

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

LYDIA REBECCA GASKIN *et al.*,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA DEPARTMENT OF
EDUCATION, *et al.*,

Defendants.

No. 94-CV-4048
(JUDGE ROBRENO)

**MEMORANDUM OF LAW IN SUPPORT OF
JOINT MOTION FOR PROVISIONAL
APPROVAL OF SETTLEMENT AGREEMENT**

The parties have moved for provisional approval of a Settlement Agreement that they have reached in the above class action, as well as for approval of a class notice. The parties submit that the Settlement Agreement meets the standards for provisional approval of a class action settlement and that such approval should be granted.

Introduction

This case was filed on June 30, 1994 as a class action suit by twelve students in local school districts in Pennsylvania who asserted that they had been denied the right to be educated in regular education classes with supplementary aids and services, and by a number of disability rights organizations, against the Commonwealth of Pennsylvania, Department of Education (PDE), PDE officials and members of the state Board of Education. Plaintiffs' claims arose under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (IDEA); Section

504 of the Rehabilitation Act 29 U.S.C. § 794; and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 (ADA).

The plaintiffs claimed that the Pennsylvania Department of Education had violated its statutory duty to ensure that students with disabilities are educated with their peers who do not have disabilities to the maximum extent appropriate and that, as a consequence, plaintiffs and other members of the class have been removed from regular education classes and schools even though they could satisfactorily be educated in regular education classes with the use of supplementary aids and services. Plaintiffs alleged, further, that PDE failed to assure that they and other class members had been placed in regular education classes for at least part of the school day but denied the supplementary aids and services they need to succeed in regular education classes. The defendants denied these allegations.

A class consisting of all school-age students with disabilities in Pennsylvania who have been denied a free appropriate education in regular education classrooms with individualized supportive services, or have been placed in regular education classrooms without the supportive services, individualized instruction, and accommodations they need to succeed in the regular education classroom was certified on June 12, 1995. The class was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

The parties engaged in extensive and at times contentious discovery. Numerous discovery disputes arose that had to be resolved by the Court. The parties exchanged approximately eighteen expert reports on subjects including the defendants' scheme for monitoring local school districts; their system of comprehensive personnel development and the delivery of technical assistance and training; special education placement patterns in Pennsylvania; the services and

pecially designed instruction actually received by a sample of special education students in Pennsylvania; and the educational experiences of the individual plaintiffs.

The parties also exchanged settlement proposals and drafts and engaged in attempts at settlement discussions before two different United States Magistrate Judges, the Honorable James R. Melinson and the Honorable Arnold C. Rapoport, both of the Eastern District of Pennsylvania. These discussions began in June, 1999 and continued, off and on, until April 30, 2002, when they were discontinued.

Following a discovery dispute in the spring of 2002, the Court ordered the appointment of the Honorable Louis C. Bechtle, a retired federal judge, as Discovery Master in this case. Judge Bechtle developed a process for resolution of discovery disputes and set deadlines for the completion of all discovery. Judge Bechtle resolved numerous discovery disputes, reviewed hundreds of pages of documents and issued a detailed ruling on the discoverability of these documents and parts thereof. With his assistance and supervision, discovery was completed on May 30, 2003.

In July, 2003, the parties filed cross-motions for summary judgment, followed by responses and replies. Collectively, the submissions on summary judgment were voluminous. On March 24, 2004, the Court heard oral argument on the cross-motions for summary judgment. Following the argument, the parties agreed to engage in settlement talks and to seek the assistance of Judge Bechtle as a mediator, due to Judge Bechtle's familiarity with the case and the parties' trust in his fairness and objectivity.

The parties executed a detailed Agreement to Mediate, and submitted an order governing mediation that was submitted and entered by the Court. From July through mid-December, 2004, the parties negotiated a comprehensive settlement agreement covering all the issues in the case.

The negotiations included representatives of the plaintiff parties; they included mediation sessions before Judge Bechtel, face to face meetings of the negotiating teams, correspondence and exchange of drafts. The negotiations were at arms length.

In the proposed settlement, the Pennsylvania Department of Education agrees to a series of undertakings that, collectively, will require and encourage local school districts to provide supplementary aids and services to students with disabilities in regular education classrooms. The undertakings cover virtually every aspect of PDE's special education system, from policies and procedures and individual education planning to compliance monitoring, complaint resolution, special education planning and comprehensive personnel development. The result will be a seamless system in which school district staff are informed of their responsibility to develop and provide supplementary aids and services in regular education classes, enabled to develop the skills they need to fulfill this responsibility, monitored for their compliance with this responsibility and required to take corrective action when they fail to fulfill it. Thus, the settlement promises to remedy current conditions and provide a viable mechanism for compliance in the future. *See Collier v. Montgomery County Housing Authority*, 192 F.R.D. 176, 186 (E.D. Pa. 2000).

ARGUMENT

I. The Settlement Agreement Amply Satisfies the Standards for Provisional Approval of a Class Action Settlement.

To approve a settlement in a class action suit preliminarily, before directing that members of the class be given notice and an opportunity to be heard in a formal fairness hearing, the Court should be satisfied that "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential

treatment to class representatives or segments of the class, and falls within the range of possible approval.” *Samuel v. Equicredit Corp.*, 2002 U.S. Dist. LEXIS 8234 (E.D. Pa. 2002) *1, citing MANUAL ON COMPLEX LITIGATION § 30.44 (1985). In addition, "the court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid." NEWBERG ON CLASS ACTIONS § 11.25 (3d ed. 1992) at 11-37. *See also Fry v. Hayt*, 198 F.R.D. 461, 465 (E.D. Pa. 2000); *Lachance v. Harrington*, 965 F. Supp. 630, 636 (E.D. Pa. 1997).

A. The Settlement Negotiations Were Serious, Informed and Non-Collusive.

There can be no question that the negotiations that led to the proposed Settlement Agreement were at arms-length. The parties first engaged in settlement negotiations in June, 1999, before a federal magistrate judge, and those negotiations continued before a second magistrate judge until April, 2002, when they ended in impasse. Negotiations began again after the parties’ dispositive motions were argued in March, 2004, with the Honorable Louis C. Bechtle as a mediator. Judge Bechtle had served as Discovery Master in this case and thus was well informed in his own right about the issues in the case and the strengths and weaknesses of each party’s case. Judge Bechtle’s work as mediator was essential to resolving some of the difficult issues that divided the parties.

The parties had engaged in extensive discovery over a period of many years and thus were able to evaluate their respective positions. The defendants were aided during the settlement negotiations by the former director of the Bureau of Special Education and current director of the Pennsylvania Training and Technical Assistance Network, who has worked in leadership roles within Pennsylvania’s special education system for many years. Representatives of the plaintiff

parties also participated in the negotiations; both they and plaintiffs' counsel contributed their knowledge, accumulated over many years of advocacy for special education students across the Commonwealth, of special education service delivery systems in Pennsylvania.

B. The Proposed Settlement Agreement Contains No Obvious Deficiencies.

The proposed settlement agreement provides the plaintiff class with a remedy that addresses virtually every form of relief that was requested in the Complaint. The complaint requested that PDE be ordered to provide comprehensive personnel development to train regular and special education personnel in promising educational practices for the provision of supplementary aids and services to students with disabilities in regular classes; that PDE be ordered to monitor local school districts to determine whether they improperly remove class members from regular education classrooms and whether they provide the specialized instruction and supplementary aids and services that could enable students with disabilities to be educated satisfactorily in the regular classroom environment; and that PDE require local school districts to take corrective action when failure to provide such services is found. Complaint, Request for Relief ^{aa} 1-12. These elements of plaintiffs' requested relief are addressed in Sections IV.4, IV.6 and IV.7 of the Agreement, and include among PDE's undertakings a new form of monitoring, LRE Monitoring, that PDE will employ in addition to existing monitoring methods.

In addition, the Settlement Agreement provides for policy development and implementation that will require school districts to adhere to the standards for placing students in regular education classrooms set forth by the Court of Appeals for the Third Circuit in *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204 (3d Cir. 1993) (Section IV.1); changes in the IEP format to include additional guidance to IEP teams in making placement

decisions that comport with 20 U.S.C. §1412(a)(5) and *Oberti* (Section IV.3); a Complaint Resolution Process that is highly responsive to parent complaints against local school districts; and support for advocacy by the plaintiffs. A central provision of the agreement is an Advisory Council to review implementation of the Agreement and system-wide progress, the majority of whose members will be parents of children with disabilities.

The Settlement Agreement contains no obvious deficiencies such as unduly large payments of attorney fees to plaintiffs' counsel or the named plaintiffs. The Agreement provides for a one-time payment of attorney fees and costs to plaintiffs' counsel that represents approximately 69% of their lodestar and out of pocket costs. Plaintiffs' counsel will receive no further payments for work performed after May, 2004, or for work on enforcement and mediation. They will be responsible for a significant portion of the costs of mediation in connection with enforcement and any other out of pocket costs they incur in connection with implementation. *See Samuel v. Equicredit Corp.*, 2002 U.S. Dist. LEXIS 8234 at *5 n. 4 (settlement preliminarily approved where fees were equal to or less than plaintiffs' lodestar).

The twelve individual plaintiffs will receive some compensation in response to their claims for compensatory education and tuition reimbursement. Complaint, Request for Relief ¶ 13. These claims were the subject of extensive discovery in the course of the litigation and were extensively briefed in plaintiffs' motion for summary judgment. Judge Bechtle was actively involved in helping to resolve the parties' respective positions concerning the monetary provisions of the Settlement Agreement.

C. The Settlement Agreement is Fair and Reasonable.

The Settlement Agreement is plainly within the range of reasonableness of a class action settlement affecting an entire state system for delivery of special education services.

In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Court of Appeals held that the following factors should be considered by district courts in determining whether a settlement under Rule 23(e) is fair, reasonable and adequate to serve the interests of the class:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 157.¹ Measured by these factors, the proposed Settlement Agreement is fair and reasonable.

(1) The complexity, expense and likely duration of the litigation. At the time the present settlement negotiations began, the Court had not yet ruled on the parties comprehensive

¹ The Settlement Agreement in this case was not negotiated prior to class certification, and so the especially stringent rules applicable to “settlement classes” do not apply here. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 805 (3d Cir. 1983).

cross- motions for summary judgment. The parties' joint management plan provided for additional discovery after resolution of dispositive motions (assuming they were denied). A case of this magnitude would be enormously expensive and time-consuming to try. Both sides engaged numerous expert witnesses who would need to be compensated for their testimony at trial. The trial would likely be of long duration. *See D.M. v. Terhune*, 67 F.Supp. 2d 401, 409-410 (D.N.J. 1999). An appeal is virtually a certainty in a case raising relatively novel and complex issues, as this case does. For these reasons, if the case were not settled, class members would have to wait years for any equitable relief they might receive, delay that is not in the interest of children with disabilities.² *Cf. Hawker v. Consovoy*, 198 F.R.D. 619, 627-628 (D.N.J. 2001).

(2) *The reaction of the class to the settlement.* This, of course, can only be assessed after notice and hearing. It is important, however, that the named plaintiffs and plaintiff organizations collectively represent many different disabilities and regions of the state.

(3) *The stage of the proceedings and the amount of discovery completed.* This factor has been called “[a] lens through which courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.” *Serventi v. Bucks Technical High School*, 2004 U.S. Dist. LEXIS 24025 (E.D.Pa.) *18, citing *In re General Motors Corp.*, 55 F.3d at 813. Counsel’s appreciation of the merits was well-developed in the present case. The Settlement Agreement was negotiated after the close of discovery in a case where discovery was unusually protracted. Discovery included more than fifty depositions; an extensive review of the programs of a sample of special education students across the Commonwealth in which dozens

² As the Court of Appeals observed in *Susan N. v. Wilson School Dist.*, 70 F.3d 751, 760 (3d Cir. 1995), “Children are not static beings; neither their academic progress nor their disabilities wait for the resolution of legal conflicts.”

of observers and reviewers participated, and whose methodology was hotly contested; immense document discovery; numerous proceedings to resolve discovery disputes; and the appointment of a Discovery Master. The parties filed comprehensive dispositive motions.

(4) *The risks of establishing liability.* This case involved relatively novel legal theories, some of them untested in this jurisdiction, of the state's responsibility for comprehensive personnel development and the provision of supplementary aids and services in regular education classrooms. This case is also highly fact-intensive. Such a case is inherently risky. *See Serventi v. Bucks Technical High School*, 2004 U.S. Dist. LEXIS at *19-*20.

(5) *The risks of establishing damages.* Because this is an action for injunctive relief, the fifth *Girsh* factor does not apply. *Hawker v. Consovoy*, 198 F.R.D. at 633.

(6) *The risks of maintaining the class action through trial.* The class had been certified since 1995, and all discovery had been conducted on a class-wide basis; thus, this does not appear to be a great risk.

(7) *The ability of the defendants to withstand a greater judgment.* Since this is a case for injunctive and declaratory relief, this factor is inapplicable. *Serventi* at *20.

(8) *The range of reasonableness of the settlement fund in light of the best possible recovery* and **(9) *the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.*** In evaluating these factors in a case seeking injunctive relief, courts compare the relief accorded by the settlement to the relief the plaintiffs could expect to receive after trial, in light of the risks of litigation. *D.M. v. Terhune*, 67 F.Supp. 2d at 410-411. Here, where the settlement addresses virtually all the relief requested by the plaintiffs in their complaint and accords additional relief, it is submitted that the settlement is a

fair resolution of plaintiffs' claims, "considering the attendant risks of litigation and the marginal additional relief possible from a favorable outcome." *Id.* at 411.

II. The Proposed Notice to Class Members is Adequate.

The parties propose that notice be given to class members through a variety of methods, including notifying the parents of special education through their local school districts, through parent organizations and the plaintiff organizations; by publication in leading newspapers in each of Pennsylvania's media markets; and by posting on the parties' and counsel's websites. In addition, notice will be provided by mail to all parents who have filed complaints with the Bureau of Special Education or have participated in a due process hearing during the last two years. The parties submit that such notice is adequate in this case, where the members of the class, like the members of many other classes certified under Rule (b)(2), cannot be identified with precision since the class is defined by the conduct of the defendants. To the extent practicable, the parties undertake to give notice to the families of all special education students in Pennsylvania.

Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). The type of notice to which a member of a class is entitled depends upon the information available to the parties about that person" and the possible methods of identification. *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1098 (5th Cir. 1977), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). In determining the reasonableness of the effort required, the court must look to the "anticipated results, costs, and amount involved." *In re Nissan*, 552 F.2d at 1099. For those whose names and

addresses cannot be determined by reasonable efforts, notice by publication will suffice under Rule 23(c)(2) and under the due process clause. *Mullane*, 339 U.S. at 317-18.

CONCLUSION

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

Respectfully submitted,

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