UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

J.S.M., *et al.*,

Plaintiffs,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION, *et al.*,

Defendants.

Case No. 20-cv-705-EK-SJB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

PRELIMINARY STATEMENT

After over four years of zealous litigation and extensive arm's-length negotiations, Plaintiffs,[1] on behalf of themselves and members of the certified Class, have entered a Settlement with Defendants the New York City Department of Education ("NYCDOE"), the Chancellor of the NYCDOE (together with NYCDOE, "City Defendants"), the New York State Education Department ("NYSED"), and the New York State Commissioner of Education (together with NYSED, "State Defendants"), that resolves all of the Class's claims in exchange for relief that Plaintiffs believe will bring Defendants into compliance with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. The Stipulation of Settlement, attached as Exhibit 1 to the Declaration of Danielle F. Tarantolo ("Tarantolo Decl.") and described in detail below, will bring valuable relief to the Class, while respecting the discretion of Defendants to run their agencies as they see fit, and contemplates an appropriately limited role for judicial oversight.

Plaintiffs bring this motion under Federal Rule of Civil Procedure 23, and respectfully request that the Court enter the proposed Preliminary Approval Order attached as Exhibit 3 to the Tarantolo Declaration. That Order would provisionally find that the relief provided for in the Settlement is fair, reasonable, and adequate; direct distribution of the Class Settlement Notice, attached as Exhibit 2 to the Tarantolo Declaration; and schedule a Fairness Hearing, after which the Court can consider final approval of the Settlement. Defendants consent

[1] J.S.M., by her parent, E.M.; E.M., individually and on behalf of J.S.M.; B.M., by his parents, M.C. and L.M.; M.C. and L.M., individually and on behalf of B.M.; C.G., by his parent, L.G.; L.G., individually and on behalf of C.G.; P.W., by his parents, T.F. and P.R.W.; T.F. and P.R.W., individually and on behalf of P.W.; Q.T., by his parents, W.J.T. and W.H.T.; W.J.T. and W.H.T., individually and on behalf of Q.T.; A.N., by her parent, T.N.; T.N., individually and on behalf of A.N.; A.S., by his parent, T.T.; T.T., individually and on behalf of A.S.; K.M.E., by her parent, E.N.; E.N., individually and on behalf of K.M.E.; S.F., by her parent, A.F.; A.F., individually and on behalf of S.F.; S.S., by her parent, D.C.; D.C., individually and on behalf of S.S.; and W.W., by her parent, S.J.; S.J., individually and on behalf of W.W. (together, "Named Plaintiffs").

to the preliminary approval of the Settlement (although the views expressed in this Memorandum of Law are solely those of Plaintiffs).

As the Court is aware, this action challenges systemic delays in Defendants' administration of the hearing system that adjudicates the Due Process Complaints ("DPCs") filed by parents of New York City schoolchildren seeking a free and appropriate public education under the federal IDEA, 20 U.S.C. § 1400 *et seq*. For many years leading up to this lawsuit, that hearing system systematically delivered decisions on these DPCs long after federal timelines for such decisions had expired. Through the Settlement, Defendants—after consultation with Plaintiffs, officials at the Defendant agencies, and other experts and stakeholders—have agreed to take concrete actions to reduce these delays, in conjunction with the voluntary changes Defendants have commenced during the pendency of this Action.

Most critically, the Settlement imposes a series of phased compliance benchmarks that, over time, require Defendants to bring the DPC hearing system into substantially full compliance with federal timelines. *See infra* at 10–12. The Settlement also reflects Defendants' agreement to take other steps designed to ensure these benchmarks are met, to mitigate harm to Class Members while the system comes into compliance, and to improve the hearing system going forward. These steps include undertaking an expedited review of currently backlogged cases; making technological upgrades to promote more efficient management of DPCs; increasing transparency to families regarding the DPC process; responding to families' complaints and needs for urgent relief in connection with DPCs; providing special protections to students whose hearing decisions are delayed; training and overseeing hearing officers; and sharing information so Class Counsel (and Defendants themselves) can monitor the system's progress towards compliance. *See infra* at 12–21. The Settlement also has a defined sunset period and contemplates that the Court's

role is appropriately limited to overseeing systemic issues during the operative period. *See infra* at 21–22.

The Settlement is "fair, reasonable, and adequate," satisfying all requirements of Rule 23(e)(2). Specifically, the Named Plaintiffs and Class Counsel have adequately represented the class, Fed. R. Civ. P. 23(e)(2)(A); the Settlement was negotiated at arm's length, *id.* 23(e)(2)(B); the relief provided for the class is adequate, *id.* 23(e)(2)(C); and the proposal treats all Class Members equitably, *id.* 23(e)(2)(D). As the Court has observed (consistent with applicable case law), resolution of this matter by settlement is "strongly preferred." (ECF No. 181 (May 14, 2024 Hearing Tr.) 6:2–5); *see Clark* v. *Ecolab, Inc.*, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (courts should give "proper deference to the private consensual decision of the parties . . . [and] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation" (internal quotation marks and citations omitted)).

For the reasons set forth below, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement, direct provision of notice to the Class, and set a Fairness Hearing for the final approval of the Settlement.

BACKGROUND

I. THE IMPARTIAL HEARING SYSTEM AND THE ALLEGATIONS IN THE COMPLAINT

A. The Impartial Hearing System in New York City

The IDEA provides children with disabilities, including Class Members (as defined in the Stipulation of Settlement and Order for Class Certification, ECF No. 33), with the right to a "free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Under the IDEA, Class Members are entitled to an individualized education program ("IEP") setting forth specific services

designed to "enable the child to be involved in and make progress in the general education curriculum." *Id.* § 1414(d)(1)(A)(i). The IDEA imparts distinct responsibilities on both the relevant local educational agency—here, NYCDOE—and the relevant state educational agency—here, NYSED—to ensure that each child is provided with an adequate IEP. *See id.* §§ 1401(19), (32); 1412(a); 1414(d)(2)(A).

Families who believe that the services provided by an IEP are not sufficient to ensure a child is receiving a FAPE, or who believe they are entitled to an IEP but have not received one, are entitled to file a DPC seeking an appropriate educational program and other related services. *Id.* § 1415(b)(6)–(7); 34 C.F.R. § 300.507(a). Once a family files a DPC, the IDEA provides for an "impartial due process hearing" conducted by an impartial hearing officer to address the merits of the DPC and provide for the requested relief (if warranted). 20 U.S.C. §§ 1415(f)(1)(A), (f)(3)(A). New York State has implemented a "two-tier" impartial hearing system to address DPCs. In New York City, NYCDOE is initially responsible for conducting impartial hearings, and any appeals of the decision of the impartial hearing officer go to NYSED. *Id.* § 1415(g); N.Y. Educ. Law § 4404(1).

Critically, the filing of a DPC triggers a statutorily mandated timeline to ensure that any deficiencies in a child's IEP are addressed in a timely manner. Once a DPC is filed, a 30-day "resolution period" begins during which NYCDOE must convene a meeting with the parent, teachers, and a NYCDOE representative with "decision-making authority" to attempt to resolve the dispute. 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. § 300.510(a)–(b). If the DPC is not resolved in the resolution period, then the IDEA sets forth the "applicable timelines" governing an impartial hearing. 20 U.S.C. § 1415(f)(1)(B)(ii). These timelines require NYCDOE and NYSED to "ensure that not later than 45 days after the expiration of the 30 day period" set aside for resolution, "(1) [a]

final decision is reached in the hearing; and (2) [a] copy of the decision is mailed to each of the parties." 34 C.F.R. §§ 300.33; 300.515(a). In other words, the IDEA allows for a maximum of 75 days between the filing of a DPC and a final decision on the DPC, absent a valid extension requested by either or both of the parties. *Id.* § 300.515(c). New York State regulations provide that an impartial hearing officer may not "solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason" with respect to a DPC. 8 N.Y.C.R.R. § 200.5(j)(5)(i).

