *See* Consent Decree ¶ 77, August 24, 2006, *Blackman, et al. v. District of Columbia, et al.*, Civil Action No. 1:97-cv-02402-PLF-JMF, ECF No. 498 ("To ensure timely delivery of products and services pursuant to federal law and federal court order, Defendants' procurement of such products and/or services to class members under this Consent Decree may be made without regard to the DC Procurement Practices Act, D.C. Code § 2-301.01 et seq., any other District or federal law relating to procurement, and any regulations thereunder.").

class members of their rights under the settlement; the right of each class member to convert their services award into an expense award for educational purposes; the availability of a Compensatory Education Outreach Coordinator to assist with the delivery of compensatory education and services; Defendants' data collection, reporting, and payment processing obligations; and the oversight of the process by the Third-Party Auditor. *See* ECF No. 191-1, paras. 90, 94-105, 111-112, 113-124, 132.

However, the members of the subclass who did not receive the educational and related services prescribed by their IEPs from March 24, 2020 through August 31, 2021—during the worst of the COVID-19 pandemic—are not similarly situated to the students who did not receive services after the litigation of this case resulted in a Contempt Order in February 2022 (*i.e.*, from February 1, 2022 to the Effective Date of September 22, 2023). During the first period, students largely received work packets for their education and related services were limited. Memorandum Opinion, June 16, 2021, ECF No. 38, pp. 5-8. The situation for students improved after the preliminary injunction issued, COVID restrictions loosened, and Maya Angelou Public Charter School-Academy took over as the education provider as of October 1, 2021, but did not move to full compliance. *See* Second Millian Decl., para. 6. Therefore, to address missing services to students from September 1, 2021, to January 31, 2022, after the preliminary injunction had issued, the Court entered a Contempt Order with relief for the affected students. The Settlement Agreement provides that the affected students who have not yet received all the relief to which they are entitled under the Contempt Order will continue to be entitled to this relief. *See* ECF No.191-1, Section V; *see also id.*, para. 82.

Because of the difference in receipt of education and related services in the period from March 24, 2020 through August 31, 2021 (when education was largely comprised of work packets)

to the period after the Contempt Order issued (*i.e.*, February 1, 2022, to the Effective Date of September 22, 2023) (when MAPCS-A teachers were facilitating classes), students in the two periods are entitled to different levels of compensatory education under the Settlement Agreement. The Settlement Agreement applies a higher percentage of educational hours recovery for the time period between March 24, 2020 through August 31, 2021, than for the time period between February 1, 2022 through the Effective Date. *See* ECF No. 191-1, paras. 91, 92. By implementing this approach, the Settlement Agreement is fair to all class members entitled to compensatory education by treating the different character of the missed services in these two time periods differently.

Thus, the relief for the Injunctive Relief Subclass is uniform for all class members, and the relief for the Compensatory Education Subclass appropriately differentiates depending on the nature of education services that the students received or did not receive in the two distinct time periods. For these reasons, this factor weighs in favor of preliminary approval.

E. Additional Factors Weigh in Favor of Preliminary Approval Including the Opinion of Experienced Counsel and Support of Named Plaintiffs.

District courts may consider the reaction of the class and the opinion of experienced counsel at the preliminary approval stage. *See Stephens*, 329 F.R.D. 476 at 486 (explaining that two of the factors that courts in this Circuit "generally consider" in evaluating Rule 23 settlement agreements include the reaction of the class and the opinion of experienced counsel and examining those factors at the preliminary approval stage); *see also Abraha*, 2020 WL 4432250, at *9 (finding that "the Court must consider the opinion of experienced and informed counsel, which should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement" (internal quotations and citation omitted)); *Richardson*, 951 F. Supp. 2d 104 at 107–08 ("Opinion of . . . experienced and informed counsel should be afforded substantial consideration

by a court in evaluating the reasonableness of a proposed settlement" (internal quotations and citation omitted)).

In *Abraha v. Colonial Parking*, the Court found that the representations of counsel for both Parties that they believed the settlement was fair, reasonable, and adequate, weighed in favor of granting preliminary approval. Similarly, here, counsel for both Parties represent that they believe the Settlement Agreement is fair, reasonable, and adequate. *See* Second Millian Decl., para. 11.

