SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Moises Jimenez, Devaun Longley, R.O. by his guardian Doris Afumaa, individually and on behalf of all others similarly situated, and INTEGRATENYC Inc.,

Plaintiffs,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE PUBLIC SCHOOLS ATHLETIC LEAGUE,

Defendants.

Index No. 155825/2018

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY APPROVAL OF THE PARTIES' SETTLEMENT AGREEMENT

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INTRODUCTION

In 2018, a group of Black and Latinx high school students filed a class action race-based discrimination lawsuit because they were deprived the ability to play the sports they wanted to at their schools. In New York City, many small, segregated schools offer no sports teams at all, or just have one or two options. Three years later, the attached Stipulation of Settlement (the "Settlement") creates major reforms to the policies and practices of the New York City Department of Education ("DOE") and the Public School Athletic League ("PSAL") that will end preexisting discriminatory policies, greatly increase the number of available teams, and expand access to high school sports, thereby significantly reducing this disparate impact on Black and Latinx high schoolers. By the Settlement's terms, Black and Latinx students across the City who have the least access to after-school sports will receive no fewer than 200 new sports teams over the next three years.

The cornerstone of these reforms is the Shared Access Program ("SAP") concept. This model—further explained below and in the Settlement itself—allows small schools to play together under one PSAL program, with far more sports teams to choose from. Each SAP will have as a minimum number of PSAL sports teams the total collective number of teams across participating schools before the SAP was created, which in and of itself will greatly expand access for students attending the schools participating in each SAP. At least 21 currently underserved school districts—over half of all NYC school districts—will offer at least one SAP as a result of the Settlement.

Per the Settlement, students will also have a greater voice in determining the design and implementation of the DOE and PSAL's sports programming through newly created mechanisms, such as the Student Sports Survey and a "real time" electronic feedback form. This

aspect of the Settlement is especially salient in the eyes of the Plaintiffs, who fought hard to include these terms.

Most importantly, because the parties stipulated and the Court so-ordered for this case to proceed as a class action in 2020, the Settlement benefits all current and future Black and Latinx New York City high school students who attend a DOE high school and who are or become eligible for participation in high school sports through the 2023-2024 school year.

Plaintiffs Moises Jimenez, Devaun Longley, R.O., by his guardian Doria Afumaa, individually and on behalf of the certified class, and IntegrateNYC Inc. ("IntegrateNYC") (collectively, "Plaintiffs") move this Court for preliminary approval of the attached Settlement Agreement and approval of the Parties' proposed Notice of Class Action Settlement ("Class Notice").

Defendants have approved the Settlement Agreement, the Notice of Class Action Settlement, and the Proposed Preliminary Approval Order but have not provided a position on this Motion.

BACKGROUND

I. PROCEDURAL BACKGROUND

On June 21, 2018, four Black and Latinx NYC public high school students—L.P. by her guardian Linda Bryant, M.D. by his guardian Angel Diaz, A.A. by his guardian Francisco Ballester, and M.O. by his guardian Jesenia Olivo—and IntegrateNYC, a student-led advocacy organization, filed a class action complaint in the Supreme Court of the State of New York, County of New York (the "Complaint"). Fischer Aff. ¶ 4.[1] *Moises Jimenez et al. v. N.Y.C. Dep't of Educ. et al., No.* 155825/2018 (Sup. Ct., N.Y. Cnty.). The Complaint alleges that the DOE,

[1] Citations to "Fischer Aff." refer to the Affirmation of Aron Fischer, Esq., filed contemporaneously herewith.

PSAL, and the then-PSAL Director violated the New York City Human Rights Law, N.Y.C. Admin. Code. § 8-101 et seq., which prohibits discrimination based on race, color, or national origin in public accommodations such as New York City's public high schools. Fischer Aff. ¶ 5. Specifically, Plaintiffs alleged that the DOE and the PSAL (collectively, "Defendants")[2] have long engaged in discriminatory policies and practices that have a disparate impact on Black and Latinx public high school students and have denied Black and Latinx students the equal opportunity to participate in high school sports teams in the NYC public school system compared to students of other races, colors, and national origins. Fischer Aff. ¶ 6.