Under both federal and state law, NYCDOE and NYSED each have responsibilities to ensure the timeliness of the impartial hearing system in New York City. Among other responsibilities, NYCDOE must appoint impartial hearing officers, conduct hearings, and convene resolution sessions. *See* N.Y. Educ. Law § 4404(1); 8 N.Y.C.R.R. § 200.5(j). Likewise, NYSED is required to certify and train impartial hearing officers, establish guidelines for the assignment and recusal of impartial hearing officers, and develop appropriate procedures for the impartial hearing system. *See* N.Y. Educ. Law §§ 4403(19); 4404(1)(c).[2]

B. Allegations in the Complaint

Plaintiffs filed the operative Amended Complaint in this action on March 20, 2020. (ECF No. 21 ("Amended Complaint" or "AC").) At the time the Amended Complaint was filed, the 11 Named Plaintiffs were minor children with disabilities who were enrolled in the New York City public school system, bringing claims by and through their families. (AC ¶¶ 14–24.) Each

[2] In late 2021, the City Defendants, State Defendants, and the New York City Office of Administrative Trials and Hearings ("OATH") executed a memorandum of agreement whereby a newly created special education unit within OATH adjudicates DPCs. (ECF No. 131 (Garcia Aff.) ¶ 5.) OATH began hearing DPCs in March 2022. (*Id.* ¶ 9.) While the hearing process completes its transition to the OATH system, some cases continue to be heard by the independent hearing officers used in the former system in place at the time the Amended Complaint was filed.

minor Plaintiff experienced significant learning, behavioral, or other impairments in their everyday life that qualified them for special education services necessary to ensure a FAPE. (*See id.* ¶¶ 165, 180, 195, 207, 224, 236, 249, 266, 278, 291, 306.) But each of these children failed to receive the necessary special education services from NYCDOE that would meet their unique needs, forcing their families to file DPCs. (*See id.* ¶¶ 168, 185, 200, 212, 227, 239, 251, 269, 281, 296, 310.) And each child was harmed by the failures of NYCDOE and NYSED to ensure a decision on his or her DPC within the IDEA's required timeframe. (*See id.* ¶¶ 176–77, 191–92, 204, 222, 231–33, 244–46, 262–63, 273–75, 286–88, 302–03, 315–17.) The Amended Complaint also sets forth detailed allegations that these delays were systemic rather than isolated: at the time of filing, the average case length of a DPC in New York City was 259 days, over three times the mandated time period. (*Id.* ¶¶ 4, 74.)

As a result of these unlawful and systemic delays, Plaintiffs brought this action on behalf of themselves and a class of New York City children and families who did not receive timely DPC decisions. Specifically, Plaintiffs brought claims against NYCDOE, the Chancellor of NYCDOE, NYSED, and the Commissioner of NYSED seeking relief under the IDEA (*id.* ¶¶ 329–41), as well as claims pursuant to the New York State Education Law (*id.* ¶¶ 342–47), Section 504 of the Rehabilitation Act (*id.* ¶¶ 348–56), and the Americans with Disabilities Act (*id.* ¶¶ 357–63.)

II. THIS LITIGATION

A. Class Certification

The parties stipulated to class certification in this case. On June 18, 2020, the Court so-ordered the parties' stipulation certifying a Rule 23(b)(2) class consisting of: "Individuals who file or have filed due process complaints, and the children on whose behalf due process complaints are filed, when the due process complaints are unresolved and the decisions on such complaints

have not been timely provided under applicable federal and New York State law" (the "Class"). (ECF No. 33 at 3.) All parties and the Court agreed that this class meets the requirements for class certification under Rules 23(a) and (b)(2) and that the action may be appropriately litigated as a Rule 23(b)(2) class action. (*Id.* at 2–5.) The Court appointed NYLAG and Sullivan & Cromwell LLP as Class Counsel. (*Id.* at 5.)[3]

Thereafter, the Court approved an agreed class notice, and the notice was circulated by NYCDOE in early December 2020. (*See* ECF Nos. 39-1, 39-2.) To circulate the notice to Class Members, NYCDOE sent the notice to the email addresses provided to the New York City Impartial Hearing Office in connection with Class Members' pending DPCs. NYCDOE and NYLAG also posted the notice on their websites.

B. Discovery

Discovery was stayed from May 2020 through June 2021 while the parties pursued early settlement discussions. (*See* ECF No. 47.) Starting in June 2021, while settlement discussions continued, *see infra* Section III, the parties engaged in fact discovery including document production and interrogatories. Over the course of approximately one year, the parties served 119 document requests and 40 interrogatories, negotiated parameters for the responses to those requests, and produced over 40,000 responsive documents, data and declarations. (D. Tarantolo Decl. ¶¶ 6–7.) Plaintiffs retained Stout to perform analysis on the data received in discovery. (*Id.* ¶ 8.) No depositions or expert discovery were conducted. (*Id.* ¶ 7.)

[3] On June 23, 2023, the Court issued an order directing the parties to brief certain issues pertaining to the certified class. The parties responded via letters on August 1. (*See* ECF Nos. 168, 169, 170.) On August 9, 2023, the Court requested additional briefing from the parties, which the parties subsequently filed. (*See* ECF Nos. 173, 174, 175, 177, 179.) Neither the Court nor the parties have taken further action on these issues.

C. Summary Judgment Motions and State Defendants' Motion to Dismiss

On February 11, 2022, State Defendants moved to dismiss Plaintiffs' Section 1983 claims, which Plaintiffs opposed on February 25, 2022. (ECF Nos. 99, 103.) The motion is currently held in abeyance. (*See* Sept. 6, 2023 Order.)

Plaintiffs and State Defendants both moved for partial summary judgment on IDEA liability. Plaintiffs moved for partial summary judgment on their IDEA claims on May 26, 2022, arguing that (i) Defendants were directly violating the IDEA; (ii) Defendants were jointly liable for these violations; and (iii) Plaintiffs were harmed by these violations. (ECF No. 123.) State Defendants also moved for partial summary judgment, and opposed Plaintiffs' motion, on July 29, 2022, arguing that (i) there was no private right of action against NYSED under the IDEA; (ii) State Defendants satisfied their obligations under the IDEA; and (iii) Plaintiffs' claims are based on outdated facts considering the transfer of the hearing system to OATH. (ECF No. 136.) City Defendants also opposed Plaintiffs' motion, arguing that (i) Plaintiffs' claims were based on outdated facts; and (ii) City Defendants should not be held liable for issues over which NYSED has authority and control. (ECF No. 129.) These motions are also currently held in abeyance. (*See* Sept. 6, 2023 Order.)

III. SETTLEMENT NEGOTIATIONS

From nearly the outset of this action, the parties have engaged in extensive, detailed, and thorough settlement negotiations regarding a potential resolution of Plaintiffs' claims. The parties have spent many hundreds of hours involved in comprehensive discussions about every aspect of the New York City impartial hearing system. (*See* Tarantolo Decl. ¶¶ 9–13.) Throughout 2020 and much of 2021, counsel for Plaintiffs and Defendants convened regular working sessions, often on a weekly basis, to explore potential resolutions and work toward a proposed settlement that would provide meaningful injunctive relief to the Class. (*See id.* ¶ 13; *see also* ECF Nos. 29,

34–36, 38, 40, 42–43, 45–46.) At various points, non-parties to this litigation, including the New York City Office of the Comptroller and OATH, also provided feedback to inform the parties' settlement discussions. Discussions continued apace throughout document discovery and the parties' dispositive motion briefing in 2022, and remained ongoing until the Settlement was executed in late 2024. (Tarantolo Decl. ¶¶ 13–16.)

The parties have diligently worked toward a resolution of Plaintiffs' claims that provides effective relief to children and families in need. In addition to the regular meetings discussed above, the parties engaged in several mediation sessions with Magistrate Judge Roanne Mann. (ECF Nos. 51, 57, 61, 66.) To provide additional structure and accountability to the parties' ongoing negotiations, in March 2022, the parties retained the Honorable James C. Francis (Ret.), to serve as a mediator for the settlement process. (Tarantolo Decl. ¶ 14.) Judge Francis has overseen approximately two dozen confidential meetings among the parties, and has regularly corresponded regarding multiple complex elements of the settlement. Judge Francis's oversight and guidance as a settlement mediator have proven invaluable in guiding the parties to resolution. (*Id.*) In conjunction with the retention of Judge Francis, the parties also agreed to engage an outside consulting firm, Thru Consulting, to inform the parties' settlement efforts by evaluating NYCDOE's DPC resolution and settlement processes and providing confidential recommendations intended to improve and streamline these processes. Thru's recommendations have informed the parties' settlement discussions. (Tarantolo Decl. ¶ 15.)