District courts also consider the support of class representatives at the preliminary approval stage. A factor for consideration at final approval is whether the Settlement Agreement will be received positively by the Settlement Class. However, at the preliminary approval stage, because notice has not been sent to members of the Rule 23 classes, the Court cannot yet assess the reaction of the class to the proposed settlement. *See Abraha*, 2020 WL 4432250, at *9. Nevertheless, the Parties have reason to believe that the Settlement Agreement will be received positively by the Class. All the named Plaintiffs, who have been involved in the litigation since its initial stages, fully support the Settlement Agreement. *See* Second Millian Decl., para. 13; *see also Stephens*, 329 F.R.D. 476 at 488 (describing as "encouraging" at the preliminary approval stage the "unanimous reaction of the class representatives" in support of the Settlement Agreement). Therefore, this factor weighs in favor of preliminary approval.

II. THE COURT SHOULD DIRECT DISTRIBUTION OF THE NOTICE OF THE SETTLEMENT TO THE CLASS AND SCHEDULE A FAIRNESS HEARING.

Pursuant to Federal Rule of Civil Procedure 23(e)(1)(B), the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Furthermore,

pursuant to Rule 23(e)(2), a court must hold a hearing prior to approving a settlement proposal that binds class members.

The Parties have demonstrated above in Section I that the Court will likely be able to grant final approval of the Settlement Agreement under Rule 23(e)(2). In addition, Plaintiffs believe they have demonstrated in their Unopposed Motion to Certify the Settlement Class, ECF No. 192, that the Court is also likely to be able to grant final certification to the Settlement Class pursuant to Rules 23(b)(2) and 23(b)(3). Therefore, the Parties respectfully request that this Court direct notice and schedule a Fairness Hearing at the Court's earliest convenience but no sooner than 60 days from the date of its Order granting preliminary approval to allow adequate time for notice to the class.

The Parties request that the Court approve their proposed Class Notice for distribution, which is attached to the Settlement Agreement as Exhibit 1. *See* ECF No. 191-2, Proposed Class Notice. Such notice "must be reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Brown v. Wells Fargo Bank, N.A.*, 869 F. Supp. 2d 51, 64 (D.D.C. 2012) (alteration in original) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). *See, e.g.*, *Stephens*, 329 F.R.D. 476 at 490-91 (finding sufficient proposed class notices that "explain the terms of the settlement; what the recipient can expect to receive from the settlement; . . . what steps he or she must take to opt out of the settlement; and how he or she can raise an objection to the settlement and participate in the final fairness hearing.").

The Parties' proposed Class Notice satisfies these criteria and explains the lawsuit, the terms of the proposed settlement including a summary of the injunctive and compensatory relief, the procedures for opting out of or objecting to the settlement, and information related to the

Fairness Hearing. *See* ECF No. 191-2. For example, the Parties' proposed notice explains that any member of the Settlement Class may object to the proposed Settlement Agreement (*id.*, p. 2), that any member of the Settlement Class who wishes to object must do so in writing to the mailing or e-mail addresses listed in the Class Notice (*id.*, pp. 4-5), and all objections must be received by the Court no later than fourteen days before the scheduled Fairness Hearing (*id.*, p. 4). In addition, the Parties' proposed notice explains that any member of the Compensatory Relief Subclass may opt out by submitting a request to opt-out in writing to Class Counsel or the Court no later than fourteen days before the scheduled Fairness Hearing. *Id.*, p. 5.

The Parties also request that the Court approve the agreed-upon dissemination process for the Class Notice specified in the Settlement Agreement. *See* ECF No. 191-1, Section XIII(C). The Parties have agreed, among other things, that Defendants will disseminate the Class Notice within ten business days of the Court's order granting preliminary approval by posting the Class Notice at the DOC Facilities in the law library, classrooms, and any other spaces in the DOC Facilities where Settlement Class Members receive educational or related services (ECF No. 191-1, para. 156(a)), by hand-delivering copies of the Class Notice to every Settlement Class Member residing at DOC Facilities (*id.*, para. 156(b)), and by mailing the Class Notice via first class mail, postage prepaid, to the current address(es) of each Settlement Class Member using good faith best efforts to obtain a current address (*id.*, para. 156(c)). Counsel for the Plaintiff class will each post the notice on their organization's website. *See* Second Millian Decl., para. 14. The Parties also request that the Court post the notice on its website. *See* ECF No. 191-1, para. 155.

Lastly, the Parties respectfully request that the Court make appropriate arrangements so that the Fairness Hearing can be accessible via teleconferencing and videoconferencing (on Zoom

or a similar platform) so that class members who are incarcerated or otherwise not able to attend in person can participate in the Fairness Hearing. *See* ECF No. 191-1, para. 161.

CONCLUSION

For the foregoing reasons, the Court should preliminarily approve the Settlement Agreement and enter an order directing the distribution of notice of the settlement and scheduling a Fairness Hearing.

Dated: September 25, 2023

Respectfully submitted,

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