

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY**

ADAM X., BRIAN Y., CASEY Z., on behalf
of themselves and all others situated, and the
AMERICAN CIVIL LIBERTIES UNION OF
NEW JERSEY, and the ARC OF NEW
JERSEY,

Plaintiffs,

v.

NEW JERSEY DEPARTMENT OF
CORRECTIONS, VICTORIA KUHN, in her
official capacity as Acting Commissioner of
the New Jersey Department of Corrections,
NEW JERSEY DEPARTMENT OF
EDUCATION, and ANGELICA ALLEN-
McMILLAN, in her official capacity as Acting
Commissioner of the New Jersey Department
of Education,

Defendants.

Civil Action No.: 3:17-cv-00188-FLW-LHG

**ORDER GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT; CERTIFYING
SETTLEMENT CLASS; DIRECTING
ISSUANCE OF SETTLEMENT
NOTICE; AND SCHEDULING
HEARING ON FINAL APPROVAL**

WHEREAS, Adam X., Brian Y., Casey Z., the American Civil Liberties Union of New Jersey and the Arc of New Jersey filed a putative class action lawsuit in the United States District Court for the District of New Jersey (No. 3:17-cv-00188-FLW-LHG) (the “Action”) with allegations related to the failure to provide special education or related services and equal educational access to students with disabilities in violation of the Individuals with Disabilities Education Act (“IDEA”), Title II of the Americans with Disabilities Act (“ADA”), and Section 504 of the Rehabilitation Act of 1973 (“Section 504”) (ECF No. 1, 26);

WHEREAS, the Plaintiff Class seeks relief against the New Jersey Department of Corrections (“DOC”); Victoria Kuhn, in her official capacity as Acting Commissioner of the DOC; the New Jersey Department of Education (“DOE”); and Angelica Allen-McMillan, in her official capacity as Acting Commissioner of the DOE (collectively, “Defendants”) for alleged violations of IDEA, 20 U.S.C. § 1400 *et seq.*; Title II of the ADA, 42 U.S.C. § 12101, *et seq.* and Section 504, 29 U.S.C. § 794;

WHEREAS Named Plaintiffs and Defendants (collectively, the “Parties”), through their respective counsel entered into a Settlement Agreement on July 15, 2021, which if approved by the Court resolves the class claims raised in this Action by Plaintiffs and is subject to judicial enforcement under 18 U.S.C. § 3626(g)(6);

WHEREAS Plaintiffs have moved the Court, pursuant to Rule 23(e)(1)(c) for: (i) certification of a plaintiff class; (ii) preliminary approval of the proposed Settlement, a copy of which is attached as Exhibit 1 to the Declaration of Jeanne LoCicero (“LoCicero Decl.”), dated July 15, 2021; (iii) approval of the Notice of Proposed Settlement of Class Action (“Class Notice,” comprised of the Full Notice, One-Page Flyer, and Compensatory Education Form), a copy of which is attached as Exhibit 2 to the LoCicero Decl.; (iv) approval of a plan for

providing notice to the Class, as set forth below; and (v) assuming the preliminary approval is granted, for a Fairness Hearing to be conducted no earlier than 90 days after the date that preliminary approval is granted; and

WHEREAS Defendants do not oppose Plaintiffs' Motion;

WHEREAS the Court has presided over proceedings in the above-captioned action and has reviewed the pleadings and papers on file, and finds good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Unless otherwise stated, the terms in this Order have the meaning set forth in the Settlement Agreement (LoCicero Decl., Exhibit 1).

2. The Court has jurisdiction over the subject matter of this action and personal jurisdiction over the Named Plaintiffs, the proposed certified class, and the Defendants.

3. The Action is certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on the following terms:

a. The proposed Class is certified pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure for purposes of settlement as follows:

All individuals who are or were housed at any DOC Prison at any point between January 11, 2015 through the Effective Date and who: (1) were identified as being entitled to special education services and reasonable educational accommodations, or (2) were not identified but had a verified Individual Education Plan ("IEP") during or prior to their period of incarceration with DOC, or (3) were not identified but had been diagnosed with an educational disability and for whom IEP development began but did not conclude prior to their period of incarceration with the DOC, or (4) were under age 18 when they entered DOC custody, were born after January 11, 1993, and did not have a high school diploma when they entered DOC custody.

b. The class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure because (1) the number of class members is so numerous that joinder of all class members is impracticable; (2) there are

questions of law or fact common to the class; (3) the claims of the Named Plaintiffs are typical of those of the class; and (4) the Named Plaintiffs and their counsel will fairly and adequately protect the interests of the class.

- c. As required by Rule 23(a)(1) of the Federal Rules of Civil Procedure, the class is “so numerous that joinder of all members is impracticable.” There are well over 40 individuals who meet the class definition. Counsel for the parties represent that there are an estimated 422 putative class members. LoCicero Decl., Exhibit 3.
- d. As required by Rule 23(a)(2) of the Federal Rules of Civil Procedure, there are a number of questions of law or fact common to the class. These questions concern (1) whether Defendants provided the special education services that class members were legally entitled to receive, and (2) the DOC Defendants’ disciplinary policies surrounding administrative segregation or other close custody housing statuses, including whether class members’ disabilities were taken into account in the disciplinary process. Additionally, there are common answers that will resolve these questions: The Court and the Parties can reach these answers by addressing Defendants’ policies and practices, without the need to examine the individual circumstances of any of the Plaintiffs or class members, as the relief at issue includes the implementation of processes, programs, and generally-applicable policies to ensure the special education rights of class members are protected. These include new DOC-wide policies to ensure appropriate development and implementation of IEPs, a manifestation determination process, and teacher-led cell-side instruction that does not rely primarily on independent worksheet completion. Finally, all class members will

be able to participate in the new compensatory education program, whereby they may have their educational records reviewed by the External Monitor to determine if they are eligible to receive appropriate compensatory education.

- a. As required by Rule 23(a)(3) of the Federal Rules of Civil Procedure, the Named Plaintiffs' claims are typical of the claims of the class. Like the Individual Named Plaintiffs, each class member's claims arise from their incarceration in DOC prisons and their alleged denial of special education services and accommodations during that time, in violation of the IDEA, the ADA, and Section 504. The two Organizational Named Plaintiffs' claims are also typical of the rest of the class in that they arose from the same conduct by Defendants.
- b. As required by Rule 23(a)(4) of the Federal Rules of Civil Procedure, the Named Plaintiffs fairly and adequately protect the interests of the plaintiff class in that (i) Named Plaintiffs Adam X., Brian Y., Casey Z., the Arc of New Jersey, and the ACLU of New Jersey do not have interests that are antagonistic to the interests of the class because all allege harm by Defendants' conduct and all will benefit from the relief requested in this Action; and (ii) the proposed class counsel, the ACLU of New Jersey Foundation, Disability Rights Advocates, and Proskauer Rose LLP, are all qualified, experienced, and capable of protecting and advancing the interests of the class.
- c. As required by Rule 23(b)(2) of the Federal Rules of Civil Procedure, Defendants' actions apply generally to the class, so that final injunctive relief is appropriate to the class as a whole.

4. The Court hereby appoints Plaintiffs Adam X., Brian Y., Casey Z., the Arc of New Jersey, and the ACLU of New Jersey as Class representatives.

5. The Court hereby appoints the ACLU of New Jersey Foundation, Disability Rights Advocates, and Proskauer Rose LLP, Plaintiffs' attorneys of record, as Class Counsel.

6. The Proposed Settlement Agreement is fair and warrants the dissemination of notice to the Class Members apprising them of the settlement.

7. The Court hereby grants preliminary approval of the terms and conditions contained in the proposed Settlement Agreement.

8. The Court preliminarily finds that the terms of the Settlement Agreement appear to be within the range appropriate for possible approval, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure and applicable law.

9. As stipulated to and represented by the Parties in the Settlement Agreement, the Court makes the following preliminary findings regarding the Prison Litigation Reform Act, 18 U.S.C. § 3626(a): (i) the education services provided at DOC prisons necessitate the remedial measures contained in the Agreement; (ii) the prospective relief in the Agreement is narrowly drawn, extends no further than necessary to correct the violations of federal rights as alleged by Plaintiffs in their Complaint, is the least intrusive means necessary to correct these violations, and will not have an adverse impact on public safety or the operation of a criminal justice system; and (iii) the Agreement complies in all respects with 18 U.S.C. § 3626(a). Should the Court grant final approval, the terms of the Agreement shall be entered by the Court in an enforceable order, based upon the consent and acquiescence of the Parties, 18 U.S.C. § 3626(g)(1), and shall be subject to judicial enforcement, 18 U.S.C. § 3626(g)(6).

10. The Court hereby approves the Class Notice annexed as Exhibit 2 to the LoCicero Declaration.

11. Within twenty-one days of this Order Granting Preliminary Approval, the Class Notice shall be disseminated to the Class, substantially in the form attached as Exhibit 2 to the LoCicero Declaration by the following means:

- a. The DOC will post the Class Notice at every DOC Prison in the law library and classrooms or any other spaces where students receive general educational services.
- b. Plaintiffs' Counsel will be provided reasonable access to meet or communicate with the following people in DOC custody to explain the terms of the Proposed Settlement: (1) all students eligible for special education and (2) all people who were under 18 and did not have a high school diploma when they entered DOC custody and who were born after January 11, 1993.
- c. The DOC will mail:
 - i. The Class Notice to the following people who were in DOC custody on or after January 11, 2015 and are no longer in DOC custody: (a) all students who were eligible for special education and related services at that time, and (b) all people who were under 18 and did not have a high school diploma when they entered DOC custody and who were born after January 11, 1993.
 - ii. The One-Page Flyer to all other students who were eligible under the State Facilities Education Act and in DOC custody on or after January 11, 2015 and are no longer in DOC custody.

- d. The DOC, DOE, ACLU of New Jersey, and Disability Rights Advocates will each post the Agreement, One-Pager Flyer, and links to the Class Notice on their respective agency and organization websites.

12. At least 14 days before the Fairness Hearing, counsel for Defendants and Class Counsel will each provide a declaration to the Court attesting to the manner in which they disseminated the Class Notice and components thereof consistent with the Agreement.

13. The Class Notice constitutes valid, due, and sufficient notice to the Class, and is the best notice practicable under the circumstances. The Class Notice apprises Class Members in a fair and neutral way of the existence of the Settlement Agreement and their rights with respect to the Settlement Agreement. Dissemination of the Class Notice as provided above is hereby authorized and approved, and satisfies the notice requirements of Rule 23(e) of the Federal Rules of Civil Procedure.

14. A hearing is appropriate to consider whether this Court should grant final approval to the Settlement Agreement, and to allow adequate time for members of the Class, or their counsel, to support or oppose this settlement. The Court will schedule a fairness hearing at least 90 days from the beginning of the Class Notice period to permit notification of the proposed settlement to relevant authorities pursuant to 28 U.S.C. § 1715 of the Class Action Fairness Act.

15. A Fairness Hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure shall be held before the undersigned on January 26, 2022 at 10:00 a.m. in the United States District Court for the District of New Jersey, Clarkson S. Fisher Building & United States Courthouse, 402 East State Street, Trenton, NJ 08608, Courtroom 5E, to determine whether the proposed settlement is fair, reasonable, and adequate, and whether it should be finally approved

by the Court. The hearing may be continued from time to time without further notice. The Fairness Hearing may be held remotely.

16. By December 17, 2021, counsel for Defendants and Class Counsel will each provide a declaration to the Court attesting to the manner in which they disseminated the Class Notice consistent with the Proposed Agreement.

17. Any member of the Class may enter an appearance on his or her own behalf in this action through that Class Member's own attorney (at their own expense) but need not do so. Class Members who do not enter appearances through their own attorneys will be represented by Class Counsel.

18. Any member of the Class may object to the proposed Settlement Agreement. Any member of the Class who wishes to object must do so in writing, and all objections must be received by Plaintiffs' Counsel no later than November 22, 2021 at the address listed in the Full Notice.

19. Any Class Member who fails to properly and timely file and serve objections or comments shall be foreclosed from objecting to the Stipulation of Settlement, unless otherwise ordered by the Court. Any member of the Class may also request permission to speak at the Fairness Hearing by submitting a request in writing as outlined above, postmarked by this same deadline.

20. Class Counsel and counsel for Defendants will respond to any timely filed objections not later than December 17, 2021.

21. Plaintiffs will file their Motion for Final Approval of Settlement no later than December 17, 2021.

22. If for any reason the Court does not grant the Motion for Final Approval of Settlement, the proposed Settlement Agreement and all evidence and proceedings in connection with the Settlement shall be null and void *nunc pro tunc*.

23. The Court further orders that pending further order from the Court, all proceedings in this Action, except those contemplated herein and in the Settlement Agreement, shall be stayed.

IT IS SO ORDERED.

DATED: July 21, 2021

/s/ Freda L. Wolfson
The Honorable Freda Wolfson
Chief Judge, United States District Court for
the District of New Jersey