Plaintiffs identified three such policies and practices. *Id. First*, Defendants' policy of "grandfathering" teams, whereby an approved application for a PSAL team is effective essentially in perpetuity. This policy favors older, more established schools—many of which have fewer Black and Latinx students—that have had teams for many years, and disfavors newer schools, most of which have predominantly Black and Latinx student enrollment. *Id. Second*, PSAL's internal process for reviewing new team applications and deciding to grant or deny teams is opaque and largely discretionary, and led to the denial of PSAL teams to schools with enrollment of 90% Black and/or Latinx students at five times the rate as schools with the highest enrollment of students of other races. *Id. Third*, Defendants' policy prohibiting students from participating in a sports team at a school where they are not registered as a full-time student, as well as their policy of withdrawing approval of teams if a school cannot fill a roster until the school reapplies and is granted a team. This third policy disproportionally affects small schools with fewer than 650 students, because the number of enrolled students simply makes fielding a full team difficult. *Id.*

[2] Both the Complaint and Amended Complaint filed in this action named Donald Douglas, the former Executive Director of PSAL, as a Defendant. However, Mr. Douglas passed away in February of 2021.

Plaintiffs demonstrated the impact of these policies with analyses of the distribution of PSAL sports performed by a top-tier statistical consultant. *Id.* For example, using 2016-2017 data, these analyses revealed that the average Black or Latinx student in NYC public high schools attends a school with 15.6 PSAL teams, while the average NYC public school student of another race attends a school with 25 PSAL teams. Ex. 3[3] ¶ 6. In the City's most highly segregated schools, where 95%-100% of the student body is Black or Latinx, the median number of PSAL sports in 2016-2017 was only seven (7). Ex. 3 ¶ 5. By contrast, in schools where 0%-5% of the student body is Black or Latinx, the median number of PSAL sports was 40. *Id.*

Defendants answered the Complaint on August 27, 2018, denying all of Plaintiffs' allegations. Fischer Aff. ¶ 10.

On September 9, 2020, three additional named Plaintiffs—Moises Jimenez, Devaun Longley, and R.O. by his guardian Doria Afumaa—joined this action via the First Amended Class Complaint (the "First Amended Complaint") after three of the original named Plaintiffs graduated from high school. Fischer Aff. ¶ 11. Defendants answered the First Amended Complaint on October 26, 2020, again denying Plaintiffs' allegations. Fischer Aff. ¶ 13.

On September 10, 2020, the court approved the parties' stipulation to certify the lawsuit as a class action on behalf of "all present and future Black and Latinx New York City high school students who attend a DOE high school and who are or become eligible for participation in high school sports" (the "Class") and appointed New York Lawyers for the Public Interest, Emery Celli Brinckerhoff Abady Ward & Maazel, and Patterson Belknap Webb & Tyler as Class Counsel. Fischer Aff. ¶ 12.

[3] Citations to "Ex." refer to exhibits to the Fischer Aff.

II. DEFENDANTS' PILOT PROGRAM

In 2019, largely as a result of this lawsuit, Defendants eliminated the team-granting process that had been in place and stopped granting new teams altogether. In lieu of this process, Defendants implemented a "Pilot Program" at 26 schools in five districts, enabling a subset of students to use either a "shared access" or "individual access" model to access PSAL teams at neighboring schools. Ex. 1 ¶ 12-14. In the shared access model, high schools that are geographically proximate to one another are grouped to share access to PSAL teams. *Id.* By contrast, in the individual access model, individual students are permitted to apply for, try out for, and/or participate in a sports team at a school nearby, provided that the sport is not offered at the high school or campus that they attend. Ex. 1 ¶ 9.

III. DISCOVERY

Plaintiffs sought extensive discovery from Defendants during the pendency of this litigation. Fischer Aff. ¶ 14. Specifically, Plaintiffs served 53 document requests, 14 interrogatories, took the deposition of Defendant Donald Douglas, and noticed an additional deposition. *Id.* When Defendants objected to producing an additional witness and refused to produce documents in response to certain of Plaintiffs' requests, Plaintiffs raised these discovery disputes with the Court, leading to two discovery conferences. *Id.*

IV. SETTLEMENT NEGOTIATIONS

On February 15, 2019, the Parties entered into a Structured Negotiation Agreement and sought a stay via stipulation in order to meaningfully discuss resolving the lawsuit via settlement; the Parties subsequently began settlement discussions in March of 2019. Fischer Aff. ¶ 15. Between March 2019 and early 2020, the Parties met in-person for extended settlement negotiations on at least five separate occasions. The Parties negotiated continuously for almost a

year before determining that they could not finalize an agreement in early 2020. Fischer Aff. ¶ 16. At this point, the Parties resumed litigating the case.

