UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EB, LB 1, HG, KSG, AJ, IP, SM, JW, DR, ***on behalf of themselves and all others similarly situated,***	:	
Plaintiffs,	:	**MEMORANDUM & ORDER APPROVING SETTLEMENT AND ENTERING FINAL JUDGMENT**
-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,***	:	**02-CV-5118 (ENV)(MDG)**
Defendants.	:	

VITALIANO, D.J.

On May 19, 2015, the Court granted preliminary approval of the class action settlement as set forth in the Stipulation and Agreement of Settlement (the "Stipulation") filed on May 13, 2015. (Order, ECF No. 222). The Court concluded that the proposed notice to class[1] was appropriate, met the

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[1] 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." (Mem. & Order, ECF No. 70). 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

requirements of Rule 23 of the Federal Rules of Civil Procedure, as well as due process, and constituted the best notice practicable under the circumstances. (*Id.* at 4). The Court also found that the Stipulation was the result of extensive arm's-length negotiations. (*Id.*). Accordingly, the Court ordered the parties to comply with their respective notice obligations as set forth in the Stipulation, and directed any objectors to file with the Clerk of Court, in writing, their comments or challenges to the Stipulation on or before July 16, 2015. This deadline has passed, and no objections were received by the Court, nor were any received by plaintiffs or defendants. (*See* Shore Decl., ECF No. 227, at ¶ 7).

Today, this Court conducted a fairness hearing at which the parties confirmed that all notice requirements contained in the Court's preliminary approval order were followed, (Birnbaum Decl., ECF No. 224; Nathan Decl., ECF No. 223; Shore Decl., ECF No. 227), and, as expected, nobody appeared to object to the settlement. Having considered all of the submissions and arguments before it, the Court finds, as discussed below, that the settlement is fair, reasonable, and adequate, and, accordingly, plaintiff's motion for final

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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). (Mem. Op. & Order, ECF No. 133).

approval of the settlement is granted.

Discussion

Rule 23(e) requires court approval for the settlement of a class action to ensure that it is both procedurally and substantively fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). Of course, 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." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)). Without "'fraud or collusion,'" a court "'should be hesitant to substitute [its] judgment for that of the parties who negotiated the settlement.'" *Shepard v. Rhea*, No. 12-CV-7220, 2014 WL 5801415, at *7 (S.D.N.Y. Nov. 7, 2014) (citations omitted). In light of the "strong judicial policy favoring settlements," courts examine the procedural and substantive fairness of the class action settlement. *Wal-Mart Stores*, 396 F.3d at 116.

To determine procedural fairness, the Court inspects the negotiation process that resulted in settlement. *Id.*; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). Here, as discussed in the Court's preliminary approval order, the settlement was reached after the parties engaged in extensive arm's-length settlement negotiations. For over 13 years, under the close and

careful supervision of Magistrate Judge Marilyn D. Go, the parties have engaged in: extensive discovery, including voluminous document production, numerous depositions, and the retention of experts; continuous pre-trial case management; and, after a stay of discovery in 2008, highly productive settlement negotiations before Magistrate Judge Go. The parties' settlement negotiations involved competent and informed counsel, which, of course, "rais[es] a presumption that the settlement achieved meets the requirements of due process." *Shepard*, 2014 WL 5801415, at *8 (citing *Wal-Mart Stores*, 396 F.3d at 116; *In re Penthouse Exec. Club Comp. Litig.*, No. 10-CV-1145, 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013)). Without hesitation, the Court concludes that the settlement memorialized in the Stipulation is procedurally fair, reasonable, adequate, and obviously not the result of fraud or collusion. *See* Fed. R. Civ. P. 23(e).

For substantive fairness, the Court is required to measure the settlement's terms and determine whether they are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). *D'Amato*, 236 F.3d at 86. The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings

and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of the best possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463. Clearly, since the case involves declaratory and injunctive relief, and does not have damages or a settlement fund, "there is no need to examine the last three *Grinnell* factors." *Shepard*, 2014 WL 5801415, at *8 (citing *Ingles v. Toro*, 438 F. Supp. 2d 203, 211 (S.D.N.Y. 2006); *Marison A. v. Giuliani*, 185 F.R.D. 152, 162 (S.D.N.Y. 1999), *aff'd sub nom. Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000)). Furthermore, on the fifth factor, the Court "will evaluate the risks of establishing remedies instead of the risks of establishing damages." *Id.* (citing *Giuliani*, 185 F.R.D. at 162).

