

Consent Decree

In The Matter of

Yarman Smith, et al. v. Berkeley Unified School District, et al.
Case No. C-04-3306 WDB (N.D. Cal.):

a class action pending in the United States District Court
for the Northern District of California

TABLE OF CONTENTS

I. INTRODUCTION1

II. THE PARTIES AND CERTIFICATION OF CLASS FOR SETTLEMENT2

 A. The Named Plaintiffs and Plaintiff Class.....2

 B. Certification of Class3

 C. The Defendants3

III. SETTLEMENT PROVISIONS4

 A. Identification of and Outreach to Class Members4

 B. Meeting to Determine Whether Students Were Unlawfully Excluded
 from School.....6

 C. Offer to Immediately Reinstate Unlawfully Excluded Students to
 Comprehensive Schools.....7

 D. Development of Plan for Students to Earn Credits and Receive
 Compensatory Educational Services.....7

 E. Expungement and Modification of Educational Records of Unlawfully
 Excluded Students.....9

 F. Establishment of Policies, Procedures, and Training Programs to
 Prevent Unlawful Exclusion of Students from Comprehensive School9

 G. Compliance With Due Process Requirements10

 H. Plan to Address Racial/Ethnic Disproportionality in School Discipline ...11

 I. Appeals from District Determinations and Dispute Resolution12

IV. CONSENT DECREE REPORTING AND OVERSIGHT.....13

 A. Consent Decree and Order of the Court.....13

 B. The Students’ Rights Monitoring Committee.....14

 C. Reporting to the Monitoring Committee and the Court.....14

D.	Responsibilities of the Monitoring Committee.....	15
V.	MISCELLANEOUS PROVISIONS.....	16
A.	Relief Available to Plaintiffs and Class Members.....	16
B.	Agreement to Defend Consent Decree	16
C.	Effective Date	17
D.	Amending the Consent Decree	17
E.	Severability	17
F.	Release of Personal Liability Claim	17
VI.	TERMINATION OF LITIGATION.....	17
VII.	ATTORNEYS FEES	18

I.

INTRODUCTION

The Plaintiffs, African American and Latino students who have attended comprehensive middle school or high school in the Berkeley Unified School District, brought this litigation on August 13, 2004. Plaintiffs allege and Defendants deny that the Berkeley Unified School District (the “District”), the Berkeley Board of Education, Superintendent, and Director of the Offices of Student Services had unlawfully, arbitrarily, and without procedural due process, excluded from comprehensive educational programs Plaintiffs and those similarly situated. Plaintiffs have alleged and Defendants have denied that the Defendants had a policy and practice of unlawfully infringing upon the constitutional and statutory rights of Plaintiffs and those similarly situated by wrongfully and arbitrarily excluding Plaintiffs from school or wrongfully and arbitrarily reassigning Plaintiffs from comprehensive school programs to county community schools, continuation schools, home-hospital instruction programs, and independent study programs for alleged violations of the District’s student conduct rules.

Plaintiffs further alleged and Defendants deny that Defendants’ policies have had a disparate negative impact on and have arbitrarily and discriminatorily excluded African American and Latino students from comprehensive school programs and have assigned them to non-comprehensive alternative programs. Plaintiffs alleged and Defendants deny that Defendants’ policies and practices denied Plaintiffs their right to Equal Protection under the Fourteenth Amendment to the United States, Article 1, Section 7, of the California Constitution, and California Government Code Sections 11135-11139.5 and their implementing regulations at Title 22, Sections 98000 et seq. of the California Code of Regulations.

This Consent Decree (or the “Decree”) is agreed to by and between the Defendants and Plaintiffs in *Yarman Smith, et al. v. Berkeley Unified School District, et al.*, United States District Court Case No. C-04-3306 (WDB), a class action (the “Class Action” or “this Action”). Plaintiffs shall be referred to herein as either “Plaintiffs” or “Class Members.” The Parties herein shall be collectively referred to as the “Parties.”

Class Members in this Class Action are all African Americans and Latinos self-identified as such in official records who have been students in the Berkeley Unified School District and who have been involuntarily excluded from comprehensive school or involuntarily reassigned from comprehensive school programs to non-comprehensive alternative programs for alleged violations of the District’s student conduct rules without having received appropriate due process of law.

This Consent Decree is not and shall never be considered an admission of any fault, error, wrongdoing, liability or violation of any right by the District or by any agent officer, servant, or employee of the District or by Plaintiffs; nor an admission by the District that this matter is appropriate for class certification.

The Parties now wish to resolve this Class Action without further litigation and therefore agree on the following terms and conditions:

II.

THE PARTIES AND CERTIFICATION OF CLASS FOR SETTLEMENT

A. The Named Plaintiffs and the Plaintiff Class

The named Plaintiffs in this Action are Yarman Smith, a minor, by Lugertha Smith, his guardian *ad litem*, Juan Muñoz, a minor, by Margarita Chavez, his guardian *ad litem*, Summer McNeil, a minor, by Sonobia Augustine, her guardian *ad litem*. The Plaintiff Class consists of

the following: all African Americans and Latinos self-identified as such in official records who have been students in the Berkeley Unified School District and who have been involuntarily excluded from comprehensive school or involuntarily reassigned from comprehensive school programs to non-comprehensive alternative programs for alleged violations of the District's student conduct rules without having received appropriate due process of law.

B. Certification of Class

For purposes of achieving a settlement in this Action, the Parties agree and stipulate that the Plaintiff Class identified in Section II.A., above, shall be conditionally certified as a class and that this Action shall be conditionally certified as a class action pursuant to Federal Rule of Civil Procedure 23(b), upon approval of the Court. The Parties further request that the Court conditionally certify this class under Rule 23(b).