In April of 2021, the Parties resumed settlement talks based on the agreed-upon terms of the previous settlement negotiations. Fischer Aff. ¶ 17.

In sum, from March 2019 through October 2021, the Parties held multiple settlement discussions involving both attorneys and clients, and vigorously negotiated every material aspect of the settlement agreement, including the total number of SAPs, the districts in which they are to be located, the professionals that will be hired, and the public feedback mechanism, among other things. Fischer Aff. ¶ 18.

All of Defendants' disclosures during settlement negotiations support the Proposed Settlement Agreement.

V. THE PROPOSED SETTLEMENT AGREEMENT

The Proposed Settlement Agreement ends the discriminatory policies and practices described in the Complaint and comprises six key commitments by Defendants:

(1) the creation and expansion of SAPs to specified school districts, with priority for districts where students' Average Access to PSAL sports teams is fewer than 12 teams per student, Ex. 1 ¶ 25;

(2) a DOE-designed Student Sports Survey to be implemented amongst the student population to assist in granting PSAL sports teams in subsequent seasons, as detailed in Ex. 1 ¶¶ 22-23;

(3) the creation and expansion of the Individual Access Program to students citywide whose access to PSAL sports teams is fewer than six (6) teams and who either cannot participate in a SAP due to geographic limitations or other restrictions, or who seek to participate in a specific sport to which they do not have access through their school or a SAP;

(4) the addition of at least five teams in each of the 2021-2022, 2022-2023, and 2023-2024 school years to specified individual DOE high schools that cannot

participate in SAPs, prioritizing those with the least access to PSAL sports steams, as detailed in Ex. 1 ¶ 33;

(5) the hiring of seven full-time positions at PSAL to support SAP coordination and interprogrammatic competition, as detailed in Ex. 1 ¶ 37; and

(6) the creation and implementation of an electronic form to accept "real time" comments and feedback regarding access to and effectiveness of the new programs from students and parents at participating schools, as detailed in Ex. 1 ¶ 38.

The Parties recognize that the creation of SAPs contemplated in Section II of the Stipulation (or, of Ex. 1) will require funding. If the DOE is unable to substantially fulfill its commitments enumerated in the Settlement Agreement due to lack of funding, the Parties agree to meet and confer to determine whether modification of the Stipulation may be appropriate. Ex. 1 ¶ 45. PSAL has already secured funding to expand PSAL access through the DOE's Executive Budget: $5.7 Million in FY22, and $7.1 Million the following year. DEP'T OF EDUC. AND SCHOOL CONSTRUCTION AUTHORITY FIN. DIVISION, REP. TO THE COMM. ON FIN., SUBCOMM. ON CAPITAL BUDGET, AND THE COMM. ON EDUC. ON THE FISCAL 2022 EXEC. BUDGET, at 9 (May 19, 2021), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2021/05/040-DOE.pdf.

The goal of this lawsuit from its initiation was to reform the DOE and PSAL's policies and procedures to increase meaningful and equitable access to more PSAL teams for Black and Latinx students, and so the Complaint sought injunctive relief, not damages. Fischer Aff. ¶ 8. The resulting Settlement, therefore, is for injunctive relief. Ex. 1.

The Parties agree that Defendants will provide to the Class through Class Counsel a series of qualitative and quantitative metrics, as detailed in Ex. 1 ¶ 41, for each school year by the conclusion of each school year during the Effective Period, which begins when the Court makes its final approval of the Settlement, and terminates thirty (30) days after Defendants provide to Class Counsel the final metrics report regarding the 2023-2024 school year and Final

Judgment is entered. Quantitative metrics will track participation in newly created sports programs, in particular the participation of Class Members, and include:

(i) a list of the newly created teams and the schools that have access to each of them;

(ii) a list of the districts currently operating SAPs and Individual Access Programs;

(iii) a list of high schools participating in a PSAL program that includes information on the districts to which they belong, the number of teams to which their students have access, the number of Black and Latinx students enrolled at each school, the number of Black and Latinx students participating in PSAL programming in each school, the sports available through each PSAL program, and a "crosswalk" identifying to what PSAL program each school belongs;

(iv) a list of schools that will be part of new SAPS to be created in the coming year;

(v) a list of all schools by district; and

(vi) a list of schools with students participating in an Individual Access Program at each school. Ex. 1 ¶ 41(a).

