UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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M.F., a minor, by and through his parent and natural guardian YELENA FERRER; M.R., a minor, by and through her parent and natural guardian JOCELYNE ROJAS; I.F., a minor, by and through her parent and natural guardian JENNIFER FOX, on behalf of themselves and a class of those similarly situated; and THE AMERICAN DIABETES ASSOCIATION, a nonprofit organization,

Plaintiffs,

- against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION; THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE OFFICE OF SCHOOL HEALTH; THE CITY OF NEW YORK; ERIC ADAMS, in his official capacity as Mayor of New York City; DAVID C. BANKS, in his official capacity as Chancellor of the New York City Department of Education; ASHWIN VASAN, in his official capacity as Acting Commissioner of the New York City Department of Health and Mental Hygiene; and ROGER PLATT, in his official capacity as Chief Executive Officer of the Office of School Health,

Defendants.

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OPINION AND ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

18 Civ. 6109 (NG) (SJB)

GERSHON, United States District Judge:

This case, brought as a class action, seeks declaratory and injunctive relief pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* ("ADA"); and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 *et seq.* ("NYCHRL"). It alleges that

Defendants have failed to provide appropriate care to students with type 1 and type 2 diabetes in New York City public schools, in violation of the students' rights under these laws.[1] Plaintiffs M.F. (by and through his natural guardian Yelena Ferrer), M.R. (by and through her natural guardian Jocelyne Rojas), I.F. (by and through her natural guardian Jennifer Fox), and the American Diabetes Association ("ADA") now move for final approval of a settlement reached on all claims with Defendants, who do not oppose the motion.

For the reasons stated below, Plaintiffs' motion is granted.

I. Notice of Proposed Settlement

On November 22, 2022, after my careful review of the proposed Settlement Agreement and proposed notice forms, as well as a hearing with the parties at which I directed edits to the notice forms, I granted preliminary approval of the Settlement Agreement, approved the form and manner of notice to the class substantially as agreed upon at the hearing, and set a date for a Fairness Hearing.

Notice of Proposed Settlement was given by both Plaintiffs and Defendants in compliance with the Preliminary Approval Order. On November 30, 2022, the DOE posted the Notices (in English, Spanish, Chinese, Bengali, Russian, Arabic, Urdu, Haitian Creole, French, and Korean), the Settlement Agreement, and the Preliminary Approval Order on the following DOE Diabetes webpage: https://www.schools.nyc.gov/school-life/health-and-wellness/staying-healthy/diabetes. On January 4, 2023, the DOE mailed by postal mail the Long Form Notice and cover letter (indicating where to obtain the Long Form Notice in languages other than English) to the parents of all current Class Members for whom the DOE had a mailing address. In December 2022 and

[1] A complaint filed by Intervenor-Plaintiffs was voluntarily withdrawn on March 1, 2023, and it was dismissed without prejudice on March 2, 2023.

January 2023, the Office of School Health ("OSH") directed DOE schools with enrolled current Class Members (current as of the date of Preliminary Approval) to disseminate by email by January 9, 2023, the Long Form Notice and cover letter to those current Class Members' parents for whom the DOE had an email address. In December 2022 and January 2023, Defendants directed appropriate OSH and OSH-assigned personnel to post the Long Form Notice and cover letter in every DOE school medical room and sent additional reminders in February 2023. Pursuant to the Class Action Fairness Act, 28 U.S.C. § 17I5, Defendants advised the United States Attorney General, the New York State Attorney General, and the New York State Commissioner of Education of the proposed settlement in this action on October 11, 2022, and of the Preliminary Approval Order and Fairness Hearing on November 25, 2022.

