UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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.

No. 18-CV-6109 (NG) (SJB)

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

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I. INTRODUCTION

After nearly four years of negotiations, the Parties have reached a proposed resolution of the claims raised in Plaintiffs' Complaint based on the alleged systemic failure of New York City's Department of Education ("DOE") to provide students with diabetes a free and appropriate public education ("FAPE") as well as equal access to all school-related programs and activities. Plaintiffs and members of a certified class (the "Class") are students with diabetes enrolled in DOE public schools who allege they have repeatedly been excluded from Defendants' school programs and school-related activities in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq*. ("Section 504"), the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq*. ("ADA"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107(4)(1)(a) ("NYCHRL").

The resulting Settlement Agreement ("Settlement Agreement" or "Agreement") with Defendants is fair, reasonable, and adequate, and largely resolves the issues raised in Plaintiffs' Complaint. The Settlement was the product of thorough arm's length negotiations, which included the input of nationally recognized diabetes experts, and Department of Education ("DOE") and Department of Health and Mental Hygiene ("DOHMH") leadership and staff. Declaration of Torie Atkinson ("Atkinson Decl."), ¶ 7. These negotiations included at least 75 in-person and virtual settlement meetings between experienced and knowledgeable counsel, exchanges of information, and numerous rounds of settlement proposals. *Id.*

Under the Settlement Agreement, Defendants will modify (and in many cases, have already modified, pursuant to ongoing Memoranda of Understanding or MOUs) their policies, practices, and procedures related to: 1) Section 504 planning to determine the needs of students with diabetes and how Defendants will meet those needs; 2) the provision of care in the least

restrictive environment ("LRE"); and 3) training for staff and contractors (nurses, paraprofessionals, Section 504 coordinators, bus drivers and attendants, and teachers and other staff) and the provision of services during the school day and in afterschool activities. Atkinson Decl., Ex. 1 (the "Agreement"), ¶¶ 10-20; Exs. A-J.[1] These institutional changes will mean that students with diabetes have the same access to school and school-related activities as their non-disabled peers.

The Settlement Agreement also provides for comprehensive reporting and monitoring. The Agreement will appoint the American Diabetes Association (the "Association"), the nation's premiere diabetes organization, as a Joint Expert to review and provide input on training and other issues affecting students with diabetes in schools. Additionally, the Agreement appoints Peter D. Blanck, Ph.D., J.D. renowned expert on the rights of students with disabilities, to monitor Defendants' compliance throughout the term of the Settlement Agreement. The Settlement will terminate after the three-year effective period of the Agreement has elapsed and a final Monitoring Report has been issued.

The Parties ask that the Court: (i) preliminarily approve the Settlement Agreement, (ii) approve the proposed form of the Class Notice and distribution plan, and (iii) set a date for a Fairness Hearing. The Parties' counsel have negotiated the Long Form Notice and Short Form Notice, Agreement, Ex. A., and agree to the form and content. The proposed Class will, upon final approval, release claims for systemic injunctive and declaratory relief relating to the subject matter of the Complaint, including claims under the ADA, Section 504, and NYCHRL. The proposed Class will not release claims relating to their individual educational rights or any claims for monetary damages.

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[1] All references to the Agreement refer to the Proposed Settlement Agreement and Order attached as Exhibit 1 of the Declaration of Torie Atkinson.

II. BACKGROUND OF THE CASE AND PROCEDURAL HISTORY

Prior to filing this lawsuit, Plaintiffs invested significant effort investigating and evaluating their claims, conducting extensive factual investigation and research, and consulting with families and stakeholders. Atkinson Decl. ¶ 4. Plaintiffs sent a demand letter and met with Defendants in person to discuss issues prior to filing, but were unable to resolve them. *Id.*

Plaintiffs then filed this civil rights class action lawsuit on November 1, 2018. Atkinson Decl. ¶ 5. The Complaint alleged that Defendants consistently failed to put necessary services in place for students with diabetes either at the start of the school year or following diagnosis during the school year, burdening parents and guardians by requiring them to report to school, often multiple times a day, to provide the medical care that DOE did not provide, including testing blood glucose levels and administering insulin. Complaint, ECF No. 1, ¶¶ 2-3.