Qualitative metrics include summaries of the results of end of year surveys of students, Athletic Directors, Principals, and other relevant staff at the schools that participate in SAPs and will be designed to capture the SAPs' successes and failures. Ex. 1 ¶ 41(b). Class Counsel will use this information to monitor the implementation of the Settlement and to ensure that its implementation is in fact reducing the disparity in access to teams and achieving the underlying goals of greater fairness and equality.

The Parties agree that Class Counsel is entitled to fees and costs and will not seek more than $1.7 Million in fees. Ex. 1 ¶ 60. The Parties also agree to the release of all factually related claims against Defendants and the withdrawal of claims and appeals. Ex. 1 ¶¶ 53-55.

VI. NOTICE TO THE CLASS

Notice of the settlement will be disseminated to the Class online and in print. As soon as practicable, following entry of the court's Preliminary Approval Order, the Class Notice will be placed on the website of New York Lawyers for the Public Interest (www.nylpi.org), one of the Class Counsel. Ex. 1 ¶ 47. The website will also contain the Settlement Agreement, the Court's stipulation and order certifying the lawsuit as a class action, the Court's order granting preliminary approval of the settlement agreement (when granted), and the First Amended Complaint. Fischer Aff. ¶ 22. In addition, Plaintiffs will make use of social and traditional media to publish and distribute information regarding the Proposed Settlement Agreement, and together with the Fair Play coalition,[4] produce know-your-rights educational materials and trainings. *Id.*

Defendants will post the Class Notice on their websites at www.schools.nyc.gov and www.psal.org, and will have a printed copy of the Class Notice displayed at a public location (i.e., a main office, lobby, or centrally located bulletin board) at all DOE high schools where in person instruction and/or PSAL activities are occurring for the duration of the Effective Period. Ex. 1 ¶ 48.

ARGUMENT

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

New York Civil Practice Law and Rule ("CPLR") section 908 specifies that any proposed "compromise" of a class action must receive Court approval. "Although the statute does not define the criteria for such approval, New York's courts have recognized that its class action statute is similar to the federal statute and have looked to federal case law for guidance."

[4] The Fair Play Coalition unites students, parents, advocates, and allies fighting for sports equity in New York City public high schools.

Fiala v. Metro. Life Ins. Co., Inc., 27 Misc.3d 599, 606-07 (Sup. Ct. N.Y. Cnty. 2010) (Kornreich, J.) (internal citations omitted) (collecting authorities).

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotation marks and citation omitted); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."). "Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Hernandez v. Merrill Lynch & Co., Inc.*, No. 11 Civ. 8472, 2012 WL 5862749, at *2 (S.D.N.Y. Nov. 15, 2012); *see also Diaz v. E. Locating Serv., Inc.*, No. 10 Civ. 4082, 2010 WL 5507912, at *3 (S.D.N.Y. Nov. 29, 2010) (giving "weight to the parties' judgment that the settlement is fair and reasonable").

At this stage, Plaintiffs seek preliminary approval of the proposed settlement. "Preliminary approval . . . requires only an initial evaluation of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks omitted). Preliminary approval is "at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n-E. R.Rs.*, 627 F.2d 631, 634 (2d Cir. 1980). "A proposed settlement of a class action should therefore be preliminarily approved where it 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." *Felix v. Northstar Location Servs., LLC*, 290 F.R.D. 397, 407 (W.D.N.Y. 2013) (internal quotation marks omitted). "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

New York courts evaluate proposed class action settlements by examining "the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members." *Fiala*, 27 Misc.3d at 606.[5] This inquiry entails analyzing "(1) the likelihood of success, similar to the analysis for a motion for preliminary injunction; (2) the extent of support from the parties, including the number of objectors and nature of objections; (3) recommendation and experience of counsel; (4) bargaining in good faith; (5) the complexity of the issues of law and fact; and (6) expense and duration of litigation." *In re N.Y. Stock Exch./Archipelago Merger Litig.*, No. 601646/05, 2005 WL 4279476, at *9 (Sup. Ct. N.Y. Cnty. Dec. 5, 2005). Here, each of these factors supports preliminary approval.