On November 29, 2022, Plaintiffs' Class Counsel, Disability Rights Advocates ("DRA"), posted the Notices, Settlement Agreement, Preliminary Approval Order, and information about the Fairness Hearing at the following website: https://dralegal.org/class-notice/nyc-school-diabetes-settlement-fairness-hearing. On December 9, 2022, Plaintiff ADA posted the Notices, Settlement Agreement, and information about the Fairness Hearing on the following website: https://diabetes.org/tools-support/know-your-rights/safe-at-school-state-laws/new-york-city-public-schools-lawsuit/nyc-class-notice. DRA announced the Settlement Agreement on its social media on November 28, 2022, and again on December 8, 2022. DRA also posted to social media on January 9, 2023. The ADA likewise posted about the settlement to social media on December 15, 2022, and again on January 5, 2023. DRA emailed a relevant listserv with respect to preliminary approval of the settlement on November 28, 2022, and emailed the Notice to relevant advocacy community contacts on January 9, 2023. The ADA likewise sent the Notice to pediatric

endocrinology providers on December 12 and 13, 2022, as well as 7,616 New York-area diabetes advocates on December 14, 2022.

DRA set up a dedicated e-mail address (diabeteslawsuit@dralegal.org) and voice mailbox (332-217-2362) for this litigation, which, following the Preliminary Approval Order, was checked every day to respond to calls and emails. DRA began receiving emails and phone calls in December 2022; Class Counsel called back each and every caller, and wrote back to each and every e-mail correspondent.

Given the foregoing, the Notice of Settlement provided to class members was reasonable, indeed ample, and satisfied the requirements of both Rule 23(e) and due process.

II. Class Definition

On June 18, 2019, I certified a class comprised of "[a]ll students with diabetes who are now or will be entitled to receive diabetes related care and attend New York City Department of Education schools." *M.F. by and through Ferrer, et al., v. New York City Dep't of Ed., et al.*, No. 18-CV-6109 (NG) (SJB), 2019 WL 2511874, at *7 (E.D.N.Y. Jun. 18, 2019).

During these proceedings for final approval of the Settlement Agreement, it became apparent that the class definition required clarification because one of the individual named Plaintiffs, M.F., was identified as a preschooler early in the litigation even though the claims in this case are claims on behalf of children in kindergarten through twelfth grade (K-12).[2] For that

[2] When I inquired with the parties about this issue, counsel for all Plaintiffs responded as follows: "Plaintiffs agree with Your Honor that, in light of the references to M.F.'s time in pre-school, the Complaint appears to be styled as invoking pre-school-related claims. We apologize for the confusion. When we filed the original Complaint, Plaintiffs had assumed that the pre-school program M.F. was enrolled in was part of the same DOE K-12 school system. In the litigation's earliest stages, we treated M.F. [both as] a preschooler and a prospective kindergartener. However, M.F. quickly became a kindergartner and relief for K-12 students in DOE schools was the focus of the litigation and settlement negotiations. For those reasons,

reason, the parties and the Court have agreed to amend the class definition to clarify the scope of the class as follows:

> All students with diabetes who are now or will be entitled to receive diabetes related care and attend New York City Department of Education schools. DOE schools means DOE kindergarten through twelfth grade schools. Charter schools, private schools, and preschool programs are not DOE schools.

See ECF Minute Entry dated April 14, 2023. Under Rule 23, "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also* 5 Moore's Federal Practice - Civil § 23.21[6] (2023) ("In fact, the court has a duty to ensure that the class is properly constituted and has broad discretion to modify the class definition as appropriate to provide the necessary precision.").

This amendment clarifies the class definition to more precisely comport with the manner in which this case has been litigated throughout its history.[3] Indeed, the Notice of Proposed

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Plaintiffs did not pursue M.F.'s potential claims as a preschooler, but rather focused on his claims as a prospective (and shortly thereafter, actual) kindergartener and issues regarding the K-12 system. The Parties continuously operated on the assumption that the subject of the litigation, and the sought-for reforms, were limited to K-12 schools." April 12, 2023 Letter, Dkt. 153 at pp. 1–2. Defendants agree that the case dealt with DOE's K-12 schools and have confirmed that M.F. accepted a kindergarten offer in April 2019. *See* April 12, 2023 Orsland Decl., Dkt. 154; April 12, 2023 Hildreth Decl., Dkt. 155 at ¶ 5. Thus, although M.F. was accurately identified as being in preschool at the time the Complaint and class certification motions were filed, he had accepted a DOE School kindergarten offer prior to class certification on June 18, 2019.