Plaintiffs allege a lack of consistent and adequate staff training that meant that Defendants placed children with diabetes in danger by routinely failing to sufficiently monitor students' blood glucose levels and failing to respond appropriately to potentially life-threatening hypoglycemia and hyperglycemia.[2] Complaint at ¶¶ 3-4. In addition to the lack of appropriately trained personnel, the Complaint alleges that DOE segregated students with diabetes and required students to miss important educational time by forcing students with diabetes to leave class multiple times a day to receive routine and necessary diabetes care. Complaint at ¶ 5. The Complaint also alleges that students with diabetes were regularly prevented from participation in

[2] Low blood glucose (hypoglycemia) is when blood glucose levels have fallen below the target range. If a student does not get enough glucose, the student can experience blurred vision, difficulty concentrating, confused thinking, slurred speech, numbness, drowsiness, and in serious cases, seizures, coma, or death. High blood glucose (hyperglycemia) is when a student has too little insulin, which is required to control the amount of glucose in a person's system, help store glucose in the body, and regulate metabolism of carbohydrates, fats and proteins. Failure to treat hyperglycemia can cause ketoacidosis (Without enough insulin, your body begins to break down fat as fuel, producing a buildup of acids in the bloodstream called ketones, eventually leading to diabetic ketoacidosis if untreated), which can be life-threatening.

field trips taken during the school day and participation in before- and after-school activities including school breakfast, after-school care, and school bus transportation. Complaint at ¶ 6. *See also* Complaint ¶¶ 14-25, 51-138.

On January 23, 2019, the Parties entered a Structured Negotiation Agreement ("SNA") and jointly sought a stay of proceedings to engage in structured negotiations. ECF Nos. 36, 36-1. Judge Sanket J. Bulsara granted the stay request orally at a conference on January 24, 2019.

On February 20, 2019, Plaintiffs moved for Class Certification. ECF No. 43. That motion was granted, Disability Rights Advocates was named Class Counsel, and the following Class was certified on June 18, 2019: "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." ECF No. 69.

Plaintiffs and Plaintiffs' Counsel conducted extensive factual investigation, research, and consultation with class members and stakeholders during the course of the litigation and resulting settlement. Atkinson Decl. ¶ 9; Declaration of Crystal Woodward ("Woodward Decl.") ¶ 13. Plaintiffs and Class Counsel consistently shaped their proposals and positions based on these meetings and information gathered, and vigorously advocated for the needs of the Class, including escalating individual issues to Defendants' attention. Atkinson Decl. ¶ 9.

The Parties jointly sought stays of discovery to engage in structured negotiations until November 23, 2020. ECF No. 86-1. These efforts were both robust and productive. The negotiations included at least 75 in-person and virtual settlement meetings among counsel, input from nationally recognized diabetes experts, exchanges of documents and information, and numerous rounds of settlement proposals. Atkinson Decl. ¶ 7; Woodward Decl. ¶ 12. On October 27, 2020, the Parties filed a joint status report that included the first five MOUs of substantive

relief related to Section 504 planning for both new and returning students, the provision of care for students in the least restrictive environment, and training for 504 Coordinators and school staff, with relief related to staff nurses filed on November 5, 2020. ECF Nos. 88-89-1.[3] Relief related to the training of contract nurses was filed on May 3, 2021, ECF No. 96-1, and relief related to afterschool and extracurricular activities was filed on May 10, 2021, ECF No. 97-1.

The Parties were unable to mutually resolve issues related to accommodations on field trips and on transportation, and Plaintiffs moved the Court for partial summary judgment on those issues on July 2, 2021. ECF Nos. 101-117. The Court held oral argument on November 30, 2021, and granted Plaintiffs' motion in its entirety on January 27, 2022. ECF No. 119. The Court entered an order and injunction on those issues on July 19, 2022. ECF No. 128.