IV. SUMMARY OF THE SETTLEMENT TERMS

Upon approval, the Settlement would resolve all claims against Defendants asserted by all Class Members by providing critical relief to Class Members as follows.

A. Phased Compliance Benchmarks

The Settlement reflects the parties' agreement to a series of phased compliance benchmarks for DPCs that are filed after the Settlement becomes effective. (Tarantolo Ex. 1, Settlement Agmt. § III.B.) Over time, these benchmarks would require Defendants to bring the hearing system into substantially full compliance with federal timelines.

Specifically, the Settlement provides that, within one year of the date the Settlement goes into effect (the "Effective Date"), at least 50% of all DPCs filed will be timely closed. (*Id.* § III.B.1.a.) "Closed" would include DPCs that have a decision issued, are withdrawn, or are administratively closed in some other manner. (*Id.* § II.NN.) Within two years of the Effective Date, at least 75% of such DPCs will be timely closed. (*Id.* § III.B.1.b.) And within three years of the Effective Date, at least 95% of DPCs will be timely closed. (*Id.* § III.B.1.c.)

Critically, the Settlement's definition of "Timely" avoids disputes over timeliness and, indeed, precludes any individualized review (by Class Counsel or the Court) of any DPC to determine timeliness. If a DPC is closed within 75 days, it is timely. (*Id.* § III.A.) If it remains pending after 75 days, but Defendants' data systems reflect entry of extensions that would make the DPC timely, the time covered by the extensions will be tolled, unless the extension meets specific, enumerated ineligibility criteria based on how it appears in the data. Specifically, if Defendants' data systems show that the extension was entered retroactively; simultaneously with another extension; or constitutes a "Waitlist Extension,"[4] that extension will be invalid and that

[4] A Waitlist Extension is an extension granted by NYSED when a hearing officer is appointed to a DPC that is not Timely, including, but not limited to, an extension that is entered when a DPC is awaiting assignment to a hearing officer. As summary judgment briefing and discussions with the Court made clear, all parties agree that Waitlist Extensions, which Defendants used as an administrative device, cannot legally extend the time period for compliance with IDEA timelines. (*See* ECF 138 (State Defs.' Resp. to 56.1 Stmt.) ¶¶ 43–48.)

time will not be tolled. (*Id.* § III.A.1.b.) All of these criteria are apparent from the data without further inquiry. In addition, if NYSED has separately reviewed a particular extension under its own processes—for example, because a family has complained to NYSED that the extension was entered improperly—and NYSED has independently determined that the extension is invalid, that extension would also be ineligible to toll the DPC's timeliness. (*Id.*) And a DPC pending for more than 75 days in which the parties have consented to enter mediation would also receive tolling for the length of the mediation period. (*Id.* § III.A.1.a.)

Since the validity of extensions is based solely on what Defendants' own systems show, or what NYSED has itself independently determined, there should be no individualized disputes over timeliness or need for Court intervention on the issue, either for any particular DPC or with respect to whether the system has met the compliance benchmarks.

The Settlement also establishes other conventions to ensure that there will be no disputes as to whether the benchmarks are met. If a DPC remains pending at the end of a reporting period, its timeliness is measured as of the end of the reporting period. (*Id.* § III.B.) If the same DPC is untimely for two or more reporting periods, Defendants' reporting will differentiate such DPCs from DPCs that are untimely for the first time in that reporting period, so that all parties will have a greater understanding of what types of DPCs are not being timely closed. (*Id.* § III.B.1.d.) Furthermore, if information entered into Defendants' data systems after the close of a reporting period shows that a DPC deemed untimely in a prior period was in fact timely, the reporting history for that DPC will be retroactively corrected. (*Id.*)

Notably, the compliance benchmarks in the Settlement leave the methods and means of bringing the system into compliance to Defendants' discretion. For example, the Settlement does not direct Defendants to maintain, accelerate, or abandon the transition of the

system to OATH, a move Defendants jointly chose to make during the pendency of this lawsuit. It does not dictate how, or how many, hearing officers should be hired, or how they should be compensated. The parties endeavored to ensure that the Settlement would direct the delivery of timely hearing decisions to which New York families are entitled by law, without unduly treading on Defendants' discretion in how they run their agencies, or inviting intervention by the Court in the substantive means by which Defendants achieve compliance with the law.

B. Expedited Review of Untimely DPCs for Potential Settlement

The phased compliance benchmarks described above will govern the disposition of DPCs filed after the Effective Date. But the system also has a backlog of cases that have already been filed and are overdue for a resolution. To clear that backlog of "pre-effective date" cases, NYCDOE has agreed to an expedited review of such cases. (Settlement Agmt. § IV.) Under this process, it will expeditiously settle those individual cases it wishes to settle; all other cases will proceed promptly to a hearing and decision. (*Id.* § IV.A.2.) This process does not infringe on NYCDOE's fundamental discretion to settle, or not settle, any individual DPC as it sees fit.

The universe of cases that will be part of this process—the so-called "Review Group"—consists of two categories of cases: (1) long-pending DPCs which were filed before July 1, 2022, regardless of whether they would be currently considered "Timely" because of extensions; and (2) cases filed after that date, but before the Effective Date, which are untimely (with timeliness to be determined using the same conventions established for the compliance benchmarks). (*Id.* § IV.A.1.) Defendants will go through the following process as to that Review Group:

First, NYSED will examine its own records to determine if there are any DPCs in the Review Group where a hearing has been conducted, but a decision has not been issued. (*Id.* § IV.A.2.a.) For any DPCs for which a hearing has been started but not concluded, NYSED will

direct the hearing officer to complete the hearing and issue a decision within 45 days. (*Id.* § IV.A.2.b.)

The remaining cases in the Review Group will go to NYCDOE for its expedited review to consider settlement. Given the volume of these cases, this Review Group is divided into eight "tranches," organized by priority. The highest priority tranches are the cases in which the student does not have pendency and is not receiving the requested services or placement while the DPC is pending.[5] (*Id.* § IV.A.3.) The lower priority tranches are those in which the student does have pendency. (*Id.* § IV.A.7–10.) NYCDOE will endeavor to review all cases in the Review Group as quickly as possible, with backstop deadlines for each successive tranche. NYCDOE is required to begin review of each new tranche at least every four months, with the final tranche to be reviewed within 32 months of the Effective Date. (*Id.* § IV.A.3–10.)

NYCDOE's review of each tranche of DPCs is carefully organized to ensure both that NYCDOE has an opportunity to examine the case and form its own position about whether to settle it, and to keep the DPCs moving quickly towards either settlement or hearing. That review will have the following steps (*see id.* § IV.A.3):

- First, NYCDOE checks to see if a hearing officer has already held a hearing, or part of a hearing, on the DPC. If so, Defendants will notify the hearing officer to either issue a decision within 14 days or complete a hearing and issue a decision within 45 days. If the hearing officer is at OATH, NYCDOE will notify OATH directly; if the hearing officer is an independent hearing officer in the legacy system, then NYSED will notify the hearing officer.

[5] Some children can continue to receive services or placements that they were previously offered by NYCDOE or awarded by a hearing officer in a prior school year through the IDEA's "stay-put" or "pendency" provision. *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (providing that during the pendency of the due process proceeding "the child involved in the complaint must remain in his or her current educational placement").

- Second, for cases that have not already had a hearing, NYCDOE will decide if a particular DPC is one that NYCDOE *is* interested in settling; is *not* interested in settling; or *may be* interested in settling but needs more information from the parent.

- If NYCDOE *is* interested in settling, NYCDOE has 120 days to apply for Comptroller approval of a settlement; has 14 days after receiving approval to transmit the offer to the parent; and, if the offer is accepted, must promptly memorialize and execute the settlement. If during this process something stops the settlement process (for example, the Comptroller does not approve the settlement or the parent rejects it), the case is referred for a prompt hearing and decision.