C. The Defendants

The Defendants in this Action are the Board of Education of the Berkeley Unified School District (the "Board of Education"), which is the elected policy-making body of the approximately 9,000 K-12 student and 500 employee Berkeley Unified School District; Gerald Herrick, Director of the Office of Student Services of the District; Michele Lawrence, Superintendent of the District; Nancy Riddle, President of the Board of Education; Terry S. Doran, Vice President of the Board of Education; Joaquin J. Rivera, John T. Selawsky, Shirley Issel, Directors of the Board of Education. Defendants Herrick and Lawrence have been sued in their personal and official capacities. Defendants Selawsky, Riddle, Rivera, Doran, and Issel have been sued in their official capacities.

III.

SETTLEMENT PROVISIONS

A. Identification of and Outreach to Potential Class Members

The Parties have agreed upon an outreach plan (Attached as Exhibit A) to identify and provide outreach to potential Class Members. Within ten school days of the Court's approval of the outreach plan, the plan shall be implemented by the District. The outreach plan shall include the following components:

1. By written and oral notice, the District shall inform the following groups of students of their rights under this Consent Decree: (1) students who have been recommended for expulsion, but did not receive an expulsion hearing during the 2002-03 and 2003-04 academic years; (2) students who have been placed at a continuation school, a community day school, an independent study program, or a home-hospital instruction program (collectively, "alternative program") during the 2002-03 and 2003-04 academic years; or (3) students who have been excluded from school entirely for more than 5 consecutive school days or 20 cumulative school days during either the 2002-03 or 2003-04 academic years. Such notice shall acknowledge and describe the District's obligation to provide a sufficient notice and hearing under California Education Code §§ 48900 *et seq.* prior to excluding any student from comprehensive school for disciplinary reasons; shall inform each student identified in this paragraph of the student's right to a meeting pursuant to Section III.B. of this Decree; and shall inform the student of the student's potential right to be reinstated in comprehensive school and/or receive compensatory educational services and the opportunity to earn educational credits pursuant to Section III.C. & D. The notice shall identify a specific District representative for students and their parents/guardians to contact to schedule the meeting.

2. The District shall provide a written notice to all students enrolled in all District comprehensive and non-comprehensive educational programs, acknowledging and describing the District's obligation to provide a sufficient notice and hearing under California Education Code §§ 48900 *et seq.* prior to excluding any student from comprehensive school for disciplinary reasons and informing students who believe they have been excluded from comprehensive school for disciplinary reasons without appropriate notice and a hearing of the student's right to a meeting pursuant to Section III.B. of this Decree; and shall inform the student of the student's potential right to be reinstated in comprehensive school and/or receive compensatory educational services and the opportunity to earn educational credits pursuant to Section III.C. & D. The notice shall identify a specific District representative for students and their parents/guardians to contact to schedule the meeting.

3. All written and oral notices and communications in this Section III.A. shall be provided to both the student and the student's parent/guardian and shall be in English, Spanish or the recipient's primary language as required by California Education Code Section 48385.

4. A notice shall be developed to notify potential Class Members and their Guardians of their general rights under this Consent Decree. The notice shall be published at the following places: Alameda County Probation Department, Alameda County Department of Social Services, Alameda County Juvenile Court, Alameda County Family Court, the Berkeley Organization of Churches, Berkeley Youth Alternatives, the Berkeley High School *Jacket*.

B. Meeting to Determine Whether Students Were Unlawfully Excluded from School

1. Within fifteen school days of receiving a claim form from a potential Class Member pursuant to Sections III.A.1. & 2, the District shall schedule and convene a meeting with each of the students identified in Sections III.A.1 & 2 and shall invite the parent/guardian of the student to attend that meeting.

2. The student and parent/guardian shall be informed of their right to be accompanied to the meeting by any person of her or his choosing. At the meeting, the District shall determine whether the student was excluded from a comprehensive educational program for disciplinary reasons without a hearing. If the student has been excluded from a comprehensive educational program in part or in whole due to the student's behavior or a violation of the District's student conduct rules and if the District cannot document that the student had received appropriate notice and the appropriate hearing as required by California Education Code §§ 48432.5 or 48900 *et seq.*, the student shall be deemed a "Class Member." If the District does provide documentation that the student had received notice, a hearing, and a formal order of expulsion, (where necessary) the student may nonetheless provide evidence that she did not receive such notice, a hearing, or formal order of expulsion and the District shall determine whether the student was excluded from a comprehensive educational program in violation of California Education Code §§ 48900 *et seq.* If the District determines that the student was so excluded, the student shall be deemed a "Class Member."

3. Upon the determination that a student is a Class Member, the District shall immediately provide the student an offer to be immediately reinstated, if appropriate, to comprehensive school pursuant to Section III.C., and shall be entitled to a plan developed pursuant

to Section III.D. If the District determines that the student was not unlawfully excluded from comprehensive school, the student may appeal that decision pursuant to Section III.I.

C. Offer to Immediately Reinstate Unlawfully Excluded Students to Comprehensive Schools

1. Immediately upon the determination pursuant to Section III.B. or III.I. that a student is a Class Member, the District shall immediately offer the Class member reinstatement to an age- and grade-level-appropriate comprehensive school in the District, unless reinstatement is not appropriate because the student is 18 years of age or older or the student no longer resides in the District.