III. SUMMARY OF THE SETTLEMENT

The proposed Settlement addresses each of the issues raised in Plaintiffs' Complaint. First, it addresses and remedies the alleged failure to schedule and hold Section 504 Meetings, and draft and implement comprehensive Section 504 plans, that lay out the diabetes-related care and accommodations which children with diabetes need to safely attend school and benefit from their education.

Second, the Settlement addresses and remedies the alleged failure to adequately train school nurses, paraprofessionals, aides, teachers, substitutes, bus personnel, and other staff on diabetes care to meet the needs of students with diabetes, such as insulin administration, blood glucose monitoring, or glucagon administration.

Third, the Settlement ends the alleged unnecessary segregation of students with diabetes leaving the room and missing valuable instruction time to receive routine diabetes-related care.

[3] The Parties re-filed these MOUs on December 7, 2020 to correct errors in filing. ECF Nos. 91-1 to 91-6.

Fourth and finally, the Agreement updates existing, and creates new, policies and protocols to ensure that students with diabetes are not excluded from school and school-related activities like field trips, after school activities, and school breakfast by not providing necessary diabetes-related care.

1. Reforms to the Section 504 Planning Process

The Agreement includes significant reforms of Defendants' Section 504 planning process that ensures Section 504 meetings are scheduled and held, and that Section 504 plans are created and signed, promptly and consistently.

The Agreement provides several reforms that apply to all students with diabetes, including changes to Defendants' longstanding practices, including:

- The development and adoption of a template Section 504 Plan for students with diabetes, based on the American Diabetes Association template. Agreement, Ex. A;
- The review and implementation of a student's Diabetes Medication Administration Form ("DMAF") immediately by a staff nurse, so long as the medical provider instructions are fully complete and unambiguous. If the DMAF is incomplete or unclear, the Office of School Health ("OSH") nurse will promptly contact the OSH Central office. The OSH Central office will then contact the student's physician or parent to clarify the DMAF with the aim of implementing the clarified/completed DMAF as soon as practicable. If the nurse is a contract rather than staff nurse, the OSH shall review the DMAF and transmit it back to the school nurse as soon as possible and no later than the following school day. Agreement, Ex. C; and
- Commitment that accommodations shall not be denied on the basis of resources or available funding. Agreement, Ex. J.

For students with diabetes who are returning to the same school the next school year, Exhibit B of the Agreement also requires that:

- Those students be contacted and made aware of Section 504 services every year;
- Section 504 Coordinators will schedule a Section 504 Meeting on behalf of a returning student to take place within 15 school days of receipt of the request for health services, or prior to the end of the school year, whichever is sooner.

For students with diabetes who are beginning school for the first time, are newly diagnosed with diabetes, or starting at a new school, Exhibit C of the Agreement provides that:

- For students who have submitted a DMAF or request for 504 services prior to the start of the school year, a Section 504 Meeting will take place prior to the first day of school whenever possible, and when health services such as nursing or a paraprofessional are requested, no later than 15 school days after the first day of school.
- For students who have submitted a DMAF or request for 504 services during the school year, a Section 504 Meeting will take place as soon as possible, and when health services such as nursing or a paraprofessional are requested, no later than 15 school days from the receipt of the DMAF or request for health services.
- As soon as possible following DOE's receipt of a DMAF and in any event no later than 5 school days following such receipt, the school will convene an Interim Care Meeting with the parent, school nurse, Diabetes Team if possible, and a school administrator with authority over school-based staff, to discuss the student's needs and provide a plan of care between when a clear and unambiguous DMAF is available and when a final Section 504 Plan can be adopted and implemented. The

meeting will focus on plans for the assignment of care and diabetes-related training of adults with responsibility for the student.

These reforms mean that students with diabetes will be able to attend school immediately, and ensure that necessary care and services are in place promptly.

