

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

D.S., by and through his mother and next friend S.S.;  
D.W. 1; D.W. 2, by and through his mother and next  
friend N.W.; R.H., by and through his mother and  
next friend H.G.; N.L., by and through her mother  
and next friend S.L.; and L.H., on behalf of  
themselves and all others similarly situated,

Plaintiffs,

vs.

NEW YORK CITY DEPARTMENT OF  
EDUCATION and NEW YORK CITY BOARD OF  
EDUCATION,

Defendants.

No. 05 Civ. 4787 (JBW)(CLP)

**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement (the “Stipulation” or the “Agreement”) is made and entered into pursuant to Rule 23 of the Federal Rules of Civil Procedure and contains the terms of a settlement (the “Settlement”) by and among Named Plaintiffs D.S., by and through his mother and next friend S.S.; D.W. 1; D.W. 2, by and through his mother and next friend N.W.; R.H., by and through his mother and next friend H.G.; and L.H., (collectively the “Named Plaintiffs”)<sup>1</sup>, and the putative class in the above-captioned action (collectively “Plaintiffs”), and New York City Department of Education and New York City Board of Education (together, the “Defendants,” and with Plaintiffs, the “Parties”).

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<sup>1</sup> Plaintiffs’ Counsel will ask the Court to remove Named Plaintiff S.L. as a Named Plaintiff on behalf of N.L., but this request will have no impact on any claim that N.L. has as a Class Member and a Compensatory Education Subclass Member.

WHEREAS:

A. On October 11, 2005, the above-captioned action of *D.S., et al., v. New York City Department of Education, et al.*, Civil Action No. 05 CV 4787 (JBW)(CLP), a putative class action, was filed in the United States District Court for the Eastern District of New York (the "Action");

B. The First Amended Complaint in the Action (the "Complaint") alleged, among other things, that Defendants violated federal and state law by placing the named plaintiffs and the putative class on shortened and/or inadequate class schedules at Boys & Girls High School, warehousing them in the auditorium, and/or wrongfully transferring or discharging such students from Boys & Girls High School;

C. The New York City Department of Education has represented to the Named Plaintiffs and the Court that all students at Boys & Girls High School have access to programs with at least five and one-half hours of instruction, unless fewer hours of instruction are necessary for Graduation;

D. The Parties now desire to resolve the issues in this litigation, without further proceedings and without admitting any fault or liability;

E. Counsel for Plaintiffs and Defendants have engaged in good-faith discussions regarding the possibility of settling the Action and have reached an agreement concerning the proposed settlement of the Action as set forth below; and

F. Plaintiffs' Counsel, having made a thorough investigation of the facts, believe that the proposed settlement is fair, reasonable and adequate and in the best interests of the Class.

NOW THEREFORE, without any admission or concession by Plaintiffs of any lack of merit of the Action whatsoever, and without any admission or concession of any liability or

wrongdoing or lack of merit in their defenses whatsoever by Defendants, it is hereby STIPULATED AND AGREED, by and among the Parties to this Stipulation, through their respective attorneys, subject to approval of the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure, that all Settled Claims as against all Released Parties and all Settled Defendants' Claims shall be compromised, settled, released, and dismissed with prejudice, upon and subject to the following terms and conditions:

### **DEFINITIONS**

1. For the purposes of this Stipulation, the terms listed below shall have the following meaning:
  - a. "Agreement Period" means the period from July 1, 2008 to the conclusion of the fall semester of the 2010/2011 school year, unless otherwise extended by the Court pursuant to paragraph 36. Notwithstanding this definition, certain portions of this Agreement may survive beyond the Agreement Period, as specified in paragraph 35 of this Agreement.
  - b. "Boys and Girls High School" or "B&G" means the high school currently operating under DBN code 16K455, located at 1700 Fulton Street, Brooklyn, NY 11213.
  - c. "Class Members" means the set of members of the Class, as defined in paragraph 5.
  - d. "Class Period" means the period from October 11, 2002 to and including the Agreement Period.
  - e. "Class Representatives" means the Named Plaintiffs and M.M., on behalf of L.W., a student currently on the register at B&G.
  - f. "Compensatory Education Subclass Members" means the members of the Compensatory Education Subclass, as defined in paragraph 6, excluding any members

who have timely and properly opted out of the class or who are otherwise excluded, as described in paragraphs 12 and 23.