The factors set forth in *Grinnell* clearly weigh in favor of final approval of the settlement. First and foremost, having already taken 13 years to approach resolution, this litigation is beyond complex, expensive, and long. A trial here would require extensive, technical, and costly class-wide examination of defendants' practices, policies, and actions dating back to 2002

and earlier. Without settlement, there would be evermore years of litigation. Such expense and uncertainty warrants approval of settlement where it is appropriately reached. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125-26 (S.D.N.Y. 1997) (holding the highly complex nature of the case, which, "has already consumed large sums of money[,] many thousands of hours of labor," and, if litigated, would require "substantial expenditures," "heavily" favored final approval), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

As for the second factor, the strength of the settlement is manifest through the lack of objections. As stated at the fairness hearing and in the parties' papers, notices were: posted in all suspension sites, DOE pathways to graduation sites, referral centers, DOE suspension hearing offices, and Committee of Special Education offices; forwarded to the New York City Impartial Hearing Office, all network and clusters leaders, the Assistant for Special Education for each network, and to any CBO with which DOE has a contract to provide GED-related services; and published in the New York Post, El Diario, and, in multiple languages, on the websites of Advocates for Children of New York, Inc. and DOE. (Birnbaum Decl.; Nathan Decl.; Shore Decl.). No class member has objected, which demonstrates that the class approves of the settlement and supports its final approval. *See Shepard*, 2014 WL 5801415, at *9 (compiling cases).

The amount of progress made in this complex case not only addresses the first factor, but the third factor as well. With the experienced and skillful guidance of Magistrate Judge Go, the parties have thoroughly completed expansive discovery and clearly had "'an adequate appreciation of the merits of the case before negotiating'" the settlement. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (citation omitted). Indisputably, the parties have a detailed familiarity with the factual and legal issues underlying this case, which, of course, weighs in favor of final approval. *See Heyer v. N.Y.C. Hous. Auth.*, 80-CV-1196, 05-CV-5286, 2006 WL 1148689, at *3 (S.D.N.Y. Apr. 28, 2006).

Without question, in the absence of a settlement, the parties and Magistrate Judge Go's prolonged efforts would be in vain, and there would be substantial risk for the class in establishing liability, obtaining remedies, and maintaining the class action through trial. *See Wal-Mart Stores*, 396 F.3d at 118; *Padro v. Astrue*, No. 11-CV-1788, at *6 (E.D.N.Y. Oct. 18, 2013) (discussing the fourth, fifth, and sixth factors simultaneously because "each of these factors concern the risks inherent in proceeding with [the] action"). The fourth, fifth, and sixth factors "do[] not require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the

proposed settlement." *In re Global Crossing Sec. & ERIS Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (citation omitted); *see also Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982). Plaintiffs point out that, alongside the inherent uncertainty of proceeding toward trial with such a complex case, continued litigation places class members at risk of losing appropriate educations services, or instruction entirely, as a result of disciplinary actions that remove class members from the classroom. (Pls.' Br., ECF No. 226, at 20). Where, as here, settlement has been reached after an arm's-length negotiation, and class counsel affirms that, in their informed opinion, the risks associated with continuing the action are substantial and heavily favor settlement, "'great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Padro*, 2013 WL 5719076, at *7 (quoting *PaineWebber*, 171 F.R.D. at 125). After carefully reviewing the Stipulation and counsels' arguments, the Court finds that the settlement is sufficiently favorable and that relief now is far more beneficial than the uncertain possibility of relief following a long, complicated, and expensive trial.

Lastly, since the relief sought here is injunctive relief, the Court should make a "larger determination of whether the settlement in reasonable." *Padro*, 2013 WL 5719076, at *7. "'In deciding whether to approve a proposed

class settlement, the most significant factor for the district court is the strength of the claimants' case balanced against the settlement offer.'" *Id.* (quoting *Plummer v. Chem. Bank*, 668 F.2d 654, 660 (2d Cir. 1982)). Here, the settlement offers class members significant injunctive relief: defendants are required to take numerous actions relating to the suspensions, removals, transfers, and discharges of class members from DOE schools to ensure the class members are not deprived of a free appropriate public education. Plaintiffs have also obtained the rights to monitor defendants to ensure their compliance with the terms of this hard-fought settlement. Furthermore, as counsel for both parties has averred, and to which this Court gives considerable weight, *id.*, the settlement is reasonable and "awards significant injunctive relief" to the class. (Pls.' Br., at 20). Accordingly, with all factors weighing in favor of final approval, the Court concludes that the settlement is fair, reasonable, and adequate.