2. The District shall appoint an administrator who shall have the authority and responsibility to ensure immediate enrollment of the student pursuant to this Section and shall ensure that school-site staff and administration facilitate such re-enrollment, including providing the student with an appropriate class schedule and appropriate instructional materials.

D. Development of Plan for Students to Earn Credits and Receive Compensatory Educational Services

Within fifteen school days of the determination by the District or the Neutral (as provided in Section III.I. below) that a student is a Class Member, the District shall develop with the Class Member an individualized plan for the Class Member to receive compensatory educational services and to earn appropriate credits toward graduation. If the Class Member or her parent/guardian disagrees with the District's plan for compensatory education, the Class Member or her parent/guardian may appeal the District's decision pursuant to Section III.I.

1. Each Class Member’s plan to earn academic credits shall consist of the following:
 - a. The goal of the plan is to assist the Class Member in recouping, as quickly as possible, all credits lost due to the District’s wrongful exclusion of the student (hereinafter “the exclusion”) from a comprehensive school program—with the intent to graduate the Class Member on time with the Class Member’s age- and grade-level peers.
 - b. The District shall initially conduct an assessment of the credits the Class Member has earned in comprehensive school and alternative programs and determine the credits the student needs to graduate.
 - c. The plan may include, as appropriate, enrollment in courses offered in a comprehensive school, the development of an after-school, independent study program, or credit for work at a community college.
 - d. The District shall ensure immediate provision of all services and funds necessary to implement the plan.
2. Each Class Member’s plan to receive compensatory educational services shall consist of the following:
 - a. The District shall provide to each Class Member a determination of the Class Member’s mathematics and English-Language Arts skills to assess the extent to which compensatory education services should be provided to the student for the exclusion of the student.
 - b. The District shall include in the Class Member’s compensatory education plan, all recommendations of the District to which the Class Member agrees.
 - c. Compensatory education may include, but is not limited to, educational therapy/tutoring, summer school, adult education, speech and language services, mental health

services, career counseling, vocational programming, post-secondary vocational or college coursework. In determining whether compensatory educational services provided by outside service providers is appropriate, the Parties and, if necessary, the Neutral shall first consider the compensatory educational services available within the District.

d. Within thirty days of any agreement regarding compensatory education services or any determination by a Neutral regarding compensatory education services, the District shall enter into and comply with any necessary contracts with outside service providers for the provision of compensatory educational services.

E. Expungement and Modification of Educational Records of Unlawfully Excluded Students

1. Within fifteen school days of the determination that a student is a Class Member, the District shall expunge or modify the Class Member's student record as follows: (1) any record reflecting that a Class Member had been properly expelled shall be expunged; and (2) a notation shall be made in the Class Member's record that any exclusion from comprehensive school programs for more than 5 consecutive school days or more than 20 school days in any school year was unlawful, unless such suspension was lawful under the California Education Code. A copy of such expunged/modified records shall be provided to the Class Member and the Class Member's parent/guardian.

2. Within fifteen school days of the determination that a student is a Class Member, the District shall also inform the Class Member that she is entitled to submit a letter or any other written statement to the District to be placed in her student record which letter or statement explains, contradicts, or objects to any reference to the Class Member's conduct or any incident related to the exclusion of the Class Member from comprehensive school. The District shall ensure that such letter or statement shall be placed in the student's educational records.

F. Establishment of Policies, Procedures, and Training Programs to Prevent Unlawful Exclusion of Students from Comprehensive School

1. At the first meeting of the Monitoring Committee (as constituted pursuant to Section IV.B. below), the Board of Education shall provide to the Monitoring Committee revised policies, a student suspension/expulsion monitoring system, and forms that are designed to ensure that no student is excluded from comprehensive educational programs in violation of California Education Code §§ 48900 *et seq.*

2. Within 60 calendar days of the effective date of this Consent Decree, the District shall provide an in-service training to all staff and administration deemed appropriate by the District regarding the policies developed pursuant to this Section. At the first meeting of the Monitoring Committee, the District Superintendent shall provide the Monitoring Committee with a signed statement that all appropriate District staff and administration received such training and shall provide the Monitoring Committee with attendance sheets containing the signature of all District personnel who participated in the trainings.

G. Compliance with Due Process Requirements

1. The District shall not authorize or participate in any practice that involuntarily excludes students from comprehensive school or involuntarily reassigns students from comprehensive school programs to county community schools, continuation schools, home-hospital instruction programs or independent study programs for alleged violations of the District's student conduct rules, unless the District provides appropriate notice and an appropriate hearing as required by California Education Code §§ 48432.5 or 48900 *et seq.*

2. The District shall meet the requirements established in Section G.1. for six consecutive semesters (three years). The District shall also document that, for six consecutive semesters, (three years), no student has been involuntarily excluded from comprehensive school

Smith et al. v. Berkeley Unified School District, et al., No. C-04-3306 (WDB)

Consent Decree

or involuntarily reassigned from comprehensive school programs to a county community schools continuation school, home-hospital instruction programs or independent study programs for alleged violations of the District's student conduct rules, unless the District provided appropriate notice and an appropriate hearing as required by California Education Code §§ 48432.5 or 48900 *et seq.*

H. Plan to Address Racial/Ethnic Disproportionality in School Discipline

1. Beginning on the first date that the Monitoring Committee meets and on a quarterly basis thereafter, the District shall provide data for the most recent quarter, disaggregated on the basis of race, ethnicity, grade level, and gender to the Monitoring Committee indicating (1) the number of students recommended for expulsion for disciplinary reasons and the reason for such recommendation; (2) the number of students who received an expulsion hearing; (3) the number of students who were formally expelled from the District by the Board of Education and the reason for such expulsion; (4) the number of students whose expulsions were suspended; (5) the number of students reassigned to or enrolled in (a) county community schools, (b) continuation schools, (c) home-hospital instruction programs, or (d) independent study programs, and the reason for such reassignment.