- If NYCDOE is *not* interested in settling, NYCDOE has 90 days to notify the parent of this decision. NYCDOE and NYSED will then take the same steps described above to ensure that the DPC gets a prompt hearing and decision.

- If NYCDOE *may be* interested in settling but needs more information from the parent, NYCDOE has 90 days to request documents and 30 days to review them after receipt. Then NYCDOE makes its decision, and channels the DPC into either settlement or hearing, subject to the same deadlines.

C. Technological Upgrades Informed by Shared Objectives

NYCDOE agrees in the Settlement to make changes to its technological infrastructure underlying DPC hearings, with the goal of improving NYCDOE's technology to help reduce hearing delays. (Settlement Agmt. § V.A.1–2.) Specifically, two systems will be affected. The first is the interface through which parents and their advocates file DPCs. As to that system, NYCDOE has agreed to undertake an upgrade called "DPC Digitalization." (*Id.* § V.A.3.) Historically, DPCs were either filed in paper form or by emailing pdf documents to the NYCDOE hearing office—necessitating substantial administrative work by NYCDOE staff to capture relevant information from the DPC and enter it into NYCDOE's systems. With the DPC Digitalization upgrade, parents will be able to file DPCs electronically and the information in the DPCs will be automatically entered into NYCDOE's systems. Critically, NYCDOE has already voluntarily taken steps towards the implementation of DPC Digitalization. (Tarantolo Decl. ¶ 22.) The Settlement obligates them to continue this critical infrastructure upgrade going forward; to adhere to certain agreed principles while doing so, such as increasing usability for parents and

making more and better data available to parents; and to continue to consider Class Counsel's input whenever changes to that interface are planned. (*Id.* §§ V.A.3, V.A.7, V.A.8.)

The second affected technological system is "IHMS," which will be an upgraded, superseding database system to store data about DPCs and the hearing system more generally. (*Id.* § V.A.4.) A comprehensive upgrade to the existing system has already been underway for years, separate from this lawsuit. (Tarantolo Decl. ¶ 22.) The Settlement piggybacks on this existing process. It does not dictate any specific aspects of the technical upgrade—which will be left to the discretion of NYCDOE—and instead articulates a list of shared objectives based on the recommendations from Thru, the special education consultant the parties retained to advise them during settlement negotiations. (Settlement Agmt. § V.A.4.) Streamlining the resolution and settlement of DPCs will improve hearing timeliness, to the benefit of both parents and NYCDOE. Accordingly, the shared objectives include, for example: consolidating and centralizing data relevant to resolutions and settlements; streamlining resolution and settlement processes; improving case assignment processes; leveraging data to prepopulate template documents; capturing data that will inform efficiency; providing accurate status information to parents; and integrating with other data systems relevant to settlement and resolution of DPCs. (*Id.*)

Importantly, NYCDOE has agreed that Thru will participate in implementation of the DPC Digitalization and IHMS technological upgrades. (*Id.* § V.B.1.) By virtue of its work in connection with this lawsuit, Thru now has deep experience and expertise in NYCDOE's processes surrounding the resolution and settlement of DPCs. Thru's continued involvement and guidance will allow NYCDOE to exercise its discretion in implementing technological changes while implementing the Settlement's objectives for the upgrade. In addition, the Settlement provides

that the parties and Thru will meet once per quarter to review the progress towards achieving the objectives of the technological upgrades. (*Id.* § V.A.5.)

D. Agreed Practice Changes and Continued Voluntary Practice Changes

The Settlement sets forth four sets of changed practices designed to help Defendants meet the compliance benchmarks while preserving their fundamental discretion and flexibility to determine how to ensure that DPC decisions are issued on time. Notably, both NYCDOE and NYSED agreed to these provisions after extensive internal discussions among key stakeholders within both agencies. In fact, NYSED and NYCDOE have already begun to implement many of these practices during the course of the lawsuit based on their own determination that they would ease hearing delays; the Settlement obligates Defendants to continue those changes going forward.

The first set of changed practices covered by the Settlement relates to DPC settlements. (Settlement Agmt. § VI.) Although DPC settlements do not directly implicate the hearing decision timeliness requirements, they indirectly implicate timeliness because, given the volume of DPCs filed each school year, when cases in which the parties could negotiate an agreement are not quickly settled, they clog the hearing system and contribute to systemic delays. By contrast, the more efficiently DPCs can be settled (if the parties are amenable), the fewer DPCs remain to be adjudicated in the system. To clarify the DPC settlement process, NYCDOE will publish a parent-facing overview of procedures on its website and continue to maintain, and train its staff on, internal procedures. (*Id.* § VI.A.) NYCDOE also agrees to continue using uniform language in its settlement stipulations and to solicit a standardized list of documents from parents to inform its settlement decisions, changes it has already unilaterally implemented during the course of this lawsuit. (*Id.* § VI.C.) Finally, NYCDOE will implement an "expedited" parent complaint procedure, so that parents who feel that the settlement process has been slowed or

impaired by factors that NYCDOE could alleviate have a means to secure the needed attention. (*Id.* § VI.B.)

The second set of changed practices covered by the Settlement relates to the resolution of DPCs (as the term "Resolution" is used in the IDEA). (*Id.* § VII.) Resolution, like DPC settlement, takes DPCs out of the hearing pipeline, making efficient resolutions key to improving hearing delays. Similar to its commitments with respect to DPC settlement, NYCDOE will publish appropriate procedures, train its staff on those procedures, and implement an expedited complaint process for parents. (*Id.* §§ VII.C, VII.D.) NYCDOE will also continue with "Rapid Resolutions," which it implemented during the pendency of the lawsuit; this program involves making written offers of resolution for certain DPCs on an expedited basis. (*Id.* § VII.A.) The Settlement further commits NYCDOE to using best efforts to ensure that the staff charged with executing resolutions have the information they need to do so effectively. (*Id.* § VII.B.)

The third set of changed practices concerns mediation, a process that involves both NYCDOE and NYSED. (*Id.* § VIII.) NYSED, which is legally responsible for running the mediation program, *see* 20 U.S.C. § 1415(e), will use best efforts to expand the categories of relief that can be provided through mediation (including monetary relief that previously had been excluded from that process), conduct training designed to expand use of mediation, and maintain a complaint process for parents to raise concerns about mediation. (*Id.* §§ VIII.A, VIII.C.) NYCDOE will publish information about mediations to expand the use of this process by parents and maintain a mediation liaison. (*Id.* § VIII.B.)

The fourth set of changed practices concerns the hearing system itself, primarily involving the oversight of hearing officers. (*Id.* § IX.) This is NYSED's legal responsibility. *See* N.Y. Educ. Law § 4404(1)(c); 8 N.Y.C.R.R. § 200.1(x)(4). NYSED will (1) direct and train

hearing officers on properly issuing extensions; (2) field complaints that improper extensions have been issued and then investigate those complaints; (3) use technology to track extensions via an application NYSED developed voluntarily during the lawsuit; (4) engage in regular reviews and oversight to identify problems surrounding extensions; (5) discipline hearing officers who grant improper extensions, as appropriate; and (6) take action to correct any systemic problems with extensions it identifies. (Settlement Agmt. § IX.A.) If the compliance benchmarks for hearing timeliness are not met, and one of the causes is that there are insufficient hearing officers, NYSED will take steps to recruit, train, and certify additional officers. (*Id.* § IX.C.) NYCDOE will also undertake certain practice changes designed to increase the efficiency of the hearing process: specifically, NYCDOE will provide guidance to its representatives regarding pre-hearing disclosures, which are tools by which hearing officers can substantially limit the disputed issues at hearing. (*Id.* § IX.D.)

