IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

P.V., a minor, by and through his Parents, **Pedro Valentin** and **Yolanda Cruz**, individually, and on behalf of all others similarly situated, et al., Plaintiffs, v. **The School District of Philadelphia**, et al., Defendants.	)	Civil Action No. 2:11-cv-04027

JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Defendant, the School District of Philadelphia and Plaintiffs, students with autism by and through their parents, hereby jointly request this Court to: (1) preliminarily approve the Settlement Agreement attached hereto as Exhibit A; (2) approve the notice to the class in the form attached hereto as Exhibit B; and (3) schedule a hearing pursuant to Federal Rule of Civil Procedure 23(e) to determine that the Settlement Agreement is a "fair, reasonable and adequate" settlement of this class action. The Settlement Agreement was negotiated and approved by all parties to this litigation in the course of a mediation before Magistrate Judge Timothy R. Rice. The reasons in support of this motion are set forth in the accompanying Memorandum.

Dated: April 15, 2014

Respectfully,

/s/ Sonja Kerr

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MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Defendant, the School District of Philadelphia (the "School District") and Plaintiffs, students with autism and their parents (collectively the "Parties") move for the preliminary approval of a Settlement Agreement that they have reached in the above-referenced class action, as well as for approval of a class notice. The Parties submit that the Settlement Agreement (Ex. A) meets the standards for preliminary approval of a class action settlement and that such approval should be granted. The Parties also submit the proposed Notice to be sent to class members (Ex. B) for the Court's approval.

INTRODUCTION

On June 20, 2011, Plaintiffs filed this class action against the School District, the School Reform Commission ("SRC"), and two School District personnel. As found by this Court:

> Plaintiffs contend[ed] that the School District transfers students with autism automatically from one school to another, simply because they complete a certain grade, more frequently than the School District transfers non-disabled students who therefore, unlike autistic children, enjoy continued, uninterrupted attendance in K-5 schools or K-8 schools. (Doc. No. 1, at ¶ 1). Plaintiffs further allege[d] that the decision-making process leading up to the transfer of an autistic

> student is conducted with little to no parental notice or involvement, and without the required consideration of the children's individualized circumstances. (Doc. No. 1, at ¶ 2).

Document 72, at 1-2. Plaintiffs asserted claims under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. and as amended ("IDEA"), Chapter 14 of the Pennsylvania Code of Education Regulations, 22 Pa. Code § 14 et seq. ("Chapter 14"), Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. and as amended ("ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504").

On October 31, 2011, the Court denied the Defendants' motions to dismiss and strike class allegations (Docs. 23 and 24). Discovery began in early 2012, and consisted of depositions of numerous employees of the School District, Plaintiff parents, and experts. Plaintiffs prevailed on their motion to compel during discovery (Doc. 39) and Defendants produced over 17,000 documents. Discovery closed on June 11, 2012.

The Parties engaged in lengthy class certification and summary judgment briefing, including surreplies. By Orders and Memorandum Opinions entered on February 19, 2013, the Court granted in part and denied in part cross motions for summary judgment (Docs. 74 and 75) and granted Plaintiffs' motion for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2) with respect to the claims on which summary judgment was entered for Plaintiffs (Docs. 72 and 73). The Court granted summary judgment in favor of the Defendants on Plaintiffs' claims that the School District transfers students with autism automatically from one school to another, simply because they complete a certain grade, more frequently than the School District transfers non-disabled students who therefore, unlike children with autism, enjoy continued, uninterrupted attendance in K-5 schools or K-8 schools. The Court granted summary judgment in favor of the Plaintiffs on Plaintiffs' claims that the decision-making process leading up to the transfer of a student with autism is conducted with little to no parental notice or involvement, and

without the required consideration of the child's individualized circumstances. Accordingly, the Court ordered the School District to "alter its upper-leveling process for children with autism to provide prior written notice and a level of parental participation that complies with the procedural requirements under the IDEA." (Doc. 74).