g. "Compensatory Education Subclass Period" means the period from October 11, 2002 to and including June 30, 2008.

h. "Compensatory Educational Services" means the services made available to Compensatory Education Subclass Members pursuant to paragraphs 13, 14, 15, 24 and 25 of the Stipulation.

i. "Current B&G Student" means a student who is on the register at B&G during the Agreement Period.

j. "Defendants' Counsel" means the Corporation Counsel of the City of New York.

k. "DOE" means the New York City Department of Education, its past or present affiliates, successors and predecessors (including the Board of Education), including, but not limited to, its supervisory staff acting in the course of their employment.

l. "DOE High School" means a secondary school operated by the DOE that provides students a program of instruction with the opportunity to meet all the requirements for and receive a Regents or, if eligible, Local High School Diploma.

m. "DOE GED Program" means a program operated by the DOE providing instruction to assist students in preparation for a state high school equivalency diploma ("GED"), as provided by 8 N.Y.C.R.R. Part 100.

n. "DOE Adult Education Program" means a DOE educational program, other than a High School, that provides instruction to individuals over the age of 21.

o. "DOE Career Training Program" means a career or vocational program administered by the DOE.

- p. "Effective Date" means the date set by the Court in accordance with the approval process of this Stipulation, as defined more fully in paragraph 42.
- q. "Graduation" means receipt of a High School Diploma, or for a student whose Individualized Education Program ("IEP") recommends an IEP Diploma, receipt of the IEP Diploma.
- r. "High School Diploma" means a Regents or Local Diploma.
- s. "Literacy Program" means a program at or near B&G established to provide assistance to Class Members, as described in paragraph 14 of the Stipulation.
- t. "Non-DOE Career Training Program" means a career or vocational program listed on Schedule A that is operated by an institution other than the DOE and approved to provide services to Compensatory Education Class Members pursuant to this Stipulation.
- u. "Non-DOE GED Program" means a program listed on Schedule A that provides instruction to assist students in preparation for a GED that is operated by an institution other than the DOE and approved to provide services to Compensatory Education Class Members pursuant to this Stipulation.
- v. "Order and Final Judgment" means the proposed order to be entered approving the Settlement substantially in the form attached hereto as Exhibit A.
- w. "Order for Notice and Hearing" means the proposed order certifying the Class and the Compensatory Education Subclass, preliminarily approving the Settlement, and directing notice thereof to the Class, substantially in the form attached hereto as Exhibit B.
- x. "Partial Day Exclusion" means any time a student is excluded from school for any part of the school day without being afforded the procedural protections set forth in New York Education Law § 3214, DOE Chancellor's Regulations A-443 or A-450 and the due

process clause of the United States Constitution. Partial Day Exclusion does not include a constructive exclusion from school resulting from the failure to provide a free appropriate public education pursuant to the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act.

y. "Plaintiffs' Counsel" means Advocates for Children of New York, Inc. and the law firm of Morrison & Foerster LLP.

z. "Publication Notice" means the notice attached to the Stipulation as Exhibit D.

aa. "Released Parties" means any and all of the Defendants and the legal representatives, heirs, successors in interest, or assigns of the Defendants.

bb. "Service Center" means the center established to provide assistance to Class Members, as described in Paragraph 13 of the Stipulation.