E. Limited Harm Mitigation for Families While the System Comes Into Compliance

The Settlement has limited provisions designed to mitigate harm to the Class during the period in which the system comes into compliance with timeliness requirements. (Settlement Agmt. § X.) First, the Settlement requires NYSED to identify, and publicize, an accessible channel by which Class Members can request expedited adjudication of a DPC. (*Id.* § X.B.2.) NYSED will ensure those applications are reviewed promptly and receive expedited treatment where appropriate. (*Id.*)

Second, the Settlement ensures that Defendants will continue to assign DPCs to hearing officers on a prioritized basis, so that students who are not receiving pendency have hearing officers assigned first. (*Id.* § X.B.1.) This is the same prioritization scheme Defendants adopted early in this lawsuit.

Third, NYCDOE will provide interim assistance for a small subset of individual Class Members who experience unlawful delays seeking certain evaluations (for example, physical therapy evaluations or neuropsychological evaluations). (*Id.* § X.A.1.a.) Once such a Class Member's DPC becomes untimely (under the same rules that apply to determining timeliness for purposes of the compliance benchmarks), NYCDOE will fund the evaluation, so long as certain criteria are met, even before the Class Member's entitlement to the evaluation is adjudicated by a hearing officer. If NYCDOE wishes to contest the entitlement to the evaluation, the Class Member and NYCDOE will obtain an expedited adjudication of that issue before a hearing officer. (*Id.*) In other words, there is no risk that NYCDOE will be obligated to fund an evaluation it objects to unless a hearing officer determines the evaluation is required. And no disputes over eligibility for this interim relief will go to Class Counsel or the Court.

Fourth, Class Members seeking compensatory services or compensatory education whose DPCs become untimely, and who eventually prevail at hearing or reach a settlement with NYCDOE, will *presumptively* be entitled to receive additional services to cover the period of unlawful delay. (*Id.* § X.A.1.b.) If there is a dispute over whether that presumption should apply, the disputes would be decided by the hearing officer assigned to the Class Member's DPC. (*Id.* § X.A.2.) Again, there would be no involvement by Class Counsel or the Court. The provisions providing interim assistance for Class Members seeking evaluations and the presumption of compensatory services for delay periods will terminate as soon as the hearing system reaches 90% compliance for two Reporting Periods. (*Id.* § X.A.1.a.4.)

F. Monitoring Designed to Share Information and Aid Transparency

The Settlement further provides for ongoing monitoring. (Settlement Agmt. § XI.) This monitoring has two purposes: it will enable Class Counsel to confirm whether Defendants have achieved compliance with the benchmarks, and it will share critical information with Class

Counsel so that the parties can confer productively together to identify solutions if those benchmarks are not met. The monitoring does not allow either Class Counsel or the Court to oversee or second-guess Defendants' management of the hearing system but provides transparency on Defendants' progress.

The bulk of this monitoring consists of sharing objective data. (*Id.* § XI.A.1–4.) This data is regularly maintained in the course of Defendants' business and is directly related to the substantive provisions of the Settlement (for example, data about harm mitigation applications). Defendants will also provide some qualitative monitoring, such as summaries or anonymized copies of complaints they have received and a random anonymized sample of DPC case detail reports so that Class Counsel can "spot check" issues related to timeliness. (*Id.* §§ XI.A.5, XI.D.)

A critical piece of monitoring concerns data points on the timeliness of NYCDOE's DPC settlement processes. (*Id.* § XI.B.) As noted above, when fewer DPCs settle, or they settle in an unduly protracted manner, more DPCs clog the hearing system, consuming resources and contributing to delays. Accordingly, the efficiency of NYCDOE's processes for settling DPCs is highly relevant to understanding the causes of hearing delays. The Settlement thus provides for detailed information sharing about that process. This information will enable both NYCDOE and Class Counsel to review NYCDOE's progress on shortening relevant timeframes, and will help the parties identify the source of any delays. (*See* May 14, 2024 Tr. 8:16–20 ("[P]ointing to the old adage, that you manage what you measure. Some more detailed and granular reporting from the City and State about the progress they are making will help not only understand the problems, but also maybe help solve them.").) If there are challenges in Defendants' achieving compliance

with the benchmarks, this data will shed light on what may be going wrong and how it can be fixed.

The Settlement also provides for "Six-Month Review Meetings," during which Defendants will provide ongoing updates to Class Counsel about implementation of the Settlement and raise any issues or concerns. (*Id.* § XII.B.) And, to the extent such issues come up between meetings, any party may request an interim meeting. (*Id.*)

G. Dispute Resolution and Limited Judicial Oversight

The Settlement proposes an enforcement scheme designed to be fair to Defendants and minimize any need for judicial oversight. (Settlement Agmt. § XII.A.) It clarifies that Plaintiffs may only seek judicial enforcement for systemic, rather than isolated, failures to meet the obligations in the Settlement, and requires a robust meet-and-confer process before Plaintiffs could seek enforcement against the responsible party. (*Id.* § XII.A.3.) The parties would engage in both formal and informal processes set forth in the Settlement to resolve any issues with the noncomplying party; Plaintiffs could only seek judicial involvement with respect to a particular Defendant's systemic noncompliance with the Settlement's requirements.

This ensures that Defendants retain discretion and latitude to change their approach over time, so long as the Class's statutory rights are honored. And, to be clear, there are no circumstances in which Defendants would be subject to judicial oversight or management as to purported noncompliance in any individual Class Member's case—whether that Class Member disputes receipt of a timely hearing decision, disputes that an extension was timely granted, is not provided mandated services, does not accept a settlement or resolution offer, or for any other reason.

The Settlement provides for a defined sunset period of four years.[6] (*Id*. § XII.A.4.) After that sunset, even if Defendants were not in compliance with federal mandates, the burden would be on Plaintiffs to seek an extension of the settlement term (which the Court could grant or deny in its discretion).

H. The Settlement Releases Systemic Claims, but Reserves Individual Ones

The Settlement contains a class-wide release that runs between Class Members and Defendants. (Settlement Agmt. § XIII.) The released claims are claims to seek *systemic* relief—defined as "relief that is designed to effectuate a change in the City Defendants' or State Defendants' policies, practices, and procedures for individuals other than the individual asserting the claim" (*id.* § II.MM)—for *systemic* failures to deliver timely hearing decisions. The Settlement is clear that any *individual* claims, no matter what the topic (including the timeliness of hearing decisions, as well as any other individual issue), are reserved to the class members and are not covered by the release. (*Id.* § XII.A.) For example, any class member's individual claim regarding his or her entitlement to services under the IDEA, pendency, injunctive relief, reimbursement, attorneys' fees, enforcement of hearing orders, claims under § 1983 or state law, or any other individualized claim, in any forum, are not released, as they are not the subject of this lawsuit or Settlement. (*Id.* § XIII.A.1.a.)

I. Reasonable Attorneys' Fees and Costs

The IDEA contains a fee-shifting provision, 20 U.S.C. § 1415(i)(3)(B), which entitles plaintiffs that prevail through litigation or settlement to recover fees from defendants. In connection with Plaintiffs' eventual request for final approval of the Settlement, Plaintiffs will

[6] *See* Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 218 (2004) (endorsing a four-year sunset period for class action settlements).

make a specific application to the Court seeking an award of fees, which the Court will assess under Fed. R. Civ. P. 23(h).

The Parties have engaged in extensive negotiations as to attorneys' fees and Defendants have agreed upon a reasonable fee amount that they will consent to pay upon Plaintiffs' eventual application to this Court. Notably, that amount is vastly lower than Plaintiffs' counsel's lodestar. Plaintiffs will submit all documentation in support of an application for the Court's approval of an award in that amount in connection with Plaintiffs' motion for final approval of this Settlement.

V. PROPOSED CLASS SETTLEMENT NOTICE & PRELIMINARY APPROVAL ORDER

In 2020, the Court approved class certification and directed the parties to provide notice to the class. (*See* ECF Nos. 33, 39.) The proposed class settlement notice is based upon that notice, but with additional information about the content of the Settlement, the process for objecting, and the Fairness Hearing. Counsel for all parties have approved this notice. (Tarantolo Decl. ¶ 4; Ex. 2.)

The Proposed Approval Order would direct the same methods of notice used in 2020 to notify class members. (Tarantolo Decl. ¶ 5; Ex. 3.) Specifically: (1) Defendant NYCDOE will send the proposed notice to Class Members (or their counsel) using the email addresses that NYCDOE has on file in connection with Class Members' DPCs; (2) Defendant NYCDOE will post the notice on its website in the section concerning impartial hearings; and (3) Class Counsel will post the notice on NYLAG's website.