[3] Plaintiffs explain that "[W]hen drafting the global Settlement Agreement, the Parties discussed in detail that DOE's pre-school program operates as a separate program, with separate admissions, funding, controlling rules and regulations, and processes for providing disability-related services. As such, it presents different issues from the larger DOE school system, involves a potentially different class and likely would require the involvement of additional defendants, and any remedies would accordingly also be separately fashioned." April 12, 2023 Letter, Dkt. 153 at p. 2. Defendants agree, specifically noting that "negotiations in this case dealt with the operation and administration of DOE's K-12 schools" and that "informal discovery that accompanied our negotiations did not encompass pre-school programs." *See* April 12, 2023 Orsland Decl., Dkt. 154 at ¶¶ 5, 7.

Settlement stated that it was directed to "[a]ll students and parents of students with diabetes in need of diabetes-related care in school who are now or will be attending New York City Department of Education (DOE) schools" and specified that "[t]his does not apply to students who are attending charter schools, private schools, or pre-school programs." For that reason, no further notice is required.

III. Discussion

Rule 23(e) permits approval of a class action settlement "only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). Traditionally, in determining whether a settlement meets this standard, courts in the Second Circuit "review[ed] the negotiating process leading up to the settlement for procedural fairness, to ensure that the settlement resulted from an arm's-length, good faith negotiation between experienced and skilled litigators." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013). Courts then evaluated the substantive fairness of the settlement, considering the nine *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; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id.[4]

I also agree. My understanding of this case, over which I have presided from its inception, has always been that the litigation, and the reforms sought, were limited to K-12 schools.

[4] These factors are set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

In 2018, Rule 23 was amended to list specific factors relating to the court's approval of a class settlement. Rule 23(e)(2) now provides that, in determining whether a settlement is "fair, reasonable, and adequate," courts must consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
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> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Factors (A) and (B) are "procedural" factors that examine "the conduct of the litigation and of the negotiations leading up to the proposed settlement," while (C) and (D) are "substantive," addressing "the terms of the proposed settlement." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. The goal of the amendment was "not to displace any factor [developed in any circuit], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id.* District courts in this Circuit, accordingly, have considered the *Grinnell* factors "in tandem" with the factors set forth in Rule 23(e)(2), *e.g.*, *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020), and the Second Circuit has continued to endorse the use of the *Grinnell*

factors following the 2018 amendment. *In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F. App'x 760, 762–63 (2d Cir. 2020).

A. Procedural Fairness

The settlement is procedurally fair. The class representatives and class counsel have adequately represented the class. Beginning in early 2019, following a stay of proceedings pursuant to a joint request by the parties to enter into a Structured Negotiation Agreement, the parties engaged in extensive settlement negotiations. These negotiations, conducted at arms-length by experienced counsel, involved approximately seventy-five settlement sessions, and included input from nationally-recognized diabetes exerts. Plaintiffs' highly skilled, competent, and experienced counsel were fully familiar with the strengths and weaknesses of their case when the Settlement Agreement was reached. The negotiations leading up to the Settlement Agreement included the informal production of nearly 2,500 pages of relevant documents, input from relevant program personnel, and the exchange of proposals, term sheets, and draft Memoranda of Understanding on various issues presented by Plaintiffs' claims. Counsel had sufficient knowledge about the factual and legal issues in the litigation "to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Namenda*, 462 F. Supp. 3d at 312 (citations omitted).

B. Substantive Fairness

The settlement is also substantively fair. First, it is not only a reasonable outcome for class members, but a highly favorable one, even apart from the considerations of complexity, expense, possible duration, and risks attendant with continued litigation. The Settlement Agreement provides broad systemic injunctive relief to class members. Defendants are already operating

under many of the agreements reached; continuing to litigate would only further delay relief for Plaintiffs and class members.