2. Requirements for Staff Training at All Levels

The Agreement also mandates and creates 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. Agreement, Exs. D-H. Training materials will be reviewed and updated as needed in consultation with the American Diabetes Association. These training requirements include:

- Nurses:
    - All nurses will receive initial training on diabetes-related care, the rights of students with diabetes, Section 504 planning, and diabetes technology, and new nurses will not be placed at a school until they have completed such training. New staff nurse initial training will occur within six weeks of their first date of employment. New contract nurse initial training is required during their orientation.
    - All nurses will complete Pre- and Post-Training Competency Assessments to evaluate nursing skills on diabetes generally, which will be updated as needed.
    - All nurses will receive student-specific training on the particular needs of the student they care for, such as diabetes technology. For example, a nurse treating a student who uses a Dexcomm 6 Continuous Glucose Monitor (CGM) will receive training on that specific device.
    - Additional training will be provided if a student is diagnosed or enters school after the start of the school year, there is a new aspect of a student's diabetes treatment regimen, or additional training is needed. Parents may request such additional training, and the training must be provided to staff nurses within 5 school days of the need for training being identified, and for contract nurses as soon as possible with a target date of 5 school days but no later than 10 school days after the need has been identified.

  - All nurses will receive annual refresher training on diabetes-related care prior to the start of the school year or as soon as possible thereafter.

- Paraprofessionals:

  - As soon as a Section 504 Team has determined that the assignment of a paraprofessional is appropriate, a paraprofessional to provide diabetes-related care will be identified promptly and in most cases within 5 school days.

  - All paraprofessionals will receive training on diabetes and the tasks they are expected to perform, as well as student-specific training for the individual student they are assisting.

  - A refresher training will be provided annually to all paraprofessionals who continue to be assigned to students with diabetes. Additional training may be provided as needed and parents may request additional training. Training will be provided upon the request of the parent if the school nurse, Diabetes Team Nurse, or Nursing Supervisor supports the need for additional training.

- Section 504 Coordinators:

  - At least one staff member at each school will receive training on Section 504 planning, including refresher training to be completed by April 15 of each school year prior to Section 504 meetings being held in May and June.

  - For new Section 504 Coordinators, 80% will receive initial training within 10 school days after the first day of school, with 100% receiving training by October 15 of each school year.

  - The annual training shall include training on the procedures and timelines for Section 504 planning for students with diabetes, including:

    - Requirements about when meetings should take place, who should be on the Section 504 team, and what the purpose and goals of the Section 504 meeting are.

    - Development of Section 504 Plans.

    - Information about the Diabetes Medication Administration Form ("DMAF");

    - An overview of certain accommodations for students with diabetes, including who provides the accommodations, nursing services,

paraprofessional services, testing accommodations, and any other service listed in the Section 504 Plan.

- Recordkeeping and documentation of this training as well as Section 504 planning and meetings.

- DOE staff such as teachers, coaches, and other adults with responsibility for a student with diabetes:
  - Any adult with responsibility for a student with diabetes during the school day or during school-related activities, including teachers, coaches, and afterschool or field trip supervisors, will be identified in the Section 504 plan.
  - All such adults with responsibility shall receive Level 1 Training about diabetes, which includes the signs and symptoms of hypoglycemia and hyperglycemia, and any necessary accommodations that must be provided to students with diabetes. Some of these adults receive Level 1 + Glucagon training, which includes, in addition to the training listed above, training on the recognition and treatment of severe hypoglycemia.
  - A sufficient number of adults shall receive Level 2 Training about diabetes, which includes skills such as blood glucose monitoring, treatment of hypo- and hyperglycemia, ketone checks, and glucagon administration, to ensure that at least one trained school staff is available at all times during the school day and on field trips and other school-related activities as needed.
  - Staff receiving Level 1 training shall complete such training within 10 school days of having been identified. Staff will receive Level 2 training within 15 school days of having been identified. As part of their training, they must successfully demonstrate the particular skills they will be responsible for performing to nursing staff.
- Bus drivers and attendants
  - All bus drivers and attendants the DOE identifies as transporting a student with a DMAF will receive training in recognizing and treating hypoglycemia, including the administration of glucagon in compliance with the Court's January 27, 2022 Opinion & Order, as modified by the July 19, 2022 Order. Back-up drivers and attendants will also be trained. This training will include a hands-on training in multiple types of glucagon.
  - The DOE will provide drivers and attendants a "quick action guide" identifying the student's specific symptoms of mild to moderate hypoglycemia, and the

common symptoms of severe hypo- and hyperglycemia, and the student's form of prescribed glucagon.