ARGUMENT

I. THIS COURT SHOULD PRELIMINARILY APPROVE THE PARTIES' SETTLEMENT

Federal courts have a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation marks and citation omitted). Expeditious settlement "allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Hadel* v. *Gaucho, LLC*, 2016 WL 1060324, at *2 (S.D.N.Y. Mar. 14, 2016); *Graff* v. *United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 477 (E.D.N.Y. 2016) ("In exercising its discretion, a court should be mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'" (internal citation omitted)). As this Court noted and the Parties agree, "an expeditious resolution" is "strongly preferred" in this case. (*See* ECF No. 181 (May 14, 2024 Hearing Tr. 6:3–4).)

Under Federal Rule of Civil Procedure 23(e), this Court must approve the Settlement before it can become binding on the Parties. Courts should approve a class action settlement if the settlement is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart*, 396 F.3d at 116 (internal quotation marks and citation omitted); *see also* Fed. R. Civ. P. 23(e)(2). "The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." *D'Amato* v. *Deutsche Bank*, 236 F.3d 78, 85–87 (2d Cir. 2001). The Court should give "proper deference to the private consensual decision of the parties . . . [and] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Clark*, 2009 WL 6615729, at *3 (internal quotation marks and citations omitted).

Specifically, to determine a settlement's fairness under Rule 23(e)(2), a court must consider whether: (a) the class representatives and class counsel have adequately represented the class; (b) the proposal was negotiated at arm's length; (c) the relief provided for the class is adequate; and (d) the proposal treats class members equitably relative to each other. In *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell*"), *abrogated on other grounds by Goldberger* v. *Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), the Second Circuit set forth nine factors courts use to aid in conducting this analysis (together, the *Grinnell* factors):

> (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 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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[7]

A. The Settlement Is Fair, Reasonable, and Adequate

1. Rule 23(e)(2)(A): Named Plaintiffs and Class Counsel Have Adequately Represented the Class

Rule 23(e)(2)(A) directs the Court to consider whether "the class representatives and class counsel have adequately represented the class." This is a "procedural" inquiry, and "the focus . . . is on the actual performance of counsel acting on behalf of the class." Fed. R. Civ.

[7] *See Hyland* v. *Navient Corp.*, 48 F.4th 110, 121 (2d Cir. 2022) ("To evaluate the fairness, reasonableness, and adequacy of a class settlement, courts employ the nine factors set out in *City of Detroit* v. *Grinnell Corp.*"); *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020) (explaining that after the 2018 amendments to Fed R. Civ. P. 23(e), "[t]he factors set forth in Rule 23(e)(2) have been applied in tandem with the Second Circuit's *Grinnell* factors and 'focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal'" (internal quotation marks and citation omitted)).

P. 23(e)(2)(A–B) advisory committee's note to 2018 amendment. Here, the Named Plaintiffs and Class Counsel have more than adequately represented the Class throughout the litigation, weighing in favor of settlement.

Class Counsel performed thousands of hours of work on this litigation, including: interviewing, collecting documents from, and providing information to Named Plaintiffs and other Class Members; filing a detailed Complaint and Amended Complaint; conducting written discovery and document discovery; filing a motion for partial summary judgment and reply brief; filing letters on several different topics to the Court including discovery disputes, class certification, Defendants' liability, and available remedies; and painstakingly negotiating the Settlement over the course of more than four years, including with assistance from this Court, a mediator, and an expert consultant. (Tarantolo Decl. ¶¶ 6–16; *see supra* at 6–9.)

The Named Plaintiffs have adequately represented the Class through full and open cooperation with Class Counsel, including by attending meetings and interviews with counsel, providing records to counsel, and reviewing and approving the substance of the Settlement. (Tarantolo Decl. ¶¶ 18–20.) They undertook these efforts despite having limited means and little familiarity with proceedings of this nature. (*Id*. ¶ 19.)

2. Rule 23(e)(2)(B): The Settlement Proposal Was Negotiated at Arm's Length

Rule 23(e)(2)(B) requires that "the proposal [be] negotiated at arm's length." The procedural fairness of a settlement is based on the negotiating process that led to it. *D'Amato*, 236 F.3d at 85. To find a settlement process fair, the court must "ensure that the settlement resulted from arm's-length negotiations and that plaintiff['s] counsel . . . possessed the experience and ability . . . necessary [for] effective representation of the class's interests." *Id*. (internal quotation marks and citation omitted).

The settlement discussions in this matter, which began in early 2020, were highly contested and spanned approximately four years. These negotiations entailed hundreds of telephone and video conferences between the Parties starting in 2020; the Parties' attendance at settlement conferences before Magistrate Judge Mann; the filing of letters to the Court regarding the status of settlement negotiations; the exchange of dozens of drafts of proposals, stipulations, settlement language, and related questions; and extensive conferences and communications with Judge Francis and experts from Thru. *See supra* at 8–9; (Tarantolo Decl. ¶¶ 9–16). Given the Parties' extensive settlement efforts, Rule 23(e)(2)(B) is satisfied. *See, e.g.*, *M.F. by & through Ferrer* v. *N.Y.C. Dep't of Educ.*, 671 F. Supp. 3d 221, 226 (E.D.N.Y. 2023) (finding settlement procedurally fair where parties engaged in dozens of settlement sessions, involved subject matter experts, produced thousands of pages of relevant documents, and involved "highly skilled" counsel); *see also Jenkins* v. *Nat'l Grid USA Serv. Co., Inc.*, 2022 WL 2301668, at *3 (E.D.N.Y. June 24, 2022) (finding settlement was reached as a result of arm's-length negotiations because parties were assisted by an experienced mediator); *Nasimova* v. *Attentive Home Care Agency Inc.*, 2020 WL 13890951, at *2 (E.D.N.Y. Nov. 2, 2020) (same).

3. Rule 23(e)(2)(C): The Relief Provided for the Class Is Adequate

a. Rule 23(e)(2)(C)(i): Costs, Risks, and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) asks the Court to consider the "costs, risks, and delay of trial and appeal," and overlaps with a number of *Grinnell* factors, which help guide the Court's application of the Rule. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019). Specifically, the Court's inquiry here should be guided by the following *Grinnell* factors, which all favor approval of the Settlement: the complexity, expense, and likely duration of the litigation (Factor 1); the stage of the proceedings and amount of completed discovery (Factor 3); the risks of establishing liability (Factor 4); the risks of establishing entitlement to relief (Factor 5);

the ability of the Defendants to withstand a greater judgment (Factor 7); the range of reasonableness of the Settlement in light of the best possible recovery (Factor 8); and the range of reasonableness of the Settlement as compared to a possible recovery in light of all the attendant risks of litigation (Factor 9). *Id.* at 693–96. As explained below, proceeding to trial in this action would have involved extensive time and resources, and significant litigation risk. Critically, the longer it takes to bring this matter to a close, even if Plaintiffs fully prevail, the longer Class Members must wait for a binding order that their DPCs be timely adjudicated, thus harming their educational progress. By settling now, Class Members will receive the benefits of the Settlement on a timeframe that is much quicker than would result even from fully successful litigation. *See, e.g.*, *M.F.*, 671 F. Supp. 3d at 226 (granting approval of final settlement with NYCDOE that provided class with "broad systemic injunctive relief," noting that "continuing to litigate would only further delay relief for Plaintiffs and class members").

Complexity, expense and likely duration of the litigation (Factor 1). This *Grinnell* factor weighs strongly in favor of settlement. "Settlement is favored" where, as here, it "results in substantial and tangible present recovery, without the attendant risk and delay of trial." *Sykes* v. *Mel Harris & Assocs., LLC*, 2016 WL 3030156, at *12 (S.D.N.Y. May 24, 2016) (internal quotation marks and citation omitted). Absent a settlement, and despite Plaintiffs' view as to the strength of their claims, the parties continue to face the prospect of significant costs and protracted litigation in advance of a complex trial.