cc. "Settled Claims" means any and all claims (i) that have been asserted in the Action by the Named Plaintiffs, Class Members, or any of them against any of the Released Parties, or (ii) that could have been asserted in any forum by the Named Plaintiffs, Class Members, or any of them against any of the Released Parties which arise out of, relate to, or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Complaint, except that "Settled Claims" does not include (a) claims to enforce the Settlement or any provision thereof; (b) claims for injunctive relief that are raised in *E.B. v. New York City Board of Education*, 02 Civ. 5118 (E.D.N.Y.), *J.G. v. Mills*, 04 Civ. 5415 (E.D.N.Y.), or *Jose P. v. Ambach*, 96 Civ. 1834 (E.D.N.Y.); (c) claims pursuant to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, or New York Education Law § 4404, to the extent that those claims do

not arise out of nor are based upon the allegations, facts, occurrences, representations or omissions that establish the individual as a Compensatory Education Subclass Member; or (d) claims for individual compensatory relief relating to events that occur on or after July 1, 2008 brought by Current B&G Students.

dd. "Settled Defendants' Claims" means any and all claims that have been or could have been asserted in the Action or any forum by any Released Parties against any of the Named Plaintiffs, Class Members, or their attorneys, which arise out of or relate in any way to the institution, prosecution, or settlement of the Action (except for claims to enforce the Settlement or any provisions thereof).

ee. "Settlement" means the settlement contemplated by this Stipulation.

ff. "Settlement Notice" means the Notice of Proposed Settlement of Class Action, Motion for Attorneys' Fees and Settlement Fairness Hearing, which is to be sent to members of the Class substantially in the form attached hereto as Exhibit C.

### **SCOPE AND EFFECT OF SETTLEMENT**

2. The obligations incurred pursuant to this Stipulation shall be in full and final disposition of the Action and any and all Settled Claims as against all Released Parties and any and all Settled Defendants' Claims against any of the Named Plaintiffs, Class Members, or Plaintiffs' Counsel.

3. (a) Upon the Effective Date of this Settlement, the Class Members, on behalf of (i) themselves, and (ii) their past or present legal representatives shall, with respect to each and every Settled Claim, release and forever discharge, and shall forever be enjoined from prosecuting, any Settled Claims against any of the Released Parties.

(b) Upon the Effective Date of this Settlement, each of the Defendants, on behalf of themselves and the Released Parties shall, with respect to each and every Settled Defendants' Claim, release and forever discharge, and shall forever be enjoined from prosecuting, any Settled Defendants' Claim against any of the Named Plaintiffs, Class Members, or Plaintiffs' Counsel.

### **CLASS CERTIFICATION**

4. The Parties agree to certification of the Class under Rule 23(b)(2) and certification of the Compensatory Education Subclass under Rule 23(b)(3) of the Federal Rules of Civil Procedure, with the Class Representatives serving as representatives of the Class.

5. The Class is defined as all persons who have not earned a High School Diploma on or before June 30, 2008 and who, at any time during the Class Period and while on the school register at B&G, have been, will be, or are at risk of being (1) denied a program with at least five and one-half hours of instruction designed to lead towards Graduation, unless fewer hours of instruction are necessary for Graduation, (2) wrongfully turned away from B&G, (3) subjected to Partial Day Exclusion, and/or (4) placed in the Attendance Academic Intervention Program ("AAIP"), also known as the "auditorium program" (the "Class" or "Class Members").

6. The Compensatory Education Subclass consists of all persons who have not earned a High School Diploma on or before June 30, 2008 and who, at any time during the Compensatory Education Subclass Period and while on the school register at B&G, were (1) denied a program with at least five and one-half hours of instruction designed to lead towards Graduation, unless fewer hours of instruction were necessary for Graduation, (2) wrongfully turned away from B&G, (3) subjected to Partial Day Exclusion, and/or (4) placed in the AAIP, also known as the



“auditorium program” (the “Compensatory Education Subclass” or “Compensatory Education Subclass Members”).