2. Developing a Plan to Address Racial/Ethnic Disproportionality in School Discipline

a. The District shall develop a plan to reduce the racial/ethnic disproportionality in (1) the number of students recommended for expulsion; (2) the number of students formally expelled; and (3) the number of students reassigned to (a) county community schools, (b) continuation schools, (c) home-hospital instruction programs, or (d) independent study programs. Such plan shall include, but not be limited to, the following: (a) staff and faculty training in

cultural diversity, (b) behavioral intervention strategies that are alternatives to suspension and expulsion, and (c) ensuring the appropriateness of referrals to Berkeley Alternative High School (“Berkeley Alternative”), ensuring that students who are referred to Berkeley Alternative receive appropriate procedural protections, and ensuring that those attending Berkeley Alternative are appropriately given the option to re-enroll in Berkeley High School.

b. Within 60 days after the effective date of this Consent Decree, the plan shall be provided to the Plaintiffs. Plaintiffs shall have the authority to accept or reject the District’s plan for good faith reasons (e.g., inappropriate timelines, lack of specificity) within 14 days of receiving the Plan. If the Plaintiffs accept the plan, it shall become a part of this Consent Decree. If the Plaintiffs reject the plan, within 14 days, the Parties shall first meet and confer in good faith to resolve any differences regarding the plan. If that meet and confer process does not result in an agreement, the District may request that the Court approve its plan and make it part of this Consent Decree. Plaintiffs may oppose that request.

I. Appeals from District Determinations and Dispute Resolution

1. For the duration of this Consent Decree, the District shall use the services of one or more neutral, third-party person(s) (“Neutral”) who shall be charged with resolving disputes between individual students or Class Members and the District regarding the implementation of Sections III.B., C., D., & E of this Decree. The Parties shall make best efforts to create a panel of qualified Neutrals who will work without compensation.

2. The Neutral shall be selected by the following process: Within 20 calendar days of the effective date of this Decree, the Parties shall meet and confer in an effort to agree upon the selection of a Neutral(s). In the event that the Parties cannot reach agreement on the

appointment of any Neutral, the Parties agree to immediately submit the matter to the Court and request that the Court select a Neutral.

3. Should a Neutral need to be replaced, this process in Section III.I.2. shall again be followed to select a replacement Neutral. Subject to the Court's approval, the Neutral may be dismissed and a replacement sought (1) upon agreement of the Parties, or (2) by the Court upon petition of any Party when exceptional circumstances are shown.

4. The Neutral shall be charged with resolving disputes between individual students or Class Members and the District regarding the implementation of Sections III.B., C., D., & E of this Decree. Any time that the District and a student or Class Member disagree regarding the implementation of Section III.B., C., D., or E., the District shall inform the student or Class Member of his or her right to appeal the District's decision and provide the student or Class Member with information to initiate the appeals process. If the student elects to appeal the District's decision, the Student must file a notice of appeal with the District within 15 school days of the District's decision. Within 15 school days of receiving the notice of appeal, the Neutral shall meet with the student or Class Member and a District representative to hear the appeal. After hearing the Appeal, the Neutral shall issue, within one day of the hearing, a brief (one paragraph) written decision that resolves the dispute. The written decision shall be binding on the student or Class Member and the District.

IV.

CONSENT DECREE REPORTING AND OVERSIGHT

A. Consent Decree and Order of the Court

Upon the final approval of this Consent Decree by the Court, this Decree and each and every one of its supplements or modifications, if any, shall become a Decree of the Court, and

shall be enforced as an order entered by this Court. The Court will retain jurisdiction to ensure implementation of the Decree. The Court shall have the authority to enter any additional orders it deems appropriate to ensure compliance with this Decree.

B. The Students' Rights Monitoring Committee

1. The Parties agree to establish a Student's Rights Monitoring Committee (the "Monitoring Committee"). The Monitoring Committee shall consist of five persons, all of whom must be identified within 60 days of the effective date of this Consent Decree. The Monitoring Committee shall include two persons of the District Superintendent's choosing. The Monitoring Committee shall also include three persons selected by the Plaintiff Class and may include one or more of Plaintiffs' counsel. The Parties may, at any time and with full discretion, replace any or all of the persons whom they have selected for the Monitoring Committee. The Parties may mutually agree to expand the number of persons on this Committee, so long as the Parties' respective proportional representation on the Committee remains the same.

2. The Monitoring Committee shall initially meet within 90 calendar days of the effective date of this Decree and on a quarterly basis thereafter throughout the duration of this Decree.

C. Reporting to the Monitoring Committee and the Court

Within 90 calendar days of the effective date of this Decree and on a quarterly basis thereafter throughout the duration of this Decree, the District shall prepare a written report for Plaintiffs' counsel, the Monitoring Committee, and the Court. This report shall include the following:

1. A narrative description of the District's efforts to implement each Section of this Decree;

2. Disaggregated on the basis of race, ethnicity, grade level, and gender, the number of students who sought a meeting pursuant to Section III.B., the number of students who were deemed “Class Members” pursuant to such meeting, the number of students who were not deemed “Class Members” pursuant to such meeting, the number of Class Members who received and the number who did not receive an offer of immediate reinstatement pursuant to Section III.C., the number of Class Members who received and the number who did not receive a Plan to earn credits and receive compensatory educational services pursuant to Section III.D., and the number of Class Members whose records were expunged or modified and the number of Class Members whose records were not expunged or modified pursuant to Section III.E.

3. Disaggregated on the basis of race, ethnicity, grade level, and gender, (1) the number of students recommended for expulsion; (2) the number of students formally expelled; (3) the number of students whose expulsions were suspended and (4) the number of students reassigned to or enrolled in (a) county community schools, (b) continuation schools, (c) home-hospital instruction programs, or (d) independent study programs.

4. A narrative report on the District’s progress toward meeting the requirements established pursuant to Section III.H.2.

5. The number of disputes heard by the Neutral pursuant to Section III.I.

6. At the first Committee meeting, the District Superintendent shall provide the Monitoring Committee with a statement affirming that all appropriate District faculty and administration received training pursuant to Paragraph III.F.2

D. Responsibilities of the Monitoring Committee

The Monitoring Committee shall have the following authority and responsibilities:

1. Meeting as a Committee pursuant to Section IV.B.

2. Reviewing and providing comments on the District's revised policies, student data management system, and forms pursuant to Section III.F.

3. Reviewing the District's report prepared pursuant to Section IV.C. and providing comments on such reports.

4. Providing comments to the District regarding the District's efforts at implementing this Consent Decree.

V.

MISCELLANEOUS PROVISIONS

A. Relief Available to Plaintiffs and Class Members

Defendants are hereby released and discharged from all causes of action, claims, demands, damages, and liabilities now existing or hereafter arising from the matters described in this Action (*Yarman Smith, et al. v. Berkeley Unified School District, et al.*,) and Section I, of this Agreement, except to the extent that Plaintiffs/Class Members reserve additional rights they may have under the IDEA (Individuals with Disabilities Act) and Section 504 of the Rehabilitation Act. This paragraph also shall not preclude any person who, after the date of the Court's final approval of this Consent Decree, is involuntarily excluded from comprehensive school or involuntarily reassigned from comprehensive school programs to county community schools, continuation schools, home-hospital instruction programs, and independent study programs for alleged violations of the District's student conduct rules without having received appropriate due process of law from pursuing any claims and seeking and obtaining any relief, including but not limited to equitable relief and compensatory damages.

B. Agreement to Defend Consent Decree

The Parties agree to jointly propose this Consent Decree to the Court and advocate for its approval as a preliminary and final order of the Court. The Parties agree to defend this Consent Decree against any potential third parties who may object to this Decree's entry as an order of the Court.

C. Effective Date

This Consent Decree shall become effective on the date it is signed as an order of this Court.

D. Amending the Consent Decree

The Parties reserve the right to move the Court to amend this Consent Decree in accordance with prevailing legal standards for modification of a consent decree. The Parties agree that prior to moving the Court to amend the Decree, the parties shall meet and confer in good faith to resolve any disputes regarding the Decree.

E. Severability

All individual provisions in this Consent Decree shall be severable. If any one or more such provision is determined by the Court to be in any way unenforceable, such determination shall have no effect on any of the remaining paragraphs, provisions, clauses, sections, sentences, or words in this Decree.

F. Release of Personal Liability Claim

By entering this Consent Decree, Plaintiffs release all Defendants from any liability in their personal capacity.

VI.

TERMINATION OF LITIGATION

After proceeding under the terms of this Consent Decree for at least six consecutive semesters (three years), if the District believes that it has achieved full compliance with this Consent Decree, the District may issue a report to Plaintiffs' counsel, the Monitoring Committee, and the Court documenting such full compliance. The Parties or the District may then move the Court for an order terminating this litigation and Consent Decree, and dismissal of the litigation with prejudice. The Court shall conduct a hearing to determine whether the District has achieved full compliance with this Decree. The District shall demonstrate to the Court's satisfaction that this Decree has been implemented, that all requirements have been met, and that it has achieved compliance with the Consent Decree. Upon the conclusion of the hearing, the Court may enter any further orders it deems appropriate, including, but not limited to, an order terminating this Consent Decree and its jurisdiction, an order continuing jurisdiction, or an order modifying the Consent Decree.

VII.

ATTORNEYS FEES

Within 30 days of the effective date of this Consent Decree, the District agrees to pay to Plaintiffs' counsel \$50,000 in full satisfaction of Plaintiffs' attorneys fees and costs for the duration of this Consent Decree, except that Plaintiffs reserve the right to seek attorneys fees in connection with any action or proceedings brought to enforce the terms of this Decree. If Plaintiffs believe that the terms of this Decree are not being implemented, the parties agree to meet and confer in good faith regarding such issues, or utilize the Monitoring Committee to

resolve such disputes prior to bringing any action or proceeding to enforce the terms of this Decree.

Date: _____

Michele B. Lawrence
Superintendent, Berkeley Unified School District

Date: _____

Nancy Riddle
President, Board of Education
Berkeley Unified School District

Approved as to Form:

Date: _____

Marleen Sacks
Atkinson, Andelson, Loya, Ruud & Romo
Attorneys for Defendants

For the Plaintiffs:

Date: _____

Lugertha Smith
Guardian *ad litem* for Yarman Smith

Date: _____

William S. Koski
Youth & Education Law Clinic
Attorneys for Plaintiffs

Date: _____

Abigail Trillin
Legal Services for Children, Inc.
Attorneys for Plaintiffs

Date: _____

William F. Abrams
Pillsbury Winthrop LLP
Attorneys for Plaintiffs

Exhibit A

BUSD Outreach: Plan

Within ten school days of the Court's approval of the Consent Decree, the District shall implement the following Outreach Plan:

1. ***Written & Oral Outreach to Targeted Students***: The District shall provide the following groups of students with written and oral notice, in English, Spanish, or in the recipient's primary language pursuant to Education Code section 48985, of their rights under the Consent Decree:
 - Students who have been recommended for expulsion, but who may not have received an expulsion hearing during the 2002/03 or 2003/04 academic years.
 - Students who have been placed in a continuation school, a community day school, an independent study program, or a home-hospital instruction program (collectively, "alternative program") during the 2002/03 or 2003/04 academic years.
 - Students who have been excluded from school entirely for more than 5 consecutive school days or 20 cumulative school days during either the 2002/03 or 2003/04 academic years.
 - A. ***Written Outreach***: The District shall provide written notice, in English, Spanish, or in the recipient's primary language pursuant to Education Code section 48985, to the above listed groups of students by providing them with the following materials:
 - a. Written Outreach to Targeted Students Letter
 - b. Compensatory Education Claim Form
 - c. Compensatory Education Claims Process
 - B. ***Oral Outreach***: The District shall also provide oral notice, in English, Spanish, or in the recipient's primary language pursuant to Education Code section 48985, to the above listed groups of students by contacting the student and/or parent/guardian in person (such as at school) or at their primary telephone number to provide the information detailed in the Written Outreach to Targeted Students Letter or by reciting the Oral Outreach to Targeted Students Script on voicemail or an answering machine.
2. ***Written Notice to All BUSD Students & Families***: The District shall provide all students enrolled in all District comprehensive and non-comprehensive educational programs with written notice, in English, Spanish, or in the recipient's primary language pursuant to Education Code section 48985, of their rights under the Consent Decree by providing them with the following materials.
 - a. Written Outreach to All BUSD Students
 - b. Compensatory Education Claim Form
3. ***Publication & Posting***: Notice to potential Class Members and their parent/ guardians of their general rights under the Consent Decree, shall also be made by publication or posting of the Written Outreach for Publication and Posting, in the English and Spanish languages, at the following places: Alameda County Probation Department, Alameda County Department of Social Services, Alameda County Juvenile Court, Alameda County Family Court, the Berkeley Organization of Churches, Berkeley Youth Alternatives, and the Berkeley High School *Jacket*.

BUSD Outreach: Written Outreach to All BUSD Students & Families

- **Were you or your African-American or Latino student asked to leave Berkeley High or a Berkeley Middle School after being accused of breaking school rules?**
- **Were you or your African-American or Latino student transferred to Berkeley Alternative High, Rock LaFleche, Independent Study, Home Health Instruction, or any other alternative school program after being accused of breaking school rules?**
- **Were you or your African-American or Latino student excluded from school for more than 5 days in a row or more than 20 days in one academic year after being accused of breaking school rules?**

If so, you or your student may be entitled to return to his or her regular school and receive free educational services, including an individualized program to earn extra credits toward graduation.

Under the law, before students can be excluded from school or involuntarily transferred to alternative programs for disciplinary reasons, school districts must take steps to inform students and parents of their rights and to make sure that students and parents have a chance to tell their side of the story at a meeting with a school administrator or at a hearing in front of the board of education. It is never legal for a student to be involuntarily placed on independent study or home health instruction.

In August 2004, a group of African-American and Latino students, represented by the Stanford Law School Youth and Education Law Project, Legal Services for Children, and Pillsbury Winthrop, filed a lawsuit against the Berkeley Unified School District. The lawsuit, called *Smith v. Board of Education*, accused the Berkeley Unified School District of excluding students from school or forcing students to transfer to alternative programs without informing them of their rights and without providing them with an opportunity to tell their side of the story. While the District denied those allegations, the students and the District agreed to settle the lawsuit. Under the agreement, the Berkeley Unified School District must allow any African-American or Latino student who was illegally excluded from school or forced to transfer to an alternative school program to return to his or her regular middle school or high school. The District must also provide any African-American or Latino student who was illegally excluded from school with additional educational services, such as tutoring, and extra credit opportunities to make up for the time that the student was kept out of school.

If you believe that you or your African-American or Latino student was unlawfully excluded from school or was forced to transfer from a comprehensive school to an alternative school program please fill out the enclosed form and return it to the District by _____. Within 15 school days of receiving your form, the District will schedule a meeting with you and your student to determine if your student was wrongfully excluded from school and is entitled to return to a comprehensive school and receive compensatory educational services. For more information contact _____ of the Berkeley Unified School District at 510-555-1212.

If you would like free legal consultation about your student's situation, please contact Legal Services for Children at 415-863-3762 or the Youth and Education Law Project at 650-723-4336.

BUSD Outreach: Written Outreach to Targeted Students

According to District records, during the past three school years, your African-American or Latino student was:

- **Referred for expulsion or asked to leave Berkeley High or a Berkeley Middle School;**
- **Suspended or excluded from school for more than 5 days in a row or more than 20 days in one academic year; or**
- **Transferred to Berkeley Alternative High, Rock LaFleche, Independent Study, Home Health Instruction, or another alternative school program.**

If your African-American or Latino child was excluded from school or referred to an alternative education program for disciplinary reasons, he or she may be entitled to return to his/her regular, comprehensive school and may be entitled to receive additional free educational services, including an individualized program to earn extra credits toward graduation.

Under the law, before students can be excluded from school or involuntarily transferred to alternative programs for disciplinary reasons, school districts must take steps to inform students and parents of their rights and to make sure that students and parents have an chance to tell their side of the story at a meeting with a school administrator or at a hearing in front of the board of education. It is never legal for a student to be involuntarily placed on independent study or home health instruction.

In August 2004, a group of African-American and Latino students, represented by the Stanford Law School Youth and Education Law Project, Legal Services for Children, and Pillsbury Winthrop filed a lawsuit against the Berkeley Unified School District. The lawsuit, called *Smith v. Board of Education*, accused the Berkeley Unified School District of excluding students from school or forcing students to transfer to alternative programs without informing them of their rights and without providing them with an opportunity to tell their side of the story. While the District denied those allegations, the students and the District agreed to settle the lawsuit. Under the agreement, the Berkeley Unified School District must allow any African-American or Latino student who was illegally kicked out of school or forced to transfer to an alternative school program to return to his or her regular middle school or high school. The District must also provide any African-American or Latino student who was illegally excluded from school with additional educational services, such as tutoring, and extra credit opportunities to make up for the time that the student was kept out of school.

To determine if your African-American or Latino student is entitled to return to a regular school program and/or entitled to receive free educational services, you must fill out the attached Compensatory Education Claim Form and submit it to the Berkeley Unified School District no later than _____. Within 15 school days of receiving your form, the District will schedule a meeting with you and your student to determine if your student was wrongfully excluded from school and is entitled to return to a comprehensive school and receive compensatory educational services. For more information contact _____ of the Berkeley Unified School District at 510-555-1212.

If you would like free legal consultation about your student's situation or assistance filling out the attached form, please contact Legal Services for Children at 415-863-3762 or the Youth and Education Law Project at 650-723-4336.

Smith et al. v. Berkeley Unified School District, et al., No. C-04-3306 (WDB)
Consent Decree—Exhibit A

BUSD Outreach: Script for Oral Outreach to Targeted Students

My name is _____. I am calling on behalf of the Berkeley Unified School District to notify you that your student may be entitled to receive additional educational benefits as the result of the settlement of the *Smith v. BUSD* lawsuit. According to District records, your African-American or Latino child was referred for expulsion during the past three school years, has been excluded from school for more than 5 consecutive school days or more than 20 cumulative school days during one academic year, or is enrolled or was enrolled in a non-comprehensive educational program, such as Berkeley Alternative High School, Rock LaFleche, Independent Study, or Home and Hospital Instruction. **If your African-American or Latino child was excluded from school or referred to an alternative school program for disciplinary reasons, he or she may be entitled to return to their regular, comprehensive school and may be entitled to receive additional free educational services, including an individualized program to earn extra credits toward graduation.**

For more information please contact _____ of the Berkeley Unified School District at 510-555-9999. For free legal consultation, you may also contact Legal Services for Children at 415-863-3762 or Stanford Law School's Youth and Education Law Project at 650-723-4336.

BUSD Outreach: Written Outreach for Publication & Posting

- **Were you or your African-American or Latino student asked to leave Berkeley High or a Berkeley Middle School after being accused of breaking school rules?**
- **Were you or your African-American or Latino student transferred to Berkeley Alternative High, Rock LaFleche, Independent Study, Home Health Instruction, or any other alternative school program after being accused of breaking school rules?**
- **Were you or your African-American or Latino student excluded from school for more than 5 days in a row or more than 20 days in one academic year after being accused of breaking school rules?**

If so, as the result of agreement reached in the lawsuit called *Smith v. Board of Education of the Berkeley Unified School District*, your African-American or Latino student may be entitled to return to his or her regular school and receive free educational services, including an individualized program to earn extra credits toward graduation. To find out more please contact the Berkeley Unified School District at 510-999-9999 or for free legal consultation contact Legal Services for Children at 415-863-3762 or the Youth and Education Law Project at 650-723-4336.

COMPENSATORY EDUCATION CLAIM FORM
Pursuant to the *Smith v. Berkeley Board of Education* Consent Decree

By filling out this form you are initiating a claim that, following a disciplinary incident, you or your African –American or Latino student was wrongfully excluded from a comprehensive school program or wrongfully transferred to a non-comprehensive school program. An exclusion or reassignment was “wrongful” if the District did not communicate what the alleged misconduct was or did not give the student and her or his parent/guardian an opportunity to present their side of the story during a hearing, as required by the applicable law. The District will send you written confirmation that your Claim Form has been received and within 15 schooldays the District will convene a meeting with you and your student to determine whether your student was wrongfully excluded from school and is entitled to return to a comprehensive school and receive compensatory educational services.

Student Name _____

Student Date of Birth _____ Student Race/Ethnicity _____

Current/Last School Attended: _____ Grade Level _____

Parent/Guardian Name _____

Address _____ Home Phone _____

_____ Work/Cell Phone _____

Approximate date of disciplinary action resulting in exclusion/transfer _____

Approximate dates of absence/exclusion due to disciplinary action _____

If applicable, approximate dates of enrollment in non-traditional educational program (e.g., Berkeley Alternative High School, Rock LaFleche, Independent Study, Home & Hospital Instruction) _____

If applicable, name of non-traditional education program _____

COMPENSATORY EDUCATION CLAIMS PROCESS
Pursuant to the *Smith v. Berkeley Board of Education* Consent Decree

Initiating the Claims Process

1. The student, parent, or guardian (“the Claimant”) may obtain the Compensatory Education Claim Form from Legal Services for Children, the Stanford Law School Youth & Education Law Project, or the Berkeley Unified School District (“the District”).

The Claimant must complete the Compensatory Education Claim Form and submit it to the Berkeley Unified School District.