Continued litigation of this complex class action would likely result in additional and significant costs, including discovery costs. The Court has held Plaintiffs' motion for partial summary judgment on their IDEA claims in abeyance since September 6, 2023 (along with the State Defendants' cross-motion for summary judgment). (*See* Sept. 6, 2023 Order.) If the Court

were to deny Plaintiffs' motion, Plaintiffs would likely move to reopen discovery and take depositions of a number of NYCDOE and NYSED personnel, including the named individual Defendants. (Tarantolo Decl. ¶ 21.) Plaintiffs anticipate that Defendants may seek to take depositions as well, and all parties may seek to depose relevant nonparties, such as individuals involved in the transition to OATH, the Comptroller's office, or others. Plaintiffs would also likely seek additional fact discovery relevant to their ADA, Section 1983, Section 504, and state law claims, since these causes of action each require different showings of proof, and this would undoubtedly be followed by expert discovery and further depositions of the parties' experts. (*Id.*) All of these steps would involve substantial time by staff at NYCDOE and NYSED, impose financial costs on NYCDOE and NYSED, and require considerable attorney time on top of the many years of litigation to date, and would be followed by an undoubtedly complex class trial and, if Plaintiffs prevailed at trial, an extended remedial phase that could involve yet further discovery. All the while, the Class would continue to endure the real-world harm resulting from unlawful and improper delays in adjudicating their claims for necessary special education services.

Seeking to avoid these growing costs, the parties "have invested considerable resources in the case through data collection, litigation efforts, and settlement negotiations." *D.S. ex rel. S.S.* v. *N.Y.C. Dep't of Educ.*, 255 F.R.D. 59, 76 (E.D.N.Y. 2008). The parties have worked tirelessly to craft a meaningful, effective resolution to this case that provides much-needed, near-term relief to the Class. And "[a]bsent a settlement, these costs will only escalate." *Id.* Indeed, "protracted litigation would preclude" Plaintiffs from addressing the "urgent need" to bring the New York City impartial hearing system into compliance. *Id.* This factor thus weighs in favor of the proposed settlement. *See, e.g.*, *Charron* v. *Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 196–97 (S.D.N.Y. 2012) (granting final approval of settlement class action where "[t]he path from this

stage of the litigation to a final judgment . . . would be long, complicated, and expensive . . . [n]otwithstanding the strength of the evidence Plaintiffs elicited during . . . investigation and discovery"), *aff'd sub nom. Charron* v. *Wiener*, 731 F.3d 241 (2d Cir. 2013).

Stage of the proceedings and amount of completed discovery (Factor 3). The relevant inquiry for this factor is "whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 699. Over the course of four-plus years, the Parties have (i) engaged in written discovery and document discovery; (ii) participated in scores of negotiation sessions across multiple methods, including weekly settlement meetings with all Parties, ad hoc meetings amongst the parties, meetings with Judge Francis, and conferences with the Court; (iii) hired an outside consultant, Thru, to examine Defendants' processes and procedures and provide recommendations; (iv) exchanged crucial data and other progress-tracking information to aid in settlement discussions; and (v) filed summary judgment briefs on partial summary judgment. Courts have found this factor satisfied by parties that "engaged in extensive discovery and motion practice," including summary judgment. *Mascol* v. *E&L Transp.*, 2009 WL 10701164, at *3 (E.D.N.Y. Mar. 24, 2009). Thus, the stage of the proceedings and the amount of discovery completed by the Parties has given Plaintiffs a sufficient understanding of the case, and favors the proposed Settlement.

Risks of establishing liability and entitlement to relief (Factors 4 and 5). To assess Factors 4 and 5, the Court should "balance the benefits afforded the Class, including immediacy and certainty of recovery, against the continuing risks of litigation," including Plaintiffs' "ab[ility] to prove liability" and their desired remedy. *In re GSE Bonds Antitrust Litig.*,

414 F. Supp. 3d at 694. The issues of liability and remedy have already been hotly contested in this litigation, and thus these factors weigh in favor of settlement. *See id.*

As Class Counsel has made clear, they believe that liability is a straightforward issue in this case. Plaintiffs moved for partial summary judgment on the basis that New York City's impartial hearing system is indisputably in violation of the IDEA's requirements for timely hearing decisions, and thus both Defendants should be held jointly and directly liable for their roles in the system's failure. (*See* ECF No. 123.) However, Defendants have declined the Court's invitation to stipulate to liability, and Defendants expressly disclaim liability in the Settlement. (*See* Settlement Agmt. § XIV.I; *see also* May 14, 2024 Hearing Tr. at 22:11–14 ("[W]hen we first started meeting about the discovery disputes in this case, I had asked the City and State why they hadn't simply conceded liability, and decided that the real fight here was at the remedy stage.").) Both Defendants opposed Plaintiffs' motion for summary judgment. (*See* ECF Nos. 129, 136.) State Defendants also filed their own motion for partial summary judgment asking the Court to find that they met all of their obligations under the IDEA. (ECF No. 136.) These motions for summary judgment are still pending. It is thus clear that if this case were to be litigated to judgment, both Defendants would vigorously contest liability. Plaintiffs thus continue to face uncertainty and challenges in their ability to prove liability, and in turn, in achieving relief for the Class.

Plaintiffs also face a risk that they could prevail on liability but nonetheless achieve relief that is significantly more limited than what is sought in the Amended Complaint or than what is achievable with Defendants' cooperation and agreement via this Settlement. The proposed Settlement sets forth measurable goals and specific actions, all of which Defendants have agreed are feasible, to bring the system into compliance as swiftly as possible.

Ability of the defendant to withstand a greater judgment (Factor 7). This factor weighs in favor of settlement because the settlement provides the most effective relief within Defendants' budgetary and institutional constraints. As public agencies, NYCDOE and NYSED are limited by their approved budgets and any greater judgment would fall on the taxpayers in the form of further protracted litigation costs and costs to effect compliance with any ultimate injunctive remedy. *See Furlong* v. *United States*, 132 Fed. Cl. 630, 634 (Fed. Cl. 2017); *Berkley* v. *United States*, 59 Fed. Cl. 675, 712–13 (Fed. Cl. 2004) ("The ability of the defendant, in this case the United States government, to withstand a greater judgment weighs neither in favor of nor against approving the settlement."). Plaintiffs have worked extensively with Defendants to fashion a meaningful remedy that provides relief to the Class as quickly as is feasible for NYCDOE and NYSED. (Tarantolo Decl. ¶¶ 9–16.) And in any event, although the Amended Complaint does not seek monetary damages, "[t]his *Grinnell* factor favors a settlement which reduces costs of the litigation that would be paid from money that should be applied to other education needs." *D.S.*, 255 F.R.D. at 78.

Range of reasonableness of the settlement in light of the best possible recovery and attendant risks of litigation (Factors 8 and 9). The "most important" of the *Grinnell* factors is the "strength of the case for plaintiffs on the merits, balanced against the [relief] offered in settlement." *Id.* (alterations in original). This analysis requires the Court to evaluate the adequacy of the settlement in light of any "uncertainties of law and fact" and "the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Frank* v. *Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (internal quotation marks and citation omitted). These two factors, which "are often combined for the purposes of analysis," *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2024 WL 3236614, at *26 (E.D.N.Y. June 28, 2024), both

weigh in favor of settlement because the proposed settlement provides the Class valuable relief and because further litigation will involve significant uncertainty and delay.

First, the terms of the proposed Settlement fall well within the range of reasonableness. The settlement offered to the Class comprehensively addresses the problems alleged in the Amended Complaint. Specifically, as described above, Defendants will agree to injunctive relief that includes compliance benchmarks; technological upgrades; changed practices; and periodic reporting to track Defendants' progress. (*See supra* at 9–21.) The proposed settlement thus provides a significant measure of the relief sought by the Class. (*See* AC ¶ 366.)

