

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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EB, LB 1, HG, KSG, AJ, IP, SM, JW, DR, :
on behalf of themselves and all others :
similarly situated, :

Plaintiffs, :

-against- :

NEW YORK CITY DEPARTMENT OF :
EDUCATION, NEW YORK CITY :
BOARD OF EDUCATION, JOE KLEIN, :
in his individual and official capacity as :
Chancellor of the New York City School :
District, :

Defendants. :

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**MEMORANDUM & ORDER
PRELIMINARILY
APPROVING THE
PROPOSED SETTLEMENT
AND APPROVING
PLAINTIFFS’ NOTICE OF
CLASS ACTION
SETTLEMENT AND
FAIRNESS HEARING**

02-CV-5118 (ENV)(MDG)

VITALIANO, D.J.

On August 17, 2004, the Court certified this action on behalf of “disabled New York city children age three through twenty-one who have been, will be, or at risk of being excluded from school without adequate notice and deprived of a free and appropriate education through suspensions, expulsions, transfers, discharges, removals and denials of access.” On June 29, 2005, the Court recertified the class, under Rule 23(b)(2), to consist of “[d]isabled New York City children age three through twenty-one who have been, will be, or at risk of being excluded from school for disciplinary reasons

without adequate notice and deprived of a free and appropriate education through suspensions, expulsions, transfers, discharges, removals, denials of access or other changes of educational placement,” and certified six subclasses under Rule 23(c)(4). The plaintiffs, without opposition, now move for preliminary approval of the proposed final settlement, the proposed notice of settlement and of the class action settlement procedure. They move in conformity with Rules 23(a) and 23(b)(2) and to implement the settlement of the parties as set forth in the Stipulation and Agreement of Settlement they filed on May 13, 2015.

Class actions may settle only with court approval. Fed. R. Civ. P. 23(e). Under the general procedure outlined by Rule 23(e), the Court must direct notice in a reasonable manner to all class members bound by the proposed settlement, hold a hearing, and permit class members to object to the proposed settlement. Following the hearing, the Court may approve the proposed settlement only upon a specific finding that it is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e). “As part of Rule 23(e)’s ‘fairness, reasonableness, and adequacy’ inquiry the court must first determine whether the terms of the proposed settlement warrant ‘preliminary approval.’” *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 355 (E.D.N.Y. 2006). Approval of a proposed class action settlement falls within the discretion of the trial

court, *see Maywalt v. Parker & Parsley Petro. Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995), and “[i]n exercising this discretion, courts should give proper deference to the private consensual decision of the parties.” *Willix v. Healthfirst, Inc.*, No. 07-CV-1143, 2010 WL 5509089, at *2 (E.D.N.Y. Nov. 29, 2010) (internal quotation marks and citation omitted).

In granting preliminary approval, the Court is only required to find that there is “probable cause to submit the [settlement] proposal to class members and hold a full-scale hearing as to its fairness.” *In re Traffic Exec. Ass’n-E. R.R.*, 627 F.2d 631, 634 (2d Cir. 1980) (internal quotation marks and citation omitted); *Puglisi v. TD Bank, N.A.*, No. 13-CV-637, 2015 WL 574280, at *1-2 (E.D.N.Y. Feb. 9, 2015). “[W]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representative[s] or segments of the class and falls within the reasonable range of approval, preliminary approval is granted.” *Bourlas*, 237 F.R.D. at 355 (quoting *In re Nasdaq Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing Manual for Complex Litigation (Third) § 30.41 (1995); *In re IPO Securities Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005))). Then, upon preliminary approval, “the court ‘must direct the preparation of notice of the certification of the settlement class, the proposed settlement[,] and the date of

the final fairness hearing.” *Id.* (quoting *In re IPO*, 226 F.R.D. at 191).

Regarding notice, pursuant to Rule 23(c)(2)(A), “[f]or any class certified under [23(b)(2)], the court may direct appropriate notice to the class.” “[T]he notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.” *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009) (alteration and internal quotation marks omitted) (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950))).

Applying these principles, the Court grants preliminary approval of the settlement memorialized in the Stipulation, concluding that the notice to the class and the proposed notice forms are appropriate, meet the requirements of Rule 23 and due process, and constitute the best notice practicable under the circumstances. The Court also finds that the Stipulation is the result of extensive, arm’s length negotiations, and, accordingly, the Court determines that there is probable cause to submit the proposed settlement to class members and thereafter hold a final hearing as to its fairness.

With the Court having read and considered the Stipulation and the accompanying documents, and the parties to the Stipulation having consented

to the entry of this Order, as more fully set forth in the Stipulation, and all terms used herein having the meanings defined in the Stipulation, it is, therefore, ORDERED that:

1. A hearing (the “Settlement Fairness Hearing”) pursuant to Rule 23(e) is hereby scheduled to be held before the Court on July 23, 2015 at 9:30 a.m. for the following purposes:
 - a) To determine whether the proposed Settlement is fair, reasonable, and adequate and should be approved by the Court;
 - b) To determine whether the Order and Final Judgment as provided under the Stipulation should be entered, dismissing the Complaint herein, on the merits and with prejudice, and to determine whether the release by the Class of the Settled Claims, as set forth in the Stipulation, should be provided to the Released Parties;
 - c) To determine whether the proposed injunctive obligations in the Stipulation are fair and reasonable and should be approved by the Court; and
 - d) To rule upon such other matters at the Court may deem appropriate.
2. The Court approves the form, substance, and requirements of the Notice of Proposed Settlement (the “Settlement Notice”), annexed to the Stipulation as Attachment F, and the Short Notice of Proposed Settlement

(the “Short Form Notice”), annexed to the Stipulation as Attachment E, and directs Defendants, within ten (10) business days of the date of entry of this Order, to post the Short Form Notice in all Suspension Sites, DOE Pathways to Graduation Sites, Referral Centers, DOE suspension hearing offices, and Committee on Special Education offices, and shall maintain those postings and make the Settlement Notice accessible to parents and students at those locations until the conclusion of the Settlement Fairness Hearing. Defendants are further directed to send copies of the Short Form Notice to the New York City Impartial Hearing Office, to all network and cluster leaders or any successor structure, to the Assistant for Special Education for each network or any successor structure, and to any CBO with which DOE has a contract to provide GED-related services to DOE high school students and request that they post the Short Form Notice until the conclusion of the Settlement Fairness Hearing.

- 3. The Court directs that Defendants shall cause the Short Form Notice to be published once in the New York Post and El Diario as soon as practicable after the Settlement Notice and Short Form Notice have been posted, but in no event more than ten (10) business days after the posting. Defendants shall, at or before the Settlement Fairness Hearing, file with the Court proof of publication of the Settlement Notice.**

4. **The Court directs Class Counsel to post the Settlement Notice on the website of Advocates for Children of New York, Inc. and directs Defendants to post a link on the DOE's website to another website that will post the Settlement Notice.**
5. **Class Members shall be bound by all determinations and judgments in this Action, whether favorable or unfavorable.**
6. **The Court will consider comments and/or objections to the Settlement, including the Injunctive Obligations, only if such comments or objections and any supporting papers are filed in writing with the Clerk of Court, United States District Court, 225 Cadman Plaza East, Brooklyn, New York 11201, and copies of all such papers are served, on or before July 16, 2015, upon each of the following:**

**Rebecca Shore
Advocates for Children of New York, Inc.
151 West 30th Street, 5th Floor
New York, New York 10001; and**

**Janice Birnbaum
New York City Law Department—General Litigation Division
100 Church Street, Room 2-195
New York, New York 10007**

7. **Attendance at the Settlement Fairness Hearing is not necessary; however, persons wishing to be heard orally with regard to the approval of the Settlement, including the Injunctive Relief, are required to indicate in a**

written submission their intention to appear at the hearing and file such submission with the Clerk of the Court, United States District Court, 225 Cadman Plaza East, Brooklyn, New York 11201, and copies of all such papers must be served, on or before July 16, 2015, upon each of the following:

Rebecca Shore
Advocates for Children of New York, Inc.
151 West 30th Street, 5th Floor
New York, New York 10001; and

Janice Birnbaum
New York City Law Department—General Litigation Division
100 Church Street, Room 2-195
New York, New York 10007

Persons who intend to comment on or object to the Settlement, including the Injunctive Obligations, and desire to present evidence at the Settlement Fairness Hearing must include in their written submissions the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the Settlement Fairness Hearing. Class Members do not need to appear at the hearing or take any other action to indicate their approval.

8. Pending final determination of whether the Settlement should be approved, the Lead Plaintiffs, all Class Members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute,

commence, or prosecute any action which asserts Settled Claims against any Released Party. However, nothing in the Stipulation or in this Order shall prevent Class Members from seeking relief for Reserved Claims in the appropriate forum.

9. This Order shall not be construed or used as an admission, concession, or declaration by or against any Defendants of any fault, wrongdoing, breach, or liability. This Order shall not be construed or used as an admission, concession, or declaration by or against Lead Plaintiffs or the Class that their claims lack merit or that the relief requested in the Action is inappropriate, improper, or unavailable, or as a waiver by any Party of any defenses or claims he, she, or it may have.
10. The Court reserves the right to continue the Settlement Fairness Hearing without further written notice.
11. The Court retains exclusive jurisdiction over the Action to consider all further matters arising out of or connected with the Settlement.

So Ordered.

**Dated: Brooklyn, New York
May 19, 2015**

/S/ Eric N. Vitaliano

ERIC N. VITALIANO
United States District Judge