A. Likelihood of Success

"Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the

[5] New York courts also deem it reasonable for class action settlements, including those relating to actions seeking injunctive rather than monetary relief, to release defendants from further liability relating to the relevant conduct so long as defendants comply with the other terms of the settlement agreement. *See NAACP NYS Conference v. Philips Elecs. N. Am. Corp.*, No. 156382/2015, 2018 N.Y. Misc. LEXIS 1831, at *11 (Sup. Ct. N.Y. Cnty. May 16, 2018) (approving as reasonable such a release contained in class action settlement agreement). The Parties' Proposed Settlement Agreement contains such a release. Ex. 1 ¶ 55.

settlement." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Although Plaintiffs believe their case is strong, it is still subject to risk. "Litigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd* 117 F.3d 721 (2d Cir. 1997). Settlement benefits the Class by ensuring some measure of relief and eliminates the "risk that an outcome unfavorable to the plaintiffs will emerge from a trial." *Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007).

Since high school athletics careers are brief, each passing sports season is precious to each member of the Class. Continuing to litigate risks further postponing individual class members' access to sports, with ramifications for their college recruitment opportunities, physical fitness, and mental health, among other important concerns. For older high school students, the stakes are even higher to obtain the opportunity to play the sports they care about before they graduate. The Settlement ensures all members of the Class will benefit from increased access to sports as early as this Fall season, and will not have to wait for the resolution of the long and uncertain processes of factual development, trial and appeals.

Further, the Settlement gives Plaintiffs a voice in the redesign of PSAL programming. Class Counsel consulted closely with the class representatives and IntegrateNYC regarding each term of the Proposed Settlement Agreement, with the goal of crafting a settlement that is as responsive to real students' needs, interests and lived experiences as possible. In this respect, settling this case offers advantages that litigating does not; were the Class fortunate enough to obtain a favorable judgment in this case—an outcome that is not guaranteed, of course—there would only be limited ability to have input on the particular reforms PSAL and DOE select to mitigate the disparate impact.

In sum, the resolution of litigation is inherently uncertain in terms of outcome and duration. The Settlement alleviates these uncertainties, and this factor thus weighs in favor of approval.

B. The Extent of Support from the Parties

Notice of the Settlement and its details has not yet been issued to the Class. The Court should more fully analyze this factor after notice is issued and publicized, and Class Members are given the opportunity to object. At this early stage in the process, the class representatives, Plaintiffs, IntegrateNYC, and Defendants have expressed their approval of the Settlement by agreeing to the Stipulation of Settlement. Moreover, the class representatives and IntegrateNYC took seriously their obligations to represent the best interest of the Class when expressing their approval. Therefore, this factor weighs in favor of preliminary approval.

C. Recommendation and Experience of Counsel

Class Counsel have litigated this case since its inception and are sufficiently familiar with both the underlying facts and the governing law to appropriately assess the circumstances and recommend Settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin*, 391 F.3d at 537 (internal quotation marks omitted).

The Parties here meet this relatively modest standard. Through discovery and publicly available information, and with the help of their economic expert, Plaintiffs had access to sufficient demographic, district and school-level data to properly analyze the disparate impact claim. Further, the Parties' attorneys exchanged information in support of settlement, and are confident that the factual record supports that the Settlement is advisable to all Parties.

Moreover, Class Counsel have the experience and knowledge to properly assess this case and analyze the proposed settlement. The Court appointed Class Counsel when it certified the

Class. Fischer Aff. ¶ 12. Class Counsel are experienced attorneys with strong reputations and expertise in civil rights law: New York Lawyers for the Public Interest has led civil rights campaigns and impact litigation in New York City since 1976, often opposing City agencies to secure racial justice in and outside of court; Emery Celli Brinckerhoff Abady Ward & Maazel LLP is "one of the most competent, successful, and reputable civil rights firms practicing" in the jurisdiction, *Wise v. City of N.Y.*, 620 F. Supp. 2d 435, 445 (S.D.N.Y. 2008); Patterson Belknap Webb & Tyler LLP is a top-tier defense firm with a robust pro bono practice. "Opinion of such experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *In re Lorazepam & Clorazepate Antirust Litig.*, No. MDL 1290, 2003 WL 22037741, at *6 (D.D.C. June 16, 2003).

D. Bargaining in Good Faith

As detailed *supra* Background Part IV, this Settlement was the result of extensive, arms-length negotiations, first in 2019 and then again in 2021. The Settlement was thus two years in the making. Far from being collusive, settlement discussions in this case required extensive back-and-forth and committed negotiations amongst counsel, as well as involving and including the clients in order to arrive at the detailed solutions found in the Settlement. Under such circumstances, it is undeniable that the parties bargained in good faith. *See Fiala*, 27 Misc.3d at 608 (noting that "the history and length of the litigation speak to the lack of collusion and coercion in negotiating the final settlement").

