

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|                                  |   |                                       |
|----------------------------------|---|---------------------------------------|
| <b>MIKEISHA BLACKMAN, ET AL.</b> | ) |                                       |
|                                  | ) |                                       |
| <b>Plaintiffs,</b>               | ) | <b>Civil Action No. 97-1629 (PLF)</b> |
|                                  | ) |                                       |
| <b>vs.</b>                       | ) |                                       |
|                                  | ) |                                       |
| <b>DISTRICT OF COLUMBIA,</b>     | ) |                                       |
| <b>ET AL.</b>                    | ) |                                       |
|                                  | ) |                                       |
| <b>Defendants</b>                | ) |                                       |

**JOINT MOTION FOR PRELIMINARY APPROVAL OF CONSENT DECREE**

The parties to this litigation, by and through their undersigned counsel, having executed the attached Consent Decree, and being of the opinion that the Decree represents a fair, reasonable, and adequate resolution of the instant lawsuits, respectfully submit the Decree to the Court for preliminary approval. The parties jointly request that the Court issue an order granting preliminary approval of the Decree subject to final approval of the court after a fairness hearing.

The parties further request that the Court issue an order (1) approving the proposed forms of Notice and the manner of disseminating Notice (2) set a date for the dissemination of Notice and (3) schedule the Fairness Hearing.

Although the parties represented to the Court that a proposed settlement would be submitted by June 17, 2003, submission was delayed by the Office of Administrative Hearings' (OAH) May 22, 2003 Motion to Intervene. The parties withheld submission pursuant to the Court's June 2, 2003 order, which stated that "[w]hile OAH asserts that the Corporation Counsel has not represented OAH's interests, such an assertion strikes the Court as being a matter for internal resolution within the District of Columbia government itself *before* any settlement

agreement is presented to the Court . . .” The parties interpret the Court’s subsequent order on August 22, 2003 to conclude that the ongoing briefing on the Motion to Intervene is no longer an impediment to filing a proposed settlement agreement. The parties have also removed from the proposed Consent Decree all direct references to OAH in order to expedite the approval process.

Defendants’ counsel has reviewed this Motion and Memorandum and have authorized Plaintiffs’ counsel to sign on their behalf.

Respectfully submitted,

ON BEHALF OF PLAINTIFFS:

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September 4, 2003

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                                     |   |                                |
|-------------------------------------|---|--------------------------------|
| MIKEISHA BLACKMAN, <u>et al.</u> ,  | ) |                                |
| Plaintiffs,                         | ) |                                |
| v.                                  | ) | Civil Action No. 97-1629 (PLF) |
|                                     | ) | <i>Consolidated with</i>       |
| DISTRICT OF COLUMBIA, <u>et al.</u> | ) | Civil Action No. 97-2402 (PLF) |
| Defendants.                         | ) |                                |
| _____                               | ) |                                |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE PARTIES’  
JOINT MOTION FOR PRELIMINARY  
APPROVAL OF CONSENT DECREE**

**I. INTRODUCTION**

The plaintiff class, consisting of the *Blackman* and *Jones* subclasses, brought this litigation in July and October 1997,<sup>1</sup> alleging violations of their right to a free and appropriate education afforded by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* and 42 U.S.C. § 1983. The *Blackman* class includes all parents and children for whom due process hearings have not been held and/or decisions issued within the time required by law. The *Jones* class includes all parents and children who obtained hearing officer determination (“HODs”) or settlement agreements (“SAs”) that were not fully implemented in a

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<sup>1</sup> *Blackman, et al. v. The District of Columbia*, was filed on July 17, 1997, alleging that defendants had failed to timely hold hearings and issued Hearing Officer Determinations in response to requests for due process hearings submitted by special education students in the District of Columbia under the Individuals with Disabilities Education Act. *Curtis, et al. v. The District of Columbia, et al.*, was filed on October 16, 1997, alleging that the defendants failed to timely implement Hearing Officer Determinations and Settlement Agreements that were executed in lieu of holding a due process hearing. Subsequently, during the litigation of the *Curtis* matter, the case was renamed *Jones*. The *Blackman* case and the *Jones* case were consolidated on November 14, 1997.