### **INJUNCTIVE RELIEF**

7. During the Agreement Period:
  - a. The program cards or notices of student programs for B&G shall inform students of their right to attend school full time until they receive a High School Diploma or until the end of the school year in which they turn 21, whichever comes first, and to have a program with at least five and one-half hours of instruction designed to lead towards Graduation, unless fewer hours of instruction are necessary for Graduation.
  - b. DOE shall not exclude a Current B&G Student from school or class at B&G unless the student is afforded the procedural protections set forth in New York Education Law § 3214 and DOE Chancellor’s Regulations A-443 or any successor regulations, A-450 or any successor regulations, and the due process clause of the United States Constitution.
  - c. DOE shall not transfer or discharge a Current B&G Student from B&G under discharge codes 02, 34, 35, 36, 37, 38, 39, 41, or 43 as they are written on the date of the signing of this Agreement, unless the Student or Parent has been provided with (1) prior notice, (2) an opportunity for a meeting, and (3) review and approval for the transfer or discharge by a DOE Senior Youth Development Director working outside of B&G, or any successor to that role provided the successor works outside of B&G.
8. No later than thirty (30) school days after the Effective Date of this Agreement, and at least once each year thereafter during the Agreement Period from the time of the initial training, the DOE shall train B&G administrative and student support staff, including but not limited to

the B&G principal, assistant principal of guidance, guidance counselors, attendance personnel, and supervisors of guidance counselors and attendance personnel. The training shall concern DOE's obligations under this Settlement, including but not limited to relevant law and DOE policies and procedures concerning a student's entitlement to attend the City's public schools, DOE's regulations and procedures concerning attendance, registration, discharge, and transfer of students, and students with disabilities. DOE will use its best efforts to provide its training materials to Plaintiffs before the training is provided. In any event, DOE will provide Plaintiffs with the training materials and the attendance sheets from this training no more than 15 school days after the training.

### **MONITORING**

9. Reporting by the DOE

a. For each semester in the Agreement Period, DOE shall provide Plaintiffs' Counsel with:

(i) by November 15, 2008,<sup>2</sup> March 15, 2009, November 15, 2009, March 15, 2010, and November 15, 2010, a copy of B&G's line schedule as of November 1 and March 1, respectively;

(ii) by February 15, 2009, July 15, 2009, February 15, 2010, July 15, 2010, and December 15, 2010,<sup>3</sup> a summary report of B&G's discharges and transfers, under the codes listed in paragraph 7(c), including those discharges and transfers that are requested but denied, and also transfers pursuant to code 48 as it is written on the

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<sup>2</sup> If the Effective Date is after November 15, 2008, the line schedule due on that date will be provided as soon after the Effective Date as possible.

<sup>3</sup> The December 15, 2010 report will include information available through December 1, 2010.

date of the signing of this Agreement. The summary report pursuant to this paragraph shall include the number of students discharged and transferred, the reasons for discharge or transfer broken down by code, the month and year of the discharged or transferred student's birth, and the number of credits earned by each student as of the date of discharge or transfer.

(iii) by February 28, 2009, July 30, 2009, February 28, 2010, July 30, 2010, and December 15, 2010,<sup>4</sup> redacted copies of all planning interview forms that seek approval of a transfer or discharge, with all attachments thereto, for Current B&G Students; and

(iv) by February 28, 2009, July 30, 2009, February 28, 2010, July 30, 2010, and December 15, 2010,<sup>5</sup> summary attendance reports for B&G for the preceding semester.

b. The information provided by DOE shall not contain personally identifiable information concerning the students, their parents, or their families, and will not be confidential.

10. Outside Monitoring

a. John Verre, the Co-Director of the Harvard Institute on Critical Issues in Urban Special Education,<sup>6</sup> shall review and report on DOE's compliance with paragraph 7 of the Stipulation. If Mr. Verre becomes unavailable to complete his obligations under this

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<sup>4</sup> The December 15, 2010 report will include information available through December 1, 2010.

<sup>5</sup> The December 15, 2010 report will include information available through December 1, 2010.