3. Integration of Students with Diabetes with Peers

The Settlement also provides for new guidance intended to address the unnecessary segregation of students with diabetes. Defendants have adopted new policies and new language in various guidance both internal, to school staff, and external, to parents and families. Under this new guidance, school staff must consider and minimize missed instruction time in determining where to provide diabetes-related care, and these considerations are included in the template Section 504 plan. Agreement, Ex. J. Additionally, resources are not permitted as a consideration for where a student receives diabetes-related care. *Id.*

4. Provision of Necessary Care on Field Trips, Afterschool, and at Other School Activities

The lawsuit, and this Agreement, include new requirements for the provision of health services afterschool for students with diabetes. Indeed, Defendants have reformed their policies regarding health services afterschool for students with all disabilities, and not just diabetes. Similarly, the July 19, 2022 Order & Injunction of this Court ensure the provision of appropriate accommodations for students on bus transportation and on field trips. ECF No. 119. As a result, the Section 504 planning process will explicitly discuss and make arrangements for afterschool care, including providing paraprofessionals, nurses, and/or other trained staff as needed to ensure that students with diabetes can fully participate in school-sponsored extracurriculars to the same extent as non-disabled students. Agreement, Ex. I. Additionally, non-DOE programs that use DOE facilities must provide necessary diabetes-related care and accommodations or lose their permit to operate on DOE property.

5. Monitoring & Joint Expert

The Agreement provides for extensive data collection and reporting to ensure that the various terms and provisions of this agreement are being implemented. To collect this information, Defendants have created and implemented a new Section 504 tracking system to more reliably collect and review this information.

Furthermore, the Agreement appoints the American Diabetes Association as a Joint Expert, to review and provide feedback on training materials and attend some trainings, as well as be a resource for questions on diabetes-related care. Agreement at ¶¶ 32, 34; Woodward Decl. ¶¶ 16; Atkinson Decl. ¶ 14. The American Diabetes Association will be compensated by Defendants at a rate of $10,000 per year for each of the three years of the Agreement. Agreement at ¶ 76.

With respect to monitoring, the Agreement appoints Dr. Blanck, a nationally renowned expert on the rights of students with disabilities, as joint monitor. Agreement at ¶ 33; Atkinson Decl. ¶ 15; Atkinson Decl., Ex. 2 (Dr. Blanck's CV). Dr. Blanck will have access to information necessary to monitor the progress and implementation of the Agreement over dozens of compliance metrics. Agreement at ¶¶ 21-26, 35-41; 45-46. Dr. Blanck will also attend ten Section 504 meetings a year, and review a sampling of ten Section 504 plans, and 100 field trip request forms ("Trips Plans"), to ensure that the meetings and plans conform with the terms of this Agreement. Agreement at ¶¶ 39-41. Dr. Blanck will be compensated at a rate of $475 per hour for reasonable hours spent enforcing the Agreement, not to exceed 200 hours per year. Agreement at ¶ 77; Exhibits N and O.

6. Other Provisions

In addition to the provisions above, the Agreement includes the following provisions:

- Provided that the Order of Final Approval is entered on or before August 31, 2023, this Agreement shall have effect from September 1, 2023 to August 15, 2026. If the Order of Final Approval is entered after August 31, 2023: the Parties will meet and confer to determine the period the Agreement shall have effect, which will be no less than three (3) years. Agreement at ¶ 42.

- Named Plaintiffs M.F., M.R., and I.F. will receive $5,000 each in Class Representative service awards. Agreement at ¶ 75.

- Plaintiffs release claims related to systemic injunctive relief regarding the systemwide failure to provide diabetes-related care and accommodations that arose on or before the Effective Date of the Agreement. Agreement at ¶ 65.

- There is a dispute resolution procedure if issues arise during the term of the Agreement. Agreement at ¶ 50.

- Defendants agree that Plaintiffs are entitled to attorneys' fees and costs as though they are prevailing parties. The Parties have agreed to negotiate the amount of fees incurred. If the Parties are unable to resolve this issue, the Parties may seek assistance from a private mediator or Plaintiffs' counsel may submit an application for counsel fees to the Court. Defendants also agreed that Plaintiffs are entitled to reasonable attorneys' fees and costs for monitoring and enforcing the terms of the Agreement. Agreement at ¶¶ 78-79.

IV. ARGUMENT

Overall, the breadth and depth of the relief in this agreement is exceptional. The widespread relief the Parties have mutually agreed to unquestionably satisfies the preliminary approval requirements.

1. Preliminary Approval of the Proposed Settlement Agreement Is Proper.

In granting preliminary approval of a settlement of a class action, a court must decide that the settlement at issue is "fair, reasonable, and adequate," and determine that "the settlement is not the product of collusion." *Mba v. World Airways, Inc.*, 369 F. App'x 194, 197 (2d Cir. 2010); *see also* Fed. R. Civ. P. 23(e). Class action settlements such as this one are generally subject to a two-step approval process: during the first step, a court grants preliminary approval, wherein it

determines that the agreement "is the result of serious, informed, non-collusive ('arm's length') negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies . . . and where the settlement appears to fall within the range of possible approval." *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009) (citations omitted); *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

The district court must explore these factors, but the decision to approve or reject a settlement is committed to the discretion of that court. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 473 (S.D.N.Y. 1998) ("The decision to grant or deny such approval lies within the discretion of the trial court … and this discretion should be exercised in light of the general judicial policy favoring settlement.") (citations omitted). *See also Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079-80 (2d Cir. 1995). "In exercising this discretion, courts should give proper deference to the private consensual decision of the parties. In evaluating the settlement, the Court should keep in mind the unique ability of Class and defense counsel to assess the potential risks and rewards of litigation." *Clark v. Ecolab, Inc.*, Nos. 07-CV-8623, 04-CV-4488, 06-CV-5672, 2009 WL 6615729, at * 3 (S.D.N.Y. Nov. 27, 2009) (citations and internal quotation marks omitted).

If a proposed settlement receives preliminary approval, the parties then provide notice to the class as ordered by the court. In a Rule 23(b)(2) class action, so long as the notice be "reasonably calculated" to "apprise interested parties" of the settlement and "afford them an opportunity to present their objections," and "express[es] no opinion on the merits of the settlement," a district court has "virtually complete discretion as to the manner of giving notice to class members." *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) (internal citations and quotations omitted). *See also Battle v. Liberty Nat. Life Ins. Co.*, 770 F. Supp. 1499,

1521 (N.D. Ala. 1991) (23(b)(2) class action notice requirements are subject to only "broad reasonableness standards imposed by due process").

Once a court grants preliminary approval and the parties provide notice to the class, the second step is triggered, and the Court then conducts a fairness hearing and evaluates the settlement to determine whether it is fundamentally "fair, reasonable, and adequate." *See Charron v. Wiener*, 731 F.3d 241, 247–48 (2d Cir. 2013). There is a "presumption of fairness, adequacy, and reasonableness" that "may attach to a class settlement" such as this one that is "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (citation and internal quotation marks omitted). In granting final approval, the Court will consider both the factors laid out in Federal Rule of Civil Procedure 23(e)(2) and the nine *Grinnell* factors established by the Second Circuit. The Rule 23(e)(2) factors are:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arms' length;
> (C) the relief provided for the class is adequate, taking into account:
>> (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 attorneys' 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.

The *Grinnell* factors largely overlap and include: "(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 . . . in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement . . . to a possible recovery in light of all the attendant risks of litigation." *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc*., 209 F.3d 43 (2d Cir. 2000).

Here, the Agreement is manifestly fair, adequate, and reasonable. It provides robust, systemic relief that Plaintiffs sought when they filed their original Complaint more than three years ago. The Agreement creates policies, procedures, and practices that will greatly improve the care and accommodations provided to students with diabetes, and provide them access to many school and school-related activities from which they were previously excluded. The Agreement was reached after extensive, arms-length negotiations by experienced counsel. It represents a great civil rights victory for the Class members. Accordingly, it should be preliminarily approved.

A. The Settlement is Procedurally Fair, Because it was Negotiated at Arm's Length by Experienced Counsel on Both Sides.

This Settlement was the product of arm's-length negotiations by experienced counsel for both Plaintiffs and Defendants. "With respect to procedural fairness, ... a District Court reviewing a proposed settlement must pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel ... possessed the [necessary] experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009) (alteration in original) (citation and internal quotation marks omitted).

Here, Plaintiffs expended significant effort prior to filing their Complaint, including meetings with Defendants, investigating and evaluating their claims. Atkinson Decl. ¶ 4; Woodward Decl. ¶ 13. After filing, the Parties, with mutual good faith, immediately engaged in

settlement negotiations that lasted nearly four years. The negotiations included the input of nationally recognized diabetes experts, and DOE and DOHMH leadership and staff, including medical providers. Atkinson Decl. ¶ 7; Woodward Decl. ¶¶ 12-13. The negotiations included at least 75 in-person and virtual settlement meetings between experienced and knowledgeable counsel, exchanges of information, and numerous rounds of settlement proposals, before and through a pandemic. Atkinson Decl. ¶ 7. When the Parties reached impasse on issues, Plaintiffs moved for partial summary judgment to contest the remaining claims. Atkinson Decl. ¶ 11. Throughout the life of the litigation, and particularly following class notice dissemination, Plaintiffs and Class Counsel met with countless families, class members, and stakeholders and consistently shaped their proposals and positions based on these meetings and information gathered. Atkinson Decl. ¶ 9; Woodward Decl. ¶ 13. Class Counsel has also vigorously advocated for the needs of the Class, including escalating individual issues to Defendants' attention. Atkinson Decl. ¶ 9.

These efforts and negotiations more than establish that "the settlement was reached after Plaintiffs conducted a thorough investigation and evaluation of the claims, and after extension negotiations between the Parties…." *Nichols v. Noom, Inc.*, No. 20-CV-3677 (KHP), 2022 WL 2705354, at *8 (S.D.N.Y. July 12, 2022) (citations omitted).

Additionally, this agreement was negotiated by experienced and reputable class action counsel. The opinion of "experienced and competent counsel in favoring a settlement" should be "accorded great weight." *In re McDonnell Douglas Equip. Leasing Secs. Litig*., 838 F. Supp. 729, 740 (S.D.N.Y. 1993) (citations omitted). Specifically, attorneys for Disability Rights Advocates and Weir Greenblatt Pierce LLP are highly qualified litigators with expertise in the

area of class actions targeted to improve access to governmental programs and services, including to educational services at public schools. Atkinson Decl. ¶¶ 19-43.

Counsel for the DOE is also well-qualified and familiar with the DOE's obligations, and counsel for DOHMH is familiar with OSH and school health obligations. Furthermore, the fact that the DOE is a public entity and approves the settlement is yet another factor that favors the approval of the settlement. *See, e.g.*, *E.E.O.C. v. Bell Atl. Corp*., Nos. 97-CV-6723, 98-CV-3427, 99-CV-5197, 2002 WL 31260290, at *3 (S.D.N.Y. Oct. 9, 2002) ("The approval of the settlement by . . . a government party . . . weigh[s] in favor of finding this a fair, adequate, and reasonable settlement.").

B. The Settlement is Substantively Fair, Because It Provides Near-Complete Relief More Certainly and Quickly Than Through Litigation.

The Agreement addresses critical issues relating to the provision of diabetes-related care to students with disabilities at DOE schools. The Agreement hews closely to the American Diabetes Association Safe at School recommendations, developed by the premiere experts in diabetes-related care for children in the country, and provides for an overhaul of DOE's prior practices and procedures that led to the conditions prompting this suit. Woodward Decl. ¶¶ 13, 15, 17.

Although Plaintiffs believe they eventually would have prevailed, had the Parties litigated—through burdensome discovery and dispositive motion practice—the resulting finding of liability would have likely meant the Parties had to then, perhaps years later, develop a remedy and operationalize the remediation of that finding, including potentially more litigation on remedy. By contrast, the Parties engaged in that process almost immediately after filing, litigating only those narrow issues for which the Parties were unable to find common ground.

The Agreement gives the Class certainty and early benefits. Woodward Decl. ¶ 18. Most importantly, it gives them significant relief that largely remediates the issues identified in Plaintiffs' Complaint. Unlike the risks and costs inherent in such protracted litigation, the Agreement will confer significant, timely benefits to the Class. In fact, the Class has already benefited from many of the negotiated policy and practice changes the Settlement will enshrine, as Defendants voluntarily agreed to implement many of the agreed-to reform during negotiations.

The Agreement also contains robust monitoring and enforcement provisions. Should Class Counsel identify issues with the DOE's compliance with the Agreement, the Parties will first attempt to resolve those issues before seeking any assistance from the Court.

2. The Court Should Direct Distribution of the Notice of Settlement.

Fed. R. Civ. P. 23(e)(1) states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Actions under Rule 23(b)(2), like this one, have no strict notice requirements, leaving the form and method of notice to the Court's discretion. *See* Fed. R. Civ. P. 23(c)(2). In a class settlement, notice must be given of the proposed terms for payment of fees and costs "in a reasonable manner." Fed. R. Civ. P. 23(h)(1). The form of the Notice and a short form notice, Atkinson Decl., Ex 1 at Exhibit A, and method of distribution has been agreed to by the Parties.

The substance of the notice is designed to inform class members, as well as third parties, of the primary features of the Agreement, the new procedures and timelines that will be adopted, the effect of the Agreement in releasing class members' claims, the terms under which the Parties will resolve fees and costs claims, the procedures and deadline for submitting objections, and ways to obtain more information. *See id.* As set forth in the Agreement, Plaintiffs recommend to the Court that notice to the Class be provided as follows:

Plaintiffs' counsel and Defendants will each post in a prominent place on their respective websites a copy of the Long Form Notice and Short Form Notice (collectively, "Notices"). Defendants will distribute the Long Form Notice to all class members by sending to all students and families with a Diabetes Medication Administration Form ("DMAF") by both postal mail and email, if known. The Long Form Notice shall also be posted in all school medical rooms (also known as nurses' offices).

This combination of methods for distributing the Notice will ensure that class members learn about the Settlement and their opportunity to object or request to speak at the Fairness Hearing. This Notice plan is substantially the same as the Notice plan adopted by the Court at the class certification stage, that resulted in a high response rate and extensive contact between Class Counsel and class members. Additionally, the redundancy of emailing the Long Form Notice to current Class members for whom the DOE has email addresses, posting the Long Form Notice in medical rooms, and posting the Notices online, should be well-designed to reach the maximum number of class members.

Class members as well as third parties may object to (or otherwise comment on) the Agreement by submitting their objections to Class Counsel, the DOE, and the Court. Objections may be accepted in writing by no later than a date set by the Court.

3. The Court Should Approve the Proposed Scheduling Order.

Below is a proposed timeline for issuance of notice, deadlines for objections and written responses to objections, if any, a date for the Fairness Hearing to determine final approval, and related orders and deadlines.

- Defendants will translate and the Parties will post the Notice and take the other steps described in the Parties' plan for disseminating the notice, within forty-five (45) days of the Court granting Preliminary Approval.

- The deadline for objections will be thirty (30) days before the Fairness Hearing.
- The Parties will provide declarations to the Court attesting that they each disseminated the Notice by at least twenty-one (21) days before the Fairness Hearing.
- The Parties will respond to any timely filed objections to the Settlement, and Plaintiffs will file a Motion for Final Approval of Settlement by fourteen (14) days before the Fairness Hearing.
- The Fairness Hearing will be at a date to be determined by the Court in accordance with Federal Rule of Civil Procedure 23 and 28 U.S.C. § 1715 of the Class Action Fairness Act, but in any event at least 104 days after the Court grants preliminary approval of the proposed settlement.

V. CONCLUSION

Plaintiffs respectfully request that the Court order preliminary approval of the Agreement, approve the form of the Notice, and issue the proposed scheduling order, including a date for the Fairness Hearing.

Dated: September 29, 2022
New York, New York

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