Defendants filed a motion for reconsideration (Doc. 76) on February 27, 2013 and the Court held a hearing on the motion on April 16, 2013. On August 14, 2013, after denying the Defendants' motion for reconsideration (Doc. 101), the Court re-opened this matter (Doc. 100) to determine the "specific contours of injunctive relief" or alternatively to give the Parties an opportunity to settle. *Id*. The Parties began settlement negotiations in May 2013.

The Parties' settlement negotiations progressed and after enlisting the help of Magistrate Judge Rice, the Parties have negotiated a comprehensive Settlement Agreement dated April 15, 2014 covering the issues in the case. *See* Ex. A. The negotiations were at arm's length. Each side fully understands the terms, and has compromised to reach the Agreement.

As noted above, the remaining issues in this lawsuit relate to notice and participation by parents in decisions to upper-level their children (grades K-8) with autism. The Settlement Agreement provides three ways that parents of class members will receive this critical information.

First, although the Court had granted summary judgment for Defendants on this issue, Defendants have agreed to publish annually a list of all the schools within the School District that have Autistic Support ("AS") classrooms in grades K-8.[1] Plaintiffs regard this list as an integral piece of information necessary to enable parents to effectively understand and potentially engage the School District about upper-leveling decisions.

[1] The list may be published with appropriate disclaimers regarding its accuracy and that school configurations are subject to change at any time throughout the year.

The School District has also agreed to provide two letter notices to class members who will likely be upper-leveled the following school year in a manner consistent with the sample notice letters attached hereto at Exhibit C.

The first letter will be sent on or about January 17 and will notify parents of the transfer and inform them that they can talk to a School District designee or their child's classroom teacher about upper-leveling or request an IEP meeting to discuss their child's needs.

A second letter will be sent on or about June 1[2] and include building assignment information, enclose the most current version of "Parents' Rights: Understanding the Procedural Safeguards Notice" booklet and inform parents they can contact a School District designee, call the Office for Dispute Resolution or contact any organization listed in the booklet for more information about mediation or filing a due process request.

Thus, the terms of the proposed Settlement Agreement provide notice and an opportunity for parental participation. Indeed, because the Court did not order the School District to provide a public list of classrooms, the Settlement exceeds the relief received by Plaintiffs. Two notices, giving parents two opportunities to provide input into the upper-leveling decision process, is consistent with and satisfies the Court's order that parents be given prior written notice. Prior written notice, as defined by 34 C.F.R. § 300.503 requires that parents receive notice of an action proposed or refused by the School District, an explanation of the action proposed or refused, and information about their rights and sources for assistance a reasonable time before the School District acts to propose or refuse an action affecting the child's special education. By providing

[2] As the effective date of the Settlement Agreement is April 2014, class members will only receive the June notice for the current (2013-2014) school year and that letter will not include the language from the sample at Exhibit C that prior notice was given. Furthermore, because June 1, 2014 is a Sunday, the notice letters will be sent by June 2, 2014.

parents two separate notices, one in January and one in June, the School District will afford parents with information in the spirit of the prior written notice required.

Although the Settlement Agreement calls for the dismissal of all claims, the Court will retain limited jurisdiction to enforce the Settlement Agreement until January 2, 2017. If the Parties believe that the Settlement Agreement has been breached, they must meet and confer in good faith and if they are unable to resolve the issue, the matter will be referred to Magistrate Judge Rice to enforce the Settlement Agreement and apply an appropriate remedy. The release provisions cover all claims that were or could have been brought by Plaintiffs for prospective injunctive relief challenging the School District's policy or practice, but exclude all individual claims by class members regarding upper-level transfers that they have a statutory right to bring. Finally, the Settlement Agreement provides for $325,000 in attorneys' fees and expenses to class counsel (payable in three installments), which are at a substantial discount from the lodestar. Thus, the settlement will "remedy current conditions and provide[] a viable mechanism" for compliance in the future. *See Collier v. Montgomery County Hous. Auth.*, 192 F.R.D. 176, 186 (E.D. Pa. 2000). Notice will be provided via first-class mail, and publication via newspaper and website.

Given that the Settlement Agreement will terminate this lengthy litigation and will benefit class members fairly and adequately, for the reasons expressed more fully below, the School District and Plaintiffs jointly request the Court preliminarily approve the Settlement Agreement and notice to the Class.

ARGUMENT

I. The Settlement Agreement Fully Satisfies The Standards For Preliminary Approval Of A Class Action Settlement.

When approving a class action settlement, the court must ultimately evaluate "whether the settlement is fair, adequate, and reasonable." *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983). "The law looks favorably upon class action settlements because avoiding a trial [and appeal] conserves scarce judicial resources." *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 114 (E.D. Pa. 2005). The Court must give its "initial blessing" to the preliminary settlement, i.e., before class notice is given and a formal fairness hearing is held. *See id.*

"In evaluating a proposed settlement for preliminary approval . . . the Court is required to determine only whether 'the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.'" *Mehling v. New York Life Insur. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007) (quoting *Thomas v. NCO Fin. Sys.*, 2002 U.S. Dist. LEXIS 14157, at *14 (E.D. Pa. July 31, 2002)). Courts also typically evaluate if the settlement resulted from serious arm's-length negotiations. *Id.* at 472.

The Settlement Agreement meets the standard for preliminary approval. Class members have obtained the relief to which the Court found they were entitled—parental notice prior to transfer, an opportunity for parental participation in the transfer decision, and, in addition, some of the relief to which the Court found they were not entitled—information regarding where K-8 AS classrooms are located within the School District. The Settlement Agreement also provides a mechanism for enforcing the Settlement Agreement by allowing this Court and by extension

Magistrate Judge Rice to retain limited jurisdiction until January 2017. A separate enforcement action can be brought after that time.

The Settlement Agreement should be preliminarily approved for the following reasons.

A. The Settlement Negotiations Were Serious, Informed And At Arm's-Length.

The negotiations that led to the proposed Settlement Agreement were undoubtedly at arm's length. It came only after lengthy vigorously contested litigation, with extensive briefing including motions to strike, dismiss, compel, class certification, summary judgment and reconsideration. The Parties also had the advantage of a review of the evidence by autism and special education experts.

The Parties first engaged in settlement negotiations after the Court held a hearing on the School District's motion for reconsideration. To avoid a time-consuming and costly appeal, the Parties began settlement negotiations in May 2013 and, with the assistance of Magistrate Judge Rice, reached a preliminary settlement of the merits in late December 2013. The Settlement Agreement reflects not only the interests of the class, but importantly maintains the statutory rights of individual class members. Settlement of the substantive provisions was completed in principle prior to final determination of any payment of attorneys' fees and costs on February 28, 2014.

Clearly, this Settlement Agreement did not come early in the litigation, but only after extensive discovery, merits briefing and, indeed, substantive class and merits rulings by this Court. Thus, the Parties were able to evaluate their respective positions based on the robust amount of information available to them.

B. The Proposed Settlement Agreement Contains No Obvious Deficiencies.

The proposed Settlement Agreement contains no obvious deficiencies such as preference to certain class members or excessive attorneys' fees, and is within the range for approval. The Settlement Agreement provides the Plaintiff class with a remedy that exceeds the relief ordered by this Court: (1) the School District will publish a list of all the schools within the School District that have AS classrooms[3] and the grade range of those classrooms; (2) the School District will provide two letter notices to class members prior to transferring them; and (3) the School District will inform parents that they can discuss the proposed transfer at an IEP meeting and retain their rights to challenge their own individual transfer. The relief gained through this Settlement Agreement benefits each class member and will be applied uniformly to all class members. This settlement proposal is certainly within the range of possible approval.

Attorneys' fees are reasonable as class counsel will obtain $325,000 in fees and costs from the School District, which is substantially less than their lodestar rate. *See Samuel v. Equicredit Corp.*, 2002 U.S. Dist. LEXIS 8234 at *5 n. 4 (E.D. Pa. May 6, 2002) (a $625,000 settlement preliminarily approved where fees were equal to or less than plaintiffs' lodestar). Class counsel will receive no additional fees or costs for monitoring implementation of the Settlement Agreement.

C. The Settlement Agreement Is Fair And Reasonable.

After notice and a fairness hearing are provided, a court must determine if the final settlement is fair and reasonable. A court "should presume a class settlement is fair when four factors apply: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a

[3] Classrooms serving children in grades K-8.

small fraction of the class objected.'" *Chester Upland Sch. Dist. v. Commonwealth*, 284 F.R.D. 305, 323 (E.D. Pa. 2012) (quoting *In re Warfarin*, 391 F.3d 516, 535 (3d Cir. 2004)).

Here, the Settlement Agreement easily satisfies the fairness presumption. As discussed *supra*, the negotiations were at arm's-length. Moreover, settlement occurred after discovery which included the production of thousands of documents and numerous depositions of School District representatives, Plaintiff parents, and experts. The Parties' counsel are experienced in similar litigation as PILCOP has litigated many federal class actions to protect the civil rights of individuals with disabilities. Dechert LLP is an international law firm with 26 offices in the United States, Europe, Asia and the Middle East. Dechert is highly experienced in handling complex litigation and class action matters. Schnader Harrison Segal & Lewis LLP is a reputable mid-sized law firm with many decades of experience in class action litigation. As this action was for injunctive relief, the class has not yet had an opportunity to object or react to the settlement.

Additionally, to determine if a proposed settlement under Federal Rule of Civil Procedure 23(e) is fair, reasonable, and adequate, the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) enumerated nine factors courts should consider:

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the settlement;

(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 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 to a possible recovery in light of all the attendant risks of litigation.

Id. at 157. An analysis of these factors confirms that the proposed Settlement Agreement is fair and reasonable.

(1) The complexity, expense and likely duration of the litigation. Although the Court granted partial summary judgment on the IDEA claim in favor of Plaintiffs and denied the School District's motion for reconsideration, the Court indicated that it would hold a hearing, if the case did not settle, to determine the exact contours of the injunctive relief requiring additional expense and effort by counsel. Furthermore, the legal issues were challenging and the possibility of appeal by the School District was strong. An appeal would have delayed the implementation of relief to the class.

(2) The reaction of the class to the settlement. This factor can only be assessed after notice and hearing; however, Plaintiffs are in favor of the settlement, and class counsel are not aware of any class members who have expressed a negative reaction to it.

(3) The stage of the proceedings and the amount of discovery completed. This factor "captures the degree of case development . . . prior to settlement" and "[t]hrough this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995). Counsel's appreciation of the merits was well-developed in the present case by at least February 19, 2013, when the Court certified the class and resolved cross motions for summary judgment, revealing the strengths and weaknesses of the case.

(4) The risks of establishing liability. This Court granted in part and denied in part cross motions for summary judgment. Some of the issues presented to the Court were relatively novel and untested in this jurisdiction. All parties faced significant risks in the further proceedings ordered by this Court and, if an appeal were to be filed, in the Third Circuit Court of Appeals.

(5) The risks of establishing damages. Because this was an action for injunctive relief, the fifth *Girsh* factor does not apply. *Hawker v. Consovoy*, 198 F.R.D. 619, 632 (D.N.J. 2001).

(6) The risks of maintaining the class action through trial. The class was certified prior to trial and the action was decided on cross motions for summary judgment; thus, there is little risk associated with this factor.

(7) The ability of the defendants to withstand a greater judgment. Because this action sought injunctive and declaratory relief, this factor is inapplicable.