Moreover, the Settlement will lead to substantial benefits to the Class. As a result of the settlement, Black and Latinx students with the least access to PSAL sports will receive no fewer than 200 new sports teams over the following three years. The Settlement includes not only significant reporting requirements, allowing Class Counsel to monitor PSAL's progress in complying the with terms of the settlement over a period of three years, but also permits students

to submits real time comments to ensure that their voices are heard in expanding access to PSAL sports. Students in at least 21 currently underserved districts will benefit from the settlement.

E. Complexity of the Issues of Law and Fact

"Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).

The size of the Class is both large and in flux. The Class includes "all present and future Black and Latinx New York City high school students who attend a DOE high school and who are or become eligible for participation in high school sports." Fischer Aff. ¶ 12. As of the 2018-2019 school year, there were 214,940 Black and Latinx students attending a DOE high school.[6] The Class definition also includes future students, adding tens of thousands more students to the Class. The longer this lawsuit extends, more students will matriculate into and out of the Class. The scope and fluctuation of the Class would add significant complexity to reaching a resolution through litigation.

Additionally, proving Plaintiffs' case would likely require the retention of experts to opine about DOE decision-making and to understand the logistical challenges for ensuring equitable sports team access across all NYC high schools. Settlement avoids such costs.

Finally, this matter involves a novel area of law, and therefore, the outcome of litigating is uncertain. Settlement avoids the risk that Plaintiffs could lose.

[6] NYSED, *NYC Public Schools Enrollment (2018-19)* (Oct. 24, 2021, 10:02 PM), https://data.nysed.gov/enrollment.php?instid=7889678368&year=2019&ethnicity%5B%5D=B&ethnicity%5B%5D=H&grades%5B%5D=09&grades%5B%5D=10&grades%5B%5D=11&grades%5B%5D=12&grades%5B%5D.

F. Expense and Duration of Litigation

By reaching a favorable settlement prior to dispositive motions or trial, Plaintiffs seek to avoid significant expense and delay and ensure recovery for the Class. This case has been pending since June 2018. Since then, Defendants have turned over some documents via discovery, and the Parties have engaged in two rounds of detailed settlement negotiations.

There is no question that continued litigation would considerably delay the relief for the Class, if any. Settlement avoids the inevitable years of delay that would be caused by the taking of discovery, repeated motion practice, trial, and the potential of appeals. More robust discovery would also likely cause significant disruption to DOE and PSAL operations, and a strain on its employees by requiring them to comply with an array of further depositions, document requests, interrogatories, and other information requests—an outcome that is not in the best interest of either party. The Settlement effects immediate changes to PSAL policies and avoids the inefficiencies of continued litigation.

II. THE NOTICE PLAN IS APPROPRIATE

The Parties agree that the Court should direct that the proposed Class Notice, which is attached as Exhibit 5, be published in accordance with the following notice plan. Class Counsel shall post the Class Notice, the Settlement Agreement, the Court's Stipulation and Order certifying the lawsuit as a class action, the Preliminary Approval Order, and the First Amended Complaint on the website of New York Lawyers for the Public Interest at www.nylpi.org, which shall serve as the official settlement website. Fischer Aff. ¶ 22. In addition, Class Counsel shall utilize social media and produce know-your-rights educational materials and trainings in collaboration with the Fair Play coalition and IntegrateNYC to further disseminate this information. *Id.* DOE and PSAL shall post the Class Notice on their websites at www.schools.nyc.gov and www.psal.org, as well as have a printed copy of the Class Notice

displayed at a public location (i.e., a main office, lobby, or centrally located bulletin board) at all DOE high schools where in person instruction and/or PSAL activities are occurring, for the duration of the Effective Period. *Id.* This notice plan is designed to reach Class Members as they conduct their daily routines and is sufficient, especially given that the settlement seeks only injunctive relief, not damages. The notice requirements for class actions brought for injunctive or declaratory relief are lower than for class actions seeking damages. CPLR § 904(a).

The Class Notice contains the most important, basic information about the Settlement Agreement, the class definition, and the right to object, and has been written so as to be easily comprehensible to middle and high school students. Ex. 5. Defendants have provided suggested edits to the Class Notice, which have been accepted, and all Parties support the proposed Class Notice. Fischer Aff. ¶ 21. Courts have approved class notices even when they provided only general information about a settlement. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally"). The detailed notice information contemplated by the Settlement far exceeds this bare minimum.

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of Settlement and enter the proposed order attached as Exhibit 2.

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