Upon receipt of a completed claim form and documents, the Berkeley Unified School District must immediately date and log the claim for tracking purposes. The District must send (or deliver in person, if the claim form is filed in person) written acknowledgement to the Claimant that the claim was received. This acknowledgement must include the date on which the claim was logged.

Determination of Class Member Status

2. Within 15 schooldays of receiving a claim form from a potential Class Member, the District shall schedule and convene a meeting with the student and shall invite the parent/guardian of the student to attend that meeting. At the meeting the District shall determine whether the student, who is African-American or Latino as indicated by self-identification in official records, was excluded from a comprehensive educational program for disciplinary reasons without a hearing.

The student shall be deemed a “Class Member” if:

- The student, due to her alleged behavior or a violation of the District’s student conduct rules, has been excluded or reassigned from a comprehensive educational program for any period of time and the District cannot document that the student received appropriate notice and the appropriate hearing as required by law.
- Despite documentation from the District that the student had received notice, a hearing, and a formal order of expulsion (where necessary), the student is able to provide evidence that she did not receive such notice, a hearing, or formal order of expulsion as required by law.

Reinstatement to a Comprehensive School Program

3. Upon determination that a student is a Class Member, the District shall immediately offer the Class Member immediate reinstatement to an age- and grade-level-appropriate comprehensive school in the District, unless reinstatement is not

BUSD Outreach: Compensatory Education Claim Form

appropriate because the student is 18 years of age or older or the student no longer resides in the District.

The District shall also appoint an administrator who shall be responsible for ensuring the immediate re-enrollment of the student. The administrator shall also ensure that school-site administration and staff facilitate the student's re-enrollment, including providing the student with an appropriate class schedule and appropriate instructional materials.

Development of Plan for Credit Recovery and Compensatory Educational Services

4. Within 15 school days of the determination by the District or Neutral that the student is a Class Member, the District shall develop with the Class Member an individualized plan for the Class Member to receive compensatory educational services and to earn appropriate credits toward graduation.
 - Each Class Member's plan to earn academic credits shall consist of the following:
 - a. The goal of the plan is to assist the Class Member in recouping all credits lost due to the District's wrongful exclusion of the student as quickly as possible with the intent to graduate the Class Member on time with the Class Member's age- and grade-level peers.
 - b. The District shall initially conduct an assessment of the credits the Class Member has earned in comprehensive school and alternative programs and determine the credits the student needs to graduate.
 - c. The plan may include, as appropriate, enrollment in courses offered in a comprehensive school, the development of an after-school, independent study program, and/or credit for work at a community college.
 - d. The District shall ensure immediate provision of all services and funds necessary to implement the plan.
 - Each Class Member's plan to receive compensatory educational services shall consist of the following:
 - a. The District shall provide each Class member a determination of the Class Member's mathematics and English-Language Arts skills to assess the extent to which compensatory education services should be provided to the student to compensate for the student's exclusion from school.
 - b. The District shall include in the Class member's compensatory education plan all recommendations of the District to which the Class Member agrees.

BUSD Outreach: Compensatory Education Claim Form

- c. Compensatory education may include, but is not limited to, educational therapy/tutoring, summer school, adult education, speech and language services, mental health services, career counseling, vocational programming, post-secondary vocational or college coursework. In determining whether compensatory educational services provided by outside service providers is appropriate, the Parties and, if necessary, the Neutral shall first consider the compensatory educational services available within the District.
- d. Within 30 days of any agreement regarding compensatory education services or any determination by a Neutral regarding compensatory educational services, the District shall enter into and comply with any necessary contracts with outside service providers for the provision of compensatory educational services.

Modification/Expungement of School Records

5. Within 15 school days of the determination that a student is a Class member, the District shall:
 - a. Expunge or modify the Class Member's student record as follows:
 - any record reflecting that a Class Member has been properly expelled shall be expunged; and
 - a notation shall be made in the Class Member's record that any exclusion from comprehensive school programs for more than 5 consecutive school days or more than 20 school days in any school year was unlawful, unless such suspension was lawful under California education law.

A copy of the expunged/modified records shall be provided to the Class Member and the Class Member's parent/guardian.
 - b. Inform the Class Member that she is entitled to submit to the District a letter or any other written statement explaining, contradicting, or objecting to any reference to the Class Member's conduct or any incident related to the exclusion of the Class Member from comprehensive school. The District shall ensure that the letter or statement is placed in the student's educational records.

Right to Appeal District Determinations to Neutral Third-Party

6. The Claimant or Class Member shall have the right to appeal the District determinations regarding:
 - The Claimant's claim of unlawful exclusion from school and her status as a Class Member;
 - The Class Member's reinstatement to an appropriate comprehensive school program;

BUSD Outreach: Compensatory Education Claim Form

- The District’s plan for the Class Member to earn credits and receive compensatory educational services; and
- The expungement and modification of the Class Members educational records.

The District shall notify the Claimant or Class Member of her right to appeal and shall provide the Claimant or Class Member with information and forms to initiate the appeals process.

Appeal will be made to one or more neutral person(s) (“Neutral”) who shall have the authority to resolve disputes between Claimants or Class Members and the District.

If the Claimant or Class Member wants to appeal a District determination, the Claimant or Class Member must file a Notice of Appeal with the District within 15 school days of the District’s determination. Within 15 schooldays of receiving the Notice of Appeal, the Neutral shall meet with the Claimant or Class Member and a District representative to hear the appeal. After hearing the appeal, the Neutral shall issue, within one day of the hearing a brief (one paragraph) written decision that resolves the dispute. The written decision shall be binding on the Claimant or Class Member and the District.