Conclusion

With the Court having carefully considered the Stipulation, as well as the parties' submissions and arguments in open court, and in considering the principles discussed above, for the purposes of the settlement, with all terms having the meanings defined in the Stipulation, the Court finds that:

A. The Court has jurisdiction over the subject matter of the Action,

the Lead Plaintiffs, all Class Members, and Defendants;

B. The Class and Subclasses, which include the Superintendent's Suspensions and Expulsions Subclass; Building Level Disciplinary Proceedings Subclass; Class Members without IEPs Subclass; and Section 504 Subclass, as defined in the Stipulation, were properly subject to certification pursuant to Rule 23, as set forth in the Memoranda and Orders dated August 17, 2004 and June 29, 2005;

C. Notice of the proposed settlement of this Action was given to all Class Members by publication. The form and method of notifying the class of the proposed settlement met the requirements of Rule 23 and due process, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto;

D. In entering into the Stipulation, no party has relied on any representations or arguments by any other party regarding any substantive or procedural issue in this action; and

E. The parties and their counsel have complied with the requirements of the Federal Rules of Civil Procedure and all other statutes and rules relating to the prosecution, defense, and settlement of the action as to all proceedings in this matter.

It is therefore ORDERED that:

1. The settlement set forth in the Stipulation is approved as fair, reasonable and adequate, and the Class Members and the parties are directed to consummate the settlement in accordance with the terms and provisions of the Stipulation;

2. This Action, which the Court finds was filed on a good faith basis in accordance with Rule 11, based on all publicly available information, is hereby dismissed with prejudice and without costs, except as provided in the Stipulation, as against Defendants;

3. Class members and the successors and assigns of any of them are hereby permanently barred and enjoined from instituting, commencing, or prosecuting the Settled Claims against the Released Parties. The Settled Claims are hereby compromised, settled, released, discharged, and dismissed as against the Released Parties on the merits and with prejudice by virtue of these proceedings and this Order and Final Judgment. Notwithstanding the provisions of this paragraph, nothing in the Stipulation or in this Order shall prevent Class Members from seeking relief for Reserved Claims in the appropriate forum;

4. The Injunctive Obligations are approved as fair and reasonable, and Defendants are ordered to comply with the terms of the Injunctive

Obligations as set forth in the Stipulation;

5. As set forth in the Stipulation, Class Counsel is entitled to a reasonable attorneys' fee and reimbursement of expenses. The Parties agree to negotiate the amount of fees incurred as of December 31, 2012, and if they are not able to do so within ninety (90) days of the Effective Date, Class Counsel may submit an application for counsel fees to the Court, to which Defendants shall have an opportunity to respond consistent with the Federal Rules of Civil Procedure and the Local Rules of this Court;

6. As set forth in the Stipulation, Plaintiffs are also entitled to reasonable attorneys' fees and reimbursement of expenses for time spent on this litigation from January 1, 2013 through the Effective Date as well as time spent executing, monitoring, and enforcing the terms of this Stipulation. Class Counsel will submit a request to Defendants' Counsel for these fees no later than June 30 of each calendar year and within sixty (60) days following the end of the Stipulation Period and/or any extension thereof. If the Parties cannot agree within ninety (90) days of Plaintiffs' request for fees, Plaintiffs' Counsel will apply to the Court for an award of attorneys' fees and reimbursement expenses. DOE shall have thirty (30) calendar days to respond and oppose any such application;

7. Exclusive jurisdiction is hereby retained over the Parties and the

Class Members for the administration, interpretation, effectuation, or enforcement of the Stipulation and this Order and Final Judgment, and including any application for fees and expenses incurred executing and enforcing the terms of the Stipulation set forth in paragraphs 5-6 above;

8. In the event that the Settlement does not become Final, (i) this Order and Final Judgment shall be rendered null and void and shall be vacated *nunc pro tunc* and (ii) the Action shall proceed as set forth in the Stipulation;

9. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation;

10. There is no just reason for delay in the entry of this Order and Final Judgment and immediate entry by the Clerk of Court is expressly directed pursuant to Rule 54(b).

11. The Clerk of Court is further directed to enter this case on the docket of closed cases for administrative purposes.

So Ordered.

Dated: Brooklyn, New York
July 23, 2015

s/ENV

ERIC N. VITALIANO
United States District Judge