Second, the proposed settlement is particularly reasonable when balanced against the "risks to [P]laintiffs of having to prove liability," "maintain the class action through trial," and defend a judgment on appeal. *D.S.*, 255 F.R.D. at 78. Although Plaintiffs are confident they could ultimately establish Defendants' liability, Defendants' summary judgment and other briefing have demonstrated that they would mount significant challenges before this Court and, likely, on appeal, significantly delaying any remedy to the Class. Litigating these issues, and others, through summary judgment, trial, and appeal may take years. And even if Plaintiffs prevail, the ultimate relief likely would not be meaningfully superior to what the parties have agreed to in the Settlement.

The proposed Settlement, if approved, will mitigate uncertainty, afford critical relief to Class Members in short order, and provide a structure to ensure that Defendants comply with federal and state law in the future. This comprehensive relief, "particularly in light of the risks and shortcomings of continued litigation, weighs strongly in favor of approval of the settlement under this final part of the *Grinnell* analysis." *Id.* at 79.

b. Rule 23(e)(2)(C)(ii): Effectiveness of Proposed Method of Distributing Relief to the Class

Rule 23(e)(2)(C)(ii) directs the Court to consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." "Because of the nature of the solely injunctive relief sought in this class action," this factor is inapplicable. *Liberty Res., Inc.* v. *City of Philadelphia*, 2023 WL 3204018, at *8 n.5 (E.D. Pa. May 1, 2023); *Romero* v. *Securus Techs., Inc.*, 2020 WL 6799401, at *5 (S.D. Cal. Nov. 19, 2020) ("[B]ecause the settlement agreement provides only injunctive relief that applies generally equally, there is no need for a method of distribution.").

c. Rule 23(e)(2)(C)(iii): Attorneys' Fees

In conjunction with the Settlement, the parties have negotiated a reasonable amount of attorneys' fees that Defendants would agree to pay to Class Counsel. This award of attorneys' fees and costs does not negatively impact the Class Members in any respect, because Plaintiffs have sought only declaratory and injunctive relief in the Complaint and thus a fee award to Plaintiffs is wholly separate from the relief provided to the Class. (*See* AC ¶¶ 365–66 (seeking declaratory and injunctive, but not monetary, relief).)

d. Rule 23(e)(2)(C)(iv): Agreements Made in Connection with Proposal

Rule 23(e)(2)(C)(iv) directs the Court to consider "any agreement made in connection with the [settlement] proposal." There are no agreements made in connection with the proposed Settlement other than the Settlement itself. (Tarantolo Decl. ¶ 17.)

4. Rule 23(e)(2)(D): The Proposal Treats Class Members Equitably Relative to Each Other

The settlement is fair and treats Class Members equitably relative to each other. This factor examines "whether the apportionment of relief among class members takes appropriate

account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *D'Angelo* v. *Hunter Bus. Sch., Inc.*, 2023 WL 11845607, at *14 (E.D.N.Y. Jan. 24, 2023) (quoting Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment). Here, as described above, the compliance benchmark provisions of the settlement operate uniformly to ensure Class Members' claims are adjudicated timely, and the process improvements and harm mitigation provisions apply equally to every member of the Class. Likewise, the settlement release provides equal protection to all Class Members seeking individualized relief with respect to their individual DPCs. (*See* Settlement Agmt. § XIII.A.) "Because the injunctive and declaratory relief affects all class members equally, this factor is not relevant." *See Sourovelis* v. *City of Philadelphia*, 515 F. Supp. 3d 343, 358 (E.D. Pa. 2021). Thus, this factor weighs in favor of approval.

5. Additional *Grinnell* Factors

In addition to the above *Grinnell* factors which favor settlement, the remaining factors are neutral in this regard, or else also support settlement. The second *Grinnell* factor asks the Court to consider the reactions of the Class to the Settlement. *Grinnell*, 495 F.2d at 463. At this stage, Class Counsel have reviewed the content of the Settlement with all Named Plaintiffs, and all approve of the settlement. (Tarantolo Decl. ¶¶ 19–20.) The sixth *Grinnell* factor asks the Court to consider the risks of maintaining the class action through the trial. Because the Class is already certified, this factor is neutral. *Grinnell*, 495 F.2d at 463. However, any attendant risk that the Class may be decertified "generally weighs in favor of settlement" because this "ensures that class . . . members may actually benefit from the remedies to be provided." *D.S.*, 255 F.R.D. at 78.

II. PLAINTIFFS' PROPOSED NOTICE PLAN SATISFIES THE REQUIREMENTS OF RULE 23(e)(1).

A. Notice to the Class

The Federal Rules of Civil Procedure require notice to be provided when a class action settles. *See* Fed. R. Civ. P. 23(c)(2)(B), 23(e)(1)(B). Notice to class members must be made "in a reasonable manner" that is "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B), 23(e)(1)(B). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements." *Wal-Mart*, 396 F.3d at 114. Rather, notice is considered adequate "if it may be understood by the average class member." *Id.* Notice may therefore be made by "United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B). Courts have approved plans where notice is disseminated by email. *See, e.g.*, *Ortega* v. *Uber Techs., Inc.*, 2018 WL 4190799, at *10–11 (E.D.N.Y. May 4, 2018) (approving notice plan where "settlement class would receive notice of the settlement solely by email; if an email transmitting the settlement notice is returned as undeliverable, the settlement administrator would send a copy of the notice to that class member by physical mail").

Prior notice has already been approved in this case in the form of a class notice sent to every class member (or their counsel) in December 2020 using the email addresses provided by the New York City Impartial Hearing Office, as well as public postings on the NYCDOE and NYLAG websites. (ECF No. 39-1.)

To provide notice of this Class Settlement, the Parties will implement a plan that mirrors that used for the prior notice: (1) Defendant NYCDOE will send the proposed Class Settlement Notice to Class Members (or their counsel) using the email addresses that NYCDOE has on file in connection with Class Members' DPCs; (2) Defendant NYCDOE will post the Class Settlement Notice on its website in the section concerning impartial hearings; and (3) Class

Counsel will post the Class Settlement Notice on NYLAG's website. (*See* Tarantolo Ex. 3.) Utilizing electronic means such as email and website postings is especially appropriate here, because it was a successful means of disseminating the Class Notice for this litigation in the past and Class Members' email addresses are readily accessible to City Defendants. (ECF No. 39-1.) Furthermore, effecting notice through email is far more cost-effective than mailed notice. *See, e.g.*, *In re Domestic Airline Travel Antitrust Litig.*, 322 F. Supp. 3d 64, 71–72 (D.D.C. 2018) (settlement notice by email and publication adequate under Rule 23 because direct mail would be disproportionately expensive, and defendant already possessed customer emails). This notice plan employs adequate means to ensure that the average member of the Class is fairly apprised of the proposed settlement. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 58 (E.D.N.Y. 2019).

The content of the proposed Class Settlement Notice is also appropriate. The Class Settlement Notice is written in language that is as plain and simple as possible. (Tarantolo Decl. Ex. 2.) The Class Settlement Notice also contains all of the requirements listed in Rule 23(c)(2)(B), including a "general description" that "fairly apprise[s] [the] prospective members of the class of the class action's pendency, the relevant terms of the proposed settlement, and their options in connection with th[e] case." *Weinberger* v. *Kendrick*, 698 F.2d 61, 70–71 (2d Cir. 1982) (internal quotation marks omitted). And the Class Settlement Notice will direct Class Members to the NYCDOE and NYLAG websites, which will have additional information. (Tarantolo Decl. Ex. 2.)

B. Fairness Hearing

The proposed Preliminary Approval Order would direct that the Court hold a Fairness Hearing on a date and time to be set by the Court. (Tarantolo Decl. Ex. 3.) Class members can present objections in advance of the hearing to Class Counsel via phone or email; Class

Counsel will provide Defendants' counsel with copies of any objections they receive within three business days of receipt, and will file any objections they receive with the Court before the Fairness Hearing. (*Id.*) At the Fairness Hearing, Class Members who have provided notice to Class Counsel will have the opportunity to voice objections to the Settlement Stipulation. Plaintiffs respectfully request the opportunity to address these objections, if any, in a post-hearing submission promptly after the conclusion of the hearing.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court:

1. Enter the proposed Preliminary Approval Order, attached as Exhibit 3 to the Tarantolo Declaration; and
2. Award such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 1, 2024

Respectfully submitted,

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