The parties did not reach agreement on two issues related to the provision of trained staff on bus transportation and on field trips. Ultimately, Plaintiffs moved for summary judgment on those issues, and I granted summary judgment in their favor, *M.F. by and through Ferrer, et al., v. New York City Dep't of Ed., et al.*, 582 F.Supp.3d 49 (E.D.N.Y. 2022), and entered an injunction (Dkt. 128). Defendants then agreed to incorporate the decision of the court into the Settlement Agreement.

The Settlement Agreement embodies the recommendations of the ADA Safe at School Program, the purpose of which is to ensure the provision of appropriate diabetes management and care at schools in accordance with federal and state laws and best practices. The institutional changes created by the Settlement Agreement amount to an overhaul of DOE's prior practices and are intended to provide students with diabetes the same access to school and school-related activities as their non-disabled peers. Broadly, the Settlement Agreement provides for the following relief: 1) significant reforms to DOE's Section 504 planning process to determine the needs of students with diabetes and how DOE will meet those needs; 2) new protocols surrounding the training of school nurses, paraprofessionals, teachers, substitutes, and other staff on diabetes care to meet the needs of students with diabetes; 3) new policies requiring the provision of diabetes care in the least restrictive environment and requiring that staff minimize missed instruction time in determining where a student receives diabetes-related care and that resources are not permitted as a consideration in such a determination; and 4) new requirements for the provision of health

services afterschool for students with diabetes, including that the Section 504 planning process will explicitly discuss and plan for afterschool care.

The Settlement Agreement provides not only for a dispute resolution procedure, but also for extensive data collection and reporting to ensure that the Settlement Agreement is implemented properly. It appoints the ADA as the Parties' Joint Expert and Dr. Peter D. Blanck, an expert on the rights of students with disabilities, as External Monitor. The ADA will advise on medical questions, concerns, or disputes regarding the provision of diabetes-related care as part of the Settlement Agreement. Dr. Blanck will have authority over all other monitoring and enforcement provisions of the Settlement Agreement. Defendants will compensate the ADA $10,000 per year for each of the three years of the Settlement Agreement, and Dr. Blanck at a rate of $475 per hour for reasonable time spent enforcing the Settlement Agreement, not to exceed 200 hours per year unless the Parties agree that additional time is required.

Second, the Settlement Agreement provides that Plaintiffs and class members release only any claims for systemic injunctive and declaratory relief regarding the provision of diabetes-related care in DOE schools which arose on or before the Settlement Agreement's Effective Date. No class members waive any rights to bring a lawsuit regarding individual claims or claims for monetary damages.

Third, the class has reacted positively to the Settlement Agreement. In all of DRA's contacts with class members, none of the families expressed objection to proposed reforms of the Settlement Agreement. Nearly all the class members with whom Class Counsel communicated expressed support for the specific reforms contemplated in the Settlement Agreement. No class member submitted written objections to the Settlement.

On April 19, 2023, I held a virtual Fairness Hearing at which I heard from counsel. Plaintiffs and other parents also appeared at the Fairness Hearing, and many expressed support for the litigation and the Settlement Agreement. One parent inquired about enforcement mechanisms. In response, Plaintiffs' counsel explained the dispute resolution and monitoring terms of the Settlement Agreement.

Only two individuals raised concerns with the Court following the Notice of Proposed Settlement. After I issued a Notice to Counsel on February 28, 2023, directing that the parties clarify their position with respect to the two individuals' concerns, the parties submitted their views with respect to the individuals' stated issues on March 15, 2023, and served their submissions on the relevant individuals. Although those two individuals did not file written objections, they did request to speak at the Fairness Hearing about their concerns. I took those concerns into consideration and will address them here.

One parent, Ms. Gemma Roberts, who did not appear at the Fairness Hearing, raised a concern about care in pre-K and 3-K programs. As discussed above in Section II, based on the history of this litigation, the nature of the relief sought and achieved, and discussions with Counsel, I am satisfied that this litigation does not include preschool programs, but only DOE K-12 schools. The Settlement Agreement does not cover preschool programs, and no rights related to any alleged mistreatment in preschools are released. Thus, insofar as Ms. Roberts' children are in preschool and not enrolled in a DOE K-12 school, they are not bound by the releases that affect class members.

The second parent, Ms. Kimberly Hill, who spoke at the Fairness Hearing, raised three concerns. She agreed that two of her three concerns, involving nurses' training on student-specific

insulin pumps and afterschool care, are covered in full by the Settlement Agreement. Ms. Hill's remaining concern related to whether school nurses should be allowed to change students' insulin pumps. The parties agree that school nurses should not have permission to do so. They provide sound reasons for this position, citing New York State Department of Education Guidelines, which identify safety concerns about such a practice. Notably, this position is supported by the ADA. The current ADA position is that, in the event of an insulin pump malfunction, rather than attempt to replace a device, the school should instead revert to a backup plan for insulin delivery which is to be specified during the Section 504 planning process. This position is based on the ADA's understanding of best practices for student safety. I have considered the parties' explanation, and I find it reasonable that they did not provide for a school nurse's ability to change an insulin pump in the Settlement Agreement.

In sum, I conclude that none of the concerns raised at the Fairness Hearing or earlier warrants disapproval of the Settlement Agreement.

Fourth, the Settlement Agreement provides that Defendants have agreed to pay attorneys' fees. The parties will determine the amount of fees to be paid among themselves and seek assistance from the Court only if unsuccessful in their negotiations.

Fifth and finally, the Settlement Agreement provides for service awards to each of the three individual named Plaintiffs in the amount of $5,000 each.[5] In light of the Second Circuit's decision in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* No. 20-CV-339, 2023 WL 2506455 (2d Cir. Mar. 15, 2023), I ordered Plaintiffs to file supplemental papers supporting their request for service awards. Plaintiffs have now demonstrated the sustained effort undertaken by each of the individual

[5] The Settlement Agreement refers to these awards as "incentive awards." I prefer to call them "service awards."

named Plaintiffs over the course of four years litigating this case, including, *inter alia*: providing declarations in support of class certification; attending numerous meetings with, and corresponding repeatedly with, attorneys; reviewing case documents as well as the Settlement Agreement; and facing the emotional burden of publicly sharing highly personal information without knowledge of how it may be received. Given the foregoing, the service awards are reasonable.

In sum, I find that the settlement is fair, reasonable, and adequate based on the factors set forth in Rule 23(e)(2) as well as the *Grinnell* factors insofar as those factors are relevant to this Rule 23(b)(2) class. It also complies with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), and the Class Action Fairness Act (including 28 U.S.C. § 1715). I therefore grant Plaintiffs' motion for final approval of the settlement.

IV. Conclusion

Pursuant to Fed. R. Civ. P. 23(c)(1)(C), the class definition is hereby amended to consist of: "All students with diabetes who are now or will be entitled to receive diabetes related care and attend New York City Department of Education schools. DOE schools means DOE Kindergarten through twelfth grade schools. Charter schools, private schools, and preschool programs are not DOE schools."

Plaintiffs' motion for final approval of the settlement is granted. The settlement shall be consummated in accordance with its terms as set forth in the Settlement Agreement.

Service awards are to be paid by Defendants to the three individual named Plaintiffs in the amount of $5,000 each as provided for in the Settlement Agreement.

Fees and costs are to be paid by Defendants to Plaintiffs' Counsel as determined jointly by the parties or by the court as provided for in the Settlement Agreement.

Monitoring and Expert fees are to be paid by Defendants as provided for in the Settlement Agreement.

The Clerk of Court is directed to enter final judgment in accordance with this Opinion and Order.

Without affecting the finality of the judgment which will enter as a result of this Order, the Court retains continuing jurisdiction over this matter for three school years up through the Termination Date, as defined in the Settlement Agreement, in order to supervise the implementation, enforcement, construction, and interpretation of the Settlement Agreement and this Order and to be able to determine the amount of an award of attorneys' fees and costs, to which Class Counsel is entitled, if the Parties are unable to reach an agreement as to that amount.

SO ORDERED.

/S/
NINA GERSHON
United States District Judge

April 21, 2023
Brooklyn, New York