(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 to a possible recovery in light of all the attendant risks of litigation.*** In evaluating these factors in a case seeking injunctive relief, courts compare the relief accorded by the settlement to the relief Plaintiffs could expect to receive after trial, in light of the risks of litigation. *D.M. v. Terhune*, 67 F. Supp. 2d 401, 410-11 (D.N.J. 1999). Here, the settlement addresses the crux of the relief ordered by the Court and, indeed, some of the relief denied by the Court. The Settlement Agreement provides a conduct-driven remedy that was specifically attuned to the unique issues presented in this case by capable parties and counsel well-versed in educational settings, processes, and law. Further, as noted above, there are risks and costs associated with continuing the litigation. Plaintiffs could lose or achieve less than this Settlement Agreement after the Court defines "the specific contours

of injunctive relief" or after the Third Circuit reviews the case. The settlement is a fair resolution of Plaintiffs' claims, in light of all the attendant risks of litigation.

II. The Proposed Notice To Class Members Is Adequate.

The Parties propose that notice be given to class members through a variety of methods, including notifying identifiable parents of students with autism in grades K-8, and identifiable parents of rising kindergarten students currently enrolled in early intervention, by first class mail by the School District, additionally through publication in the Philadelphia Inquirer, the Philadelphia Daily News, the Philadelphia Tribune, and the Notebook (an educational newspaper) as well as publication on the School District's website and PILCOP's website. The School District shall bear the costs, other than for PILCOP's website.

As this class action was certified under Federal Rule of Civil Procedure 23(a) and 23(b)(2) (Doc. 72), the notice requirements are less stringent than for Rule 23(b)(3) class actions which typically involve money damages. Rule 23(c)(2)(A) states that "[f]or any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class." Rule 23(e) governs proposed settlements and requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1); *see also Daniel B. v. O'Bannon*, 633 F. Supp. 919, 926 (E.D. Pa. 1986) ("The court complied with Fed. R. Civ. P. 23(e) by ordering notice of the proposed settlement sent by first class mail to all class members as well as to parents, guardians or family representatives. Any additional notice in a Rule 23(b)(2) case is not obligatory but discretionary with the court."). Generally to comply with Rule 23(e) the notice must be reasonable and "the best practicable under the circumstances." *Daniel B.*, 633 F. Supp. at 922; *Harris v. City of Phila.*, No. 82-CV-1847, 2000 U.S. Dist. LEXIS 12579, at *34 (E.D. Pa. Aug. 30, 2000).

Here the notice is fair and reasonable and the best practicable under the circumstances. Dissemination is more than satisfactory—not only will the vast majority of class member receive the notice by mail, but the School District's website, PILCOP's website and four Philadelphia newspapers will also contain the notice. Finally, the form of notice is adequate to inform class members of their rights. The notice provides a summary of the content of the lawsuit and its procedural history, details the history of settlement negotiations, and explains the settlement terms in simple/plain language. The notice also provides instructions on obtaining information relevant to the litigation, gives contact information for inquiries concerning the Settlement Agreement, sets forth the process for objecting to the Settlement Agreement, and explains that individual claimants reserve their rights.

CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court preliminarily approve the proposed Settlement Agreement, approve the Parties' proposed form of notice and proposal for providing notice, and set this matter for a fairness hearing.

Dated: April 15, 2014

Respectfully,

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[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2014, upon consideration of Joint Motion for Preliminary Approval of Settlement Agreement and the Memorandum in Support of the Joint Motion, it is hereby ORDERED that:

(1) The Settlement Agreement as proposed by the Parties is preliminarily approved;

(2) A hearing to determine if the Settlement Agreement is "fair, reasonable and adequate" pursuant to Fed. R. Civ. P. 23(e) shall be held on _____ 2014 at ____ o'clock in Courtroom _____ U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106;

(3) The notice to class submitted with the Joint Motion is approved and the School District of Philadelphia is directed to provide notice by first class mail to all class members it can identify from its records, and publish the notice in four publications, the Philadelphia Inquirer, the Philadelphia Daily News, the Philadelphia Tribune, and the Notebook. In addition, the School District of Philadelphia and the Public Interest Law Center of Philadelphia are directed to post the notice on their websites.

BY THE COURT:

_____
Davis, J