timely manner. In the complaint, plaintiffs alleged that the District of Columbia Public Schools (“DCPS”) failed to: (a) provide due process hearings within 35 days of receipt of a hearing request, pursuant to 5 DCMR § 3021.5, and HODs within 45 days of receipt of a hearing request, pursuant to 20 U.S.C. § 1415, *et seq.* and (b) timely implement HODs and SAs. The matter was certified as a class action under Fed. R. Civ. P. 23 (b)(2) on October 21, 1997, and May 13, 1998.<sup>2</sup> Both Complaints sought injunctive relief and no monetary damages.

The Court granted summary judgment on liability on plaintiffs' behalf on June 3, 1998. At that time, the Court urged the parties to agree upon a remedial plan to address the shortcomings in DCPS's special education program highlighted by the litigation. *Court Order Granting Plaintiffs' Motion for Summary Judgment*, at 2. The parties, after extensive negotiations, entered into a Settlement Agreement on June 24, 1999. *See Joint Motion for Preliminary Approval of Settlement Agreement* (June 28, 1999). Following a fairness hearing, and to address comments made during that hearing, the parties on December 10, 1999, entered into a Revised Settlement Agreement. *See Joint Motion Seeking Final Approval of the Blackman/Jones Revised Settlement Agreement* (December 13, 1999). Although the Revised Settlement Agreement received preliminary approval from this Court (*See Order re Comments on Revised Settlement Agreement* (December 14, 1999)), it was never granted final approval.

As a result of the defendants' failure to fully comply with the terms of the Revised Settlement Agreement, the parties entered into a Supplement to the Revised

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<sup>2</sup> The *Blackman* subclass was certified on October 21, 1997, and the *Jones* subclass was certified on May 13, 1997.

Settlement Agreement on September 28, 2000, giving the defendants additional time in which to comply with the *Jones* portion of the agreement. *See Defendant's Status Report Regarding Compliance with the Revised Settlement Agreement*. On January 25, 2002, the parties jointly filed a request for this Court to refer this case to mediation, which the Court granted. The proposed Consent Decree, being filed concurrently with this motion and memorandum, which includes several attachments,<sup>3</sup> is the result of that mediation.<sup>4</sup>

The proposed Consent Decree reflects the parties' realization that any future negotiated agreements had to be structured differently than the original settlement agreement to have a better chance of success. The differences between the original Settlement Agreement and the proposed Consent Decree are primarily based upon the recommendations of a nationally recognized expert in special education administration and reform, significant input from members of the special education bar, and the most recent thinking about what makes an effective settlement in system-reform litigation.

Because this is a class-action lawsuit, the parties now jointly seek the appropriate court orders in accordance with Rule 23, Federal Rules of Civil Procedure, as follows:

- (1) Preliminarily approving the proposed Consent Decree;
- (2) Approving the proposed form of notice to the class and the proposed manner of distributing notice; and

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<sup>3</sup> The following documents are attached to the Consent Decree:

- A Implementation Plan
- B Blackman/Jones Compensatory Education Handbook
- C Shari Meisel's Curriculum Vitae
- D Curriculum Vitae for the Principals of ADR Associates
- E Notice Form

<sup>4</sup> As noted in the attached motion, the parties were to submit the proposed Consent Decree in June 2003,

(3) Setting a date for a hearing at which time the fairness of the proposed Consent Decree will be presented to the court.

For the reasons set forth below, the Court should grant all such relief.

## **II. ARGUMENT**

### **A. Legal Standards under Rule 23 for Approval of Class Settlement Agreements.**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, “a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.” Where, as here, the parties propose to resolve class action litigation through a class-wide settlement, they must obtain the Court’s approval of the proposed settlement pursuant to a three-step process that is described in the *Manual for Complex Litigation, Third* (Fed. Judicial Center 1995) [“*Manual*”], § 30.41. The three steps are:

1. Preliminary approval of the proposed settlement based upon a preliminary fairness evaluation;
2. Dissemination of mailed and/or published notice of the settlement to all affected class members; and
3. A formal fairness hearing at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.

*Id.*

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but the parties withheld submission after the Court’s order regarding the OAH’s May 22, 2003 Motion to Intervene.

The purpose of the Court's preliminary evaluation of the proposed Consent Decree is to determine whether it is within the "range of possible judicial approval," and, thus, whether notice to the class of the terms and conditions of the proposed Consent Decree and the scheduling of a formal fairness hearing are worthwhile. *4 Newberg on Class Actions 4d* (2003) ["Newberg"] § 11.25. The *Manual* characterizes the preliminary approval inquiry as a court's "initial assessment" of the fairness of the proposed settlement, made on the basis of written submissions and informal presentation from the settling parties, and summarizes the preliminary approval criteria as follows:

If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice . . . be given to the Class Members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

*Manual* § 30.41 at 237; *see also 4 Newberg* § 11.25. In addition, Rule 23 (e) requires notice of a proposed compromise "in such manner as the court directs." The court must ordinarily notify the class of the proposed settlement and afford absent class members the opportunity to object to settlement in a scheduled hearing. *Manual* §§ 30.41, 30.212. *4 Newberg* § 11.41.

Finally, the parties emphasize that voluntary settlement is the preferred means of dispute resolution, especially in complex class action cases. *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C.Cir. 1993). While the Court should "scrutinize the terms of the settlement carefully," the discretion to reject a settlement is thus "restrained by the 'principle of preference' that encourages settlements." *Pigford v. Glickman*, 185 F.R.D. 82, 103 (D.D.C. 1999); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

**B. The Court Should Preliminarily Approve the Proposed Consent Decree.**

The parties respectfully request that the Court preliminarily approve the proposed Consent Decree. In approving a class action settlement, the Court has broad discretion to preliminarily determine whether it is fair, adequate, and reasonable under the circumstances, but there is “usually a presumption of fairness when a proposed class settlement, which was negotiated at arm’s length by counsel for the class, is presented for court approval.” 4 *Newberg* § 11.41. Here, the proposed Consent Decree falls well within the range of reasonableness: it confers substantial benefits on class members; it was reached through extensive arm’s-length negotiations aided by court-appointed mediators; and it is largely structured around an expert’s extensive evaluations and recommendations. Therefore, as shown below, the Consent Decree merits preliminary approval.

**(1) The Proposed Consent Decree Best Serves the Interests of Class Members**

In considering whether a settlement should be approved, the court must consider “whether the interests of the class as a whole are better served if the litigation is resolved by settlement rather than pursued.” *Manual* § 30.42 at 238. The court’s primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiff’s case. *Thomas v. Albright*, 139 F. 3d 227, 231 (D.C.Cir. 1998). In making this comparison, the Court should also assess the measure of certainty and expediency provided by the settlement. *Pigford*, 185 F.R.D. at 103.

The proposed Consent Decree is a fair and reasonable way to satisfy the Court’s judgment that the defendants have been violating the IDEA and to remedy these violations: It requires defendants to address the core issues in the short-term and to address the underlying

causes of untimely hearings and untimely implementation of HODs and SAs to prevent the deficiencies from recurring in the long-term. Prior to commencement of the formal mediation that led to the proposed Consent Decree, the plaintiffs retained an expert, Dr. Thomas Hehir,<sup>5</sup> to provide an assessment of the defendants' special education system. Dr. Hehir's expert reports provide the framework for this proposed Consent Decree, which was organized to require not just absolute deadlines for the ultimate IDEA due process issues, but also to include requirements for activities and measurable outcomes that have a direct effect on the defendants' ability to meet those deadlines. The parties relied significantly on Dr. Hehir's expertise in drafting the proposed Consent Decree in the hope of creating an agreement under which the defendants would successfully resolve the underlying obstacles to holding timely hearings and implementing HODs and SAs and thereby resolve the ultimate issues in this case. For example, the requirement to develop an electronic database for special education students, although not directly tied to the core IDEA due process deadlines, is critical to the defendants' achievement of those goals. Dr. Hehir stressed the importance of managing information, and his recommendation that defendants develop a vision of management goals with measurable outcomes for students with disabilities is reflected in the Implementation Plan, Attachment A to the Consent Decree, which is incorporated into the proposed Consent Decree.

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<sup>5</sup> Dr. Thomas Hehir served as Director of the Office of Special Education Programs at the U.S. Department of Education from September 1993 to 1999. Prior to his federal appointment, Dr. Hehir was responsible for overseeing the delivery of special education services in the Boston and Chicago public schools. Dr. Hehir is now the Director of the School Leadership Program and a lecturer at Harvard University. (Hehir Vita, Exhibit 1 to this Memorandum). Plaintiffs' counsel initially commissioned Dr. Hehir, and the defendants retained him after reviewing his initial findings (Hehir Report I, Exhibit 2 to this Memorandum) to perform a more extensive evaluation and to provide recommendations for management that would allow the defendants to provide both timely due process hearings and timely implementation of HODs and SAs. (Hehir Report II, Exhibit 3 to this Memorandum). For the second report, Dr. Hehir assembled a team of doctoral students to collect data through interviews, data review, and observation. In total, the study team conducted 75 interviews.

In addition, the proposed Consent Decree outlines a set of deadlines that the defendants are required to meet on behalf of the students comprising the two classes, including<sup>6</sup>:

- Completely eliminating the initial *Blackman* backlog by July 15, 2003;<sup>7</sup>
- Timely holding due process hearings once the initial backlog is eliminated or by August 15, 2003, whichever is first;
- Maintaining substantial compliance with the hearing requirements;
- Eliminating 95% of the initial *Jones* backlog by no later than January 31, 2004;
- Maintaining substantial compliance with timely resolution of HODs and SAs no later than January 31, 2004; and
- Formulating an acceptable compensatory education scheme for qualifying class members within 60 days of the Court granting preliminary approval of the proposed Consent Decree.

To fulfill these objectives, the defendants have agreed, among other things, to:

- Hire sufficient staff (including DCPS attorneys and SHO staff) and contract with additional Independent Hearing Officers;
- Develop the capacity of the school system to timely implement all HODs and SAs;
- Follow the actions detailed in the Implementation Plan, which was based on the results of the independent assessment by the Hehir Study team;

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<sup>6</sup> Exhibit 4 to this Memorandum is a list of timelines and deliverables that are required by the Consent Decree.

<sup>7</sup> The defendants report that they have eliminated the initial backlog; class counsel are in the process of verifying defendants' report.

- Improve and maintain SETS, the special education data management system, including development of the SETS Encounter Tracker to identify and address related service lapses;
- Maintain a Parent Service Center to resolve complaints and concerns before they become the subject of due process hearing requests; and
- Revise principal and teacher evaluations to elevate the importance of special education for all DCPS staff.

Greater accountability has also been added in the form of a Monitor/Expert who has broad authority to examine and evaluate the defendants' performance under this proposed Consent Decree. The parties have requested that the Court appoint Sheri Meisel as the Monitor/Expert.<sup>8</sup> The Monitor/Expert will report to the Court and to class counsel on whether the defendants are making adequate progress toward achieving compliance with the provisions set out in the proposed Consent Decree and will alert the parties immediately if it becomes apparent that the defendants are unlikely to meet those provisions. The Monitor/Expert will also play a significant role in developing outcome measures and activities necessary to ensure the defendants' ability to comply with the proposed Consent Decree, and she will have unfettered accessibility to the data necessary to perform her duties. Defendants have also agreed to provide class counsel and the Monitor/Expert with detailed monthly reports. In addition, an ADR

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<sup>8</sup>Sheri Meisel has a Ph.D. in Special Education from the University of Maryland. She served as the assistant to the Associate Superintendent for Special Education for the Montgomery County Public Schools from 1994-1996. She is currently the Associate Director for The National Center on Education, Disability, and Juvenile Justice at the University of Maryland. (Meisel Vita, Attachment D to the Consent Decree).

Specialist, agreed upon by the parties and approved by this Court, shall have the responsibility and authority for resolving significant complaints.<sup>9</sup>

Moreover, had plaintiffs prevailed on their claims at a trial on remedy,<sup>10</sup> they would be entitled to substantially the same relief from the Court that they will obtain through the proposed Consent Decree (e.g., compliance deadlines for the defendants, outside monitoring, ongoing Court jurisdiction). However, the risk, expense, and complexity of preparing for trial would have been significant for both plaintiffs and defendants; the remedy phase might have dragged on for years, leaving plaintiffs without services for longer; and the time, effort, and cost associated with a trial would have been considerable. Thus, both plaintiffs and defendants agree that the students in the proposed settlement class will be better served by the parties' working together on reform efforts than by spending the next several months preparing for trial, trying the case, and then going through the appellate process.

It is clear that the proposed Consent Decree confers substantial benefits on class members, along with various enforcement mechanisms to assure that these benefits continue as necessary. The proposed Consent Decree recognizes the urgent need to improve services for the plaintiff class, and contemplates that the plaintiffs, defendants, and Monitor/Expert will work in a collaborative manner most likely to yield successful, permanent reform—without the time, money, and stress demanded by further litigation. Therefore, the proposed Consent Decree best serves the interests of class members.

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<sup>9</sup> The parties are requesting that ADR Associates be approved by the Court to assist with the enforcement of the Consent Decree.

<sup>10</sup> Plaintiffs already prevailed on liability (*see Court Order Granting Plaintiffs' Motion for Summary Judgment* (June 24, 1999)); therefore remedy is the only remaining issue to be determined.

**(2) The Proposed Consent Decree Reflects an Informed Agreement Reached Through Arm's-Length Negotiations Between Experienced Counsel.**

The proposed Consent Decree withstands scrutiny under the various factors that the Court should consider when contemplating final approval, including whether the settlement is the result of extensive arm's length good-faith negotiations. *In Re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL856290 at \*1 (D.D.C. July 19, 2001). *See also In re Lorazepam*, 205 F.R.D. 369, 375-76 (D.D.C. 2002) (quoting *Manual* § 30.42) (“A ‘presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations’”).

Following the Court's 1998 granting of summary judgment on liability on plaintiffs' behalf, the parties have engaged in extensive consultations. They entered into a Settlement Agreement on June 24, 1999, and then a Revised Settlement Agreement on December 10, 1999. As a result of the defendants' failure to fully comply with the terms of the Revised Settlement Agreement, the parties entered into a Supplement to the Revised Settlement Agreement of September 28, 2000. Once quarterly reports submitted to the plaintiffs revealed that the defendants failed to meet the terms of the Supplement and that a new *Blackman* backlog had been accruing, the parties attempted negotiations. On January 25, 2002, the Court granted a request to refer this case to mediation. The proposed Consent Decree is the result of over eighteen months of arm's length negotiations and mediation facilitated by able and impartial court-appointed mediators.

In evaluating the fairness and adequacy of settlement, courts also consider whether counsel had sufficient information to reasonably assess the risks of litigation, the probability of success, and the range of recovery. *In re Lorazepam*, 205 F.R.D. at 377, citing *Luevano v. Campbell*, 93 F.R.D. 68, 86 (D.D.C. 1981) (“In evaluating the fairness and adequacy of a settlement, it is important to consider whether the settlement was reached after extensive factual

development, so that counsel on both sides would have had information sufficient to make a reasonable assessment of their risks of litigation.”).

The many problems within the DCPS have been well documented since 1980, when the Office of Special Education Program’s (“OSEP”) predecessor conducted a review of DCPS and found that “timeliness (from request for a hearing to submission of an order) had been violated” by DCPS. *Court’s Order Granting Plaintiffs’ Motion for Summary Judgment as to Liability*, at 5 *citing Plaintiffs’ Reply*, Exh. A at 19. As a result of this and other IDEA violations, OSEP directed DCPS to submit monthly reports regarding compliance (*Id* at 20). Since the Settlement Agreement on June 24, 1999, the defendants have supplied the plaintiffs with detailed quarterly reports, which set forth the manner in which DCPS accomplished the goals specified in the *Blackman/Jones* Management Plans, including goals regarding staff and resources, technology and reporting measures, and program changes, as well as monthly reports including a cumulative list of hearing requests pending without a hearing for at least thirty-five days, a cumulative list of hearings requests not listed and pending without a written decision for forty-five days, notification of compliance or noncompliance with other provision of the Agreement, all written information presented to the U.S. Department of Education with respect to hearing requests during the duration of the Settlement Agreement, as well as access to a sufficient sampling of records to verify the information contained in the monthly reports required under the Agreement. Defendants have agreed to continue providing these detailed monthly and quarterly reports, which will additionally include: quarterly reports generated from Encounter Tracker that show related service provision in all schools, including all early warnings received and action taken on those warnings; quarterly reports written on the status of action taken in the Encounter Tracker management reports; and quarterly reports on the defendants’ compliance with other provisions

of the proposed Consent Decree. Plaintiffs have also received frequent communication from members of the special education bar detailing their experiences with DCPS. Thus, plaintiffs were able to enter into the proposed Consent Decree with a clear understanding of the issues.

The active participation of experts in formulating the proposed Consent Decree provides additional evidence that it is fair, adequate, and reasonable. *See Cohen v. District of Columbia Nat. Bank*, 59 F.R.D. 84, (D.D.C. 1972) (“Given the arm’s-length negotiations conducted by counsel, counsel’s consultation with the plaintiffs’ retained expert, and their extensive...investigation, the Court will credit counsel’s opinion that these settlements are fair, reasonable, and adequate.”). Dr. Hehir’s participation in the proposed Consent Decree is even more compelling because both parties retained his expertise at different times in the negotiations and relied significantly on his expertise in drafting the proposed Consent Decree.

The court will more likely credit counsels’ opinion that settlements are fair, reasonable, and adequate given counsels’ experience. *See In re Lorazepam*, 205 F.R.D. at 381 (finding that the “[o]pinion of experienced and informed [counsel] should be afforded substantial consideration”). Class counsel unanimously concur that the proposed Consent Decree is in the best interest of the class. Their opinion should be highly credited given their experience in class action litigation and the applicable substantive law.

The Bazelon Center provides extensive expertise in special education law and class action litigation. Bazelon’s legal director, Ira Burnim, joined the Center’s legal staff in 1988 after serving as legal director of the Children’s Defense Fund and prior to that as a senior attorney with the Southern Poverty Law Center. Under Burnim’s direction, the Bazelon Center has litigated trend-setting cases in the areas of special education, mental health and child welfare system reform, and managed care that have served as models of reform in states throughout the

country. Bazelon Staff Attorney Tammy Seltzer received a two-year National Association of Public Interest Law fellowship in 1996 to work on special education issues in the District of Columbia and received a Frederick B. Abramson Public Service Award in 1999 for her work. Seltzer has been co-counsel in *Blackman* since 1997, has written several publications on the Individuals with Disabilities Education Act, and has presented on the topic to attorneys, advocates, and parents around the country.

Attorney Charles Moran has been a member of the District of Columbia bar since 1968. Since 1985, he has been engaged primarily in family law practice, and for the past eight years he has been devoted to advocacy and litigation for children with disabilities and has served as counsel for parents/guardians of more than a hundred students in administrative hearings or settlement agreements. He is intimately familiar with the hearing process and administrative remedies available to children with disabilities in DCPS, and with the failures and frustrations encountered by school personnel, parents, and students because of the failures of DCPS to provide timely hearings and comply with HODs and SAs.

Alisa Reff is of counsel with the law firm of Drinker Biddle & Reath, LLP. Reff's focus is on litigation and defense of employment-related claims. Prior to joining the *Blackman/Jones* case as class counsel, Reff had worked on other class action cases; she brings 15 years of litigation experience to the team of attorneys representing the plaintiffs in this case.

The proposed Consent Decree is the product of intense, arm's-length negotiation, years of well-documented information about problems in DCPS, as well as active collaboration of experts, court-appointed mediators, and experienced class counsel. Therefore, consistent with the requirements of Rule 23, it falls within the range of fair, adequate, and reasonable settlements deserving of preliminary approval.

### (3) **The Proposed Consent Decree is not the Product of Any Collusion.**

Before it can approve a settlement, a district court must find that it “is not the product of collusion between the parties.” *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5<sup>th</sup> Cir. 1977). The involvement of a court-appointed, independent mediator in settlement discussions supports the conclusion that the settlement does not result from collusion. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323 (2d Cir. 1990). *See also Pigford*, 185 F.R.D. at 101 (finding absolutely no evidence of collusion between counsel due to presence of a neutral and detached mediator at all settlement negotiations). The proposed Consent Decree results from over eighteen months of non-collusive negotiations facilitated by two court-appointed, volunteer mediators.

Evidence of collusion also includes “excessive compensation for attorneys,” (*Manual*, § 30.41), and courts have a duty to ensure that claims for attorneys’ fees are reasonable. *In re Lorazepam*, 205 F.R.D. at 383 citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C.Cir.1993). As a general rule, “[s]eparate negotiation of the class settlement before an agreement on fees is . . . preferable.” *Manual*, § 30.42, at 239. The proposed Consent Decree does not provide an amount regarding attorneys’ fees, and the parties’ agreement to defer attorney fee negotiations provides further evidence that there was no collusion between parties. Instead, the proposed Consent Decree outlines a process for determining fees after the Consent Decree is signed.<sup>11</sup>

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<sup>11</sup> After the parties sign the Consent Decree, they will attempt in good faith to negotiate reasonable interim attorney fees; if they are unable to agree upon a figure after ninety days of good faith negotiation, the parties agree to jointly request court-appointed mediation to resolve the issue. If such mediation is unsuccessful, class counsel will submit their fee application to the Court within ninety days thereafter.

Thus, the consideration of fees had no influence whatsoever on the benefits class counsel were able to obtain on behalf of the class.

In sum, on preliminary evaluation, the proposed Consent Decree is presumptively fair and not the product of any collusion.

### **C. The Proposed Nature and Method of Notice Satisfy the Rule 23 Requirements**

Rule 23 (e) states that when class actions are settled, notice “shall be given to all members of the class in such manner as the court directs.” According to the *Manual*, the notice to class members should: announce the proposed settlement; state that, if approved, it will bind class members; describe the essential or key terms of the proposed settlement; tell class members where they can examine or secure a copy; indicate the time and place of the fairness hearing and the method for objecting to the settlement; and display the address and phone number of class counsel and the procedure for making inquiries. *Manual* § 30.212 at 228.

The parties’ proposed form of Notice includes a mailing to class member parents and parent representatives, which will occur within thirty days of preliminary approval of the Consent Decree (Attachment E to the Proposed Consent Decree). The proposed notice summarizes the terms and conditions of the proposed Consent Decree in an informative and coherent manner in compliance with the *Manual’s* statement that “the notice should describe clearly the options open to the class members and the deadlines for taking action.” *Manual* § 30.212 at 228. The proposed Notice: explains the terms of the settlement in easy-to-understand language; informs the class that a fairness hearing will be held to determine whether the proposed Consent Decree should be finally approved—including the date, time, and location of the hearing; provides class counsel’s contact information; explains how to obtain copies of the

Consent Decree; notifies class members that they can object to the settlement; and explains the procedures and deadlines for submitting comments and objections.

Additionally, the defendants will have the notice published once in the Washington Times, which has a daily circulation of approximately 104,000, and the Washington Afro-American newspaper, at their expense. The publication will appear within thirty days after the Court grants preliminary approval of the proposed Consent Decree. The defendants will also post the notice on their website.

Accordingly, the Notice is more than adequate for class actions certified under Fed. R. Civ. P. 23(b)(2),<sup>12</sup> and class members will have sufficient opportunity to be heard on the fairness of the proposed Consent Decree. In light of the above, plaintiffs respectfully request that the Court approve the form of Notice (Attachment E to the Proposed Consent Decree) and the proposed methods for distributing notice to the class as described in this memorandum and in the accompanying [Proposed] Order.

#### **E. Scheduling a Fairness Hearing Is Appropriate.**

The parties also request that the Court set a date for the fairness hearing, at which time they will seek the Court's final approval of the proposed Consent Decree. Because the proposed Consent Decree embodies a fair, adequate, and reasonable settlement of plaintiffs' claims, it

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<sup>12</sup> Settlement notices, which are required under Rule 23(e) are "subject to many of the same considerations outlined...for certification notices." *Manual* § 30. 212 at 227. Because this claim has been certified under Rule 23(b)(2) ("making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole,") class members are not required to receive notice and an opportunity to opt out upon certification. Therefore, while notice of the settlement to class members is required, the notice principles governing certification of class actions certified under Rule 23(b)(2) suggest that notice requirements tend toward a minimum. *See* Fed. R. Civ. P. 23, Supplementary Note of Advisory Committee on the 1966 Amendment ("In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum").

clearly falls within the range of reasonableness meriting preliminary approval. Therefore, it is appropriate for the Court to complete the three-step process, pursuant to Rule 23 of the Federal Rules of Civil Procedure, by setting a date for the Fairness Hearing.

### III. CONCLUSION

For all of the foregoing reasons, the parties respectfully request that this Court grant preliminary approval to the proposed Consent Decree, approve the proposed forms of Notice and the manner of disseminating Notice, set a date for the dissemination of Notice and for class members to object to the proposed Consent Decree, and schedule the Fairness Hearing.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|                                  |   |   |
|----------------------------------|---|---|
| <b>MIKEISHA BLACKMAN, ET AL.</b> | ) |   |
|                                  | ) |   |
| <b>Plaintiffs,</b>               | ) | <b>Civil Action No. 97-1629 (PLF.JMF)</b> |
|                                  | ) |   |
| <b>vs.</b>                       | ) |   |
|                                  | ) |   |
| <b>DISTRICT OF COLUMBIA,</b>     | ) |   |
| <b>ET AL.</b>                    | ) |   |
|                                  | ) |   |
| <b>Defendants</b>                | ) |   |

**[PROPOSED] ORDER**

Upon consideration of the Joint Motion for Preliminary Approval of Consent Decree, it is,

HEREBY ORDERED that the Joint Motion for Preliminary Approval is GRANTED; and FURTHER ORDERED:

1. That the proposed Consent Decree is Preliminarily Approved;
2. That the form and manner of disseminating Notice and the proposed form of Notice is approved;
3. That the dissemination of the Notice will occur on or before \_\_\_\_\_;
4. That the Fairness Hearing will be held on \_\_\_\_\_ at \_\_\_\_\_
5. That any objections to the proposed Consent Decree must be filed with the Court and served on the parties no later than \_\_\_\_\_; and
6. That the parties will file their responses, if any, to the objections filed with the Court no later than \_\_\_\_\_.

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PAUL FRIEDMAN  
United States District Judge

DATE:

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Joint Motion and Memorandum for Preliminary Approval of Consent Decree and the Proposed Consent Decree was served on this 4th day of September 2003, via first class mail upon

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\_\_\_\_\_/s  
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