

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

ELISA W., by her next friend, Elizabeth
Barricelli, *et al.*,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

USDC SDNY
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15 Civ. 5273 (LTS) (HBP)

~~PROPOSED~~ ORDER PRELIMINARILY APPROVING SETTLEMENT

Upon consideration of Named Plaintiff Children's Motion for Preliminary Approval of Settlement, made under Rule 23 of the Federal Rules of Civil Procedure, and upon the Court's review of the Consent Decree, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Court preliminarily approves the Consent Decree as being fair, reasonable and adequate, subject to the rights of Class Members¹ to challenge the fairness, reasonableness or adequacy of the Settlement Agreement and to show cause, if any exists, why a final judgment dismissing this case against State Defendants and all released claims should not be entered following a fairness hearing.
2. The Class is conditionally certified for purposes of providing notice pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2).

¹ As used herein, "Class Members" refers to "all children who are now or will be in the foster care custody of the Commissioner of [New York City's Administration for Children's Services] during the duration of this Consent Decree". (Consent Decree ¶ 5.2.)

- i. Plaintiff Children satisfy the numerosity requirement because there are approximately 9,957² children in foster care custody in the class. *See Toney-Dick v. Doar*, No. 12 Civ. 9162 (KBF) 2013 WL 5295221, at *4 (S.D.N.Y. Sept. 16, 2013) (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (“numerosity is presumed at a level of 40 members”)).
- ii. Named Plaintiff Children satisfy the commonality requirement because “the class members have suffered the same injury”, *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks and citation omitted), and there are common questions of law and fact among the class members.
- iii. Named Plaintiff Children satisfy the typicality requirement because each class member’s claims are traceable to the same course of conduct by the Commissioner of OCFS, which has resulted in the deprivation of their constitutional and statutory rights. *See Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d. Cir. 1997) (holding that typicality is found when each class member’s claim arises from the same conduct and “each class member makes similar legal arguments to prove the defendant’s liability” (internal quotation marks omitted)).

² According to ACS, as of December 2015, the most recent date for which there is available data, there were 9,957 children in foster care. *Data/Policy*, NYC Administration for Children’s Services, <http://www1.nyc.gov/site/acs/about/data-policy.page> (last visited March 31, 2016).

- iv. Named Plaintiff Children “will fairly and adequately protect the interests of the class” because the interests of the Named Plaintiff Children are not antagonistic to the rest of the class. *See Marisol A.*, 126 F.3d at 378.
 - v. Named Plaintiff Children satisfy the requirements of Federal Rule of Civil Procedure 23(b)(2) because the Commissioner of OCFS has “acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”. Fed. R. Civ. P. 23(b)(2). *See Marisol A.*, 126 F.3d at 375 (deprivation of constitutional and statutory rights to children in foster care or at risk of entering foster care).
3. Pursuant to Rule 23(g) of the Federal Rules of Civil Procedure, the Court appoints as class counsel, Marcia Robinson Lowry of A Better Childhood, Inc. and attorneys from Cravath, Swaine & Moore LLP, including Julie A. North and J. Wesley Earnhardt, to represent the Class Members for purposes of the settlement.
4. The Court hereby approves the substance, form and manner of the Notice of Proposed Class Action Settlement (the “Notice”), attached hereto as Exhibit A.
- i. The Commissioner of OCFS will direct voluntary agencies that operate residential facilities in New York State that provide foster care and services to children in ACS’s custody to post the Notice, in both English and Spanish, in such residential programs.

- ii. The Commissioner of OCFS will direct voluntary agencies providing foster care services to children in ACS's custody to post the Notice, in both English and Spanish, in areas of the offices usually frequented by foster children.
- iii. The Commissioner of OCFS will direct ACS and the voluntary agencies providing foster care services to children in ACS's custody to post the Notice, in both English and Spanish, on their respective websites.
- iv. The Commissioner of OCFS will post the Notice, in both English and Spanish, on its website.
- v. The Commissioner of OCFS will request that family courts in New York City post the Notice, in both English and Spanish, in areas of the court usually frequented by foster children.
- vi. The Commissioner of OCFS will request that Legal Information for Families Today post the Notice, in both English and Spanish, on its website.
- vii. The Commissioner of OCFS will mail the Notice, in both English and Spanish, to the following providers of legal services and request that the Notice be shared with all attorneys representing children in ACS custody: Legal Aid Society; Lawyers for Children; the Children's Law Center; and the Office of Attorneys for Children.

- viii. The Commissioner of OCFS will mail the Notice, in both English and Spanish, to the following providers of legal services and request that the Notice be shared with all attorneys representing the parents of children in ACS custody: Brooklyn Defender Services; Bronx Defenders; Center for Family Representation; the Assigned Counsel Panel; Federal Defenders of New York; Legal Services NYC (Brooklyn Legal Services, Bronx Legal Services, Manhattan Legal Services, Queens Legal Services and Staten Island Legal Services); New York Legal Assistance Group; MFY Legal Services; Advocates for Children; New York Lawyers for the Public Interest; Urban Justice Center; Northern Manhattan Improvement Corporation; West Side SRO Law Project; Make the Road by Walking; MinKwon Community Action Center; Community Service Society; Legal Action Center; Lenox Hill Neighborhood House; The Door, A Center of Alternatives, Inc.; the Citizen's Committee for Children; the Clerk of Court in the Southern District of New York with a request that the Notice be distributed to the Clerk for the Criminal Justice Act Panel for the Southern District of New York; and the Clerk of Court in the Eastern District of New York with a request that the Notice be distributed to the Processor for the Criminal Justice Act Panel for the Eastern District of New York.
- ix. The Commissioner of OCFS will publish the Notice, in both English and Spanish, twice within a three-week period in each of the following

publications: The New York Post, The New York Daily News and El Diario as soon as practicable after the Court schedules a fairness hearing.

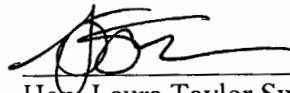
- x. Counsel for Plaintiff Children will set up a dedicated telephone number whereby interested class members can obtain more information about the settlement.

5. The Court enters the below schedule for approval of the settlement.

Event	Time for Compliance
Commissioner of OCFS to provide notice of the proposed Consent Decree to the appropriate federal and state officials as required by the Class Action Fairness Act.	<u>May 2</u> , 2016 Ten (10) days after entry of the Preliminary Approval Order.
Deadline for Publication of Notice to Class Members	<u>May 13</u> , 2016 Twenty-one (21) days after entry of the Preliminary Approval Order.
Deadline for Class members to comment upon or object to the proposed Consent Decree	<u>June 21</u> , 2016 Forty-five (45) days prior to the Fairness Hearing.
Deadline for Filing of Motion for Final Approval of Settlement	<u>July 15</u> , 2016 Twenty-one (21) days prior to the Fairness Hearing.

Deadline for Opposition to Motion for Final Approval of Settlement, or for Any Supplemental Objections to the proposed Consent Decree	<u>July 22</u> , 2016 Fourteen (14) days prior to the Fairness Hearing.
Deadline for Reply in Support of Motion for Final Approval, or Responses to Any Supplemental Objections to the proposed Consent Decree	<u>July 29</u> , 2016 Seven (7) days prior to the Fairness Hearing.
Fairness Hearing	<u>August 5</u> , 2016 at 10:30 AM Ninety (90) days after deadline for Commissioner of OCFS to provide notice of the proposed Consent Decree to the appropriate federal and state officials as required by the Class Action Fairness Act.

Dated: New York, NY
April 22, 2016



Hon. Laura Taylor Swain
United States District Judge

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