<sup>6</sup> The Parties to this Stipulation are aware of the affiliation of Mr. Verre with the Corporation Counsel in *E.B. v. New York City Board of Education*, 02 Civ. 5118 (E.D.N.Y.)

paragraph, the parties shall agree on a replacement monitor to provide any remaining monitoring services described in this paragraph. In the event that the parties are unable to agree on a replacement monitor, the parties agree to have the dispute mediated and resolved by the Honorable Cheryl L. Pollak, United States Magistrate Judge.

b. Mr. Verre's review may include, but need not be limited to, analysis of the school's student line schedule, OORS incident reports, SOHO entries, and attendance practices and procedures. As part of the review process, Mr. Verre shall conduct both announced and unannounced inspections of the school and may interview relevant school administrators, and to the extent they consent, school personnel, students, and parents, regarding the school's relevant practices and procedures.

c. DOE will provide Mr. Verre with all known relevant student complaints concerning B&G that arise after the Effective Date; Mr. Verre will consider these complaints as part of his review.

d. Mr. Verre shall perform his duties at all times in an independent and unbiased manner.

e. Before he begins substantive work, Mr. Verre will meet with representatives of the Class Representatives and Defendants both jointly and separately to enable them to give their views of the work to be done. Following these meetings, Mr. Verre may request advice from representatives of Plaintiffs and/or Defendants on any issues that arise in the course of his work. Mr. Verre shall have sole discretion to determine whether to seek such advice and, if he does seek such advice, whether to follow it.

f. For each semester in the Agreement Period, Mr. Verre will produce a draft report to Defendants' Counsel and Plaintiffs' Counsel simultaneously concerning the results of this

review by January 15, 2009, May 1, 2009, December 15, 2009, May 1, 2010, and December 15, 2010. The parties may respond to such draft report within ten (10) school days of the issuance of the report, including any information regarding any corrective actions the DOE has taken or may take, with a copy to all counsel. The draft report and responses shall be kept confidential. Mr. Verre may, in his discretion, make any further inquiry in accordance with subparagraph (b) above as he believes appropriate based upon the responses. Mr. Verre shall issue the final report within ten (10) days of the responses. The final report shall not be confidential, except that any student-identifying information will be redacted.

11. (a) Upon Plaintiffs' Counsel's request, counsel for the Parties shall meet within fifteen (15) school days of the delivery of the reports issued pursuant to paragraph 10 of this Agreement to discuss the reports and possible corrective measures and training to address concerns raised in the report.

(b) If the Agreement Period is extended pursuant to paragraph 36, additional reporting and monitoring as set forth in paragraphs 9 and 10 shall be provided on a similar schedule during the extension.

### **COMPENSATORY RELIEF**

12. Any member of the Compensatory Education Subclass may request to be excluded from the Compensatory Education Subclass following receipt of the Settlement Notice. Any such request must be made within the time period and in the manner described in the Settlement Notice. The opt-out form shall be substantially similar to the form attached as Exhibit G. Any member of the Compensatory Education Subclass who submits a valid and timely request for exclusion shall have no rights under the Settlement to Compensatory Educational Services and

will not be deemed to have released any of the Defendants with regard to his or her right, if any, to seek appropriate individual compensatory relief in an appropriate forum.

13. No later than the commencement of the counseling sessions described in paragraph 17, Defendants shall implement a Service Center in conjunction with Medgar Evers College School of Professional and Community Development to provide assistance to Class Members, with priority given to Compensatory Education Subclass Members. The Service Center shall be in place through the conclusion of the fall semester of the 2010/2011 school year but in no event for less than four (4) semesters, and shall be designed to provide assistance to no fewer than 160 students. Services shall include academic support services and guidance services. Services shall be available both during and outside ordinary school hours. To the extent a Compensatory Education Subclass Member is not attending B&G, that student shall be given access to the services provided by the Service Center after ordinary school hours.

14. Upon the commencement of the spring semester of the 2008/2009 school year, Defendants shall implement a Literacy Program at or near B&G using the Scholastic *Read 180* Reading Intervention Program to provide assistance to Compensatory Education Subclass Members. Services shall be available for up to sixty (60) Compensatory Education Subclass Members and shall be available through the conclusion of the fall semester of the 2010/2011 school year and in no event for less than four (4) semesters. To the extent a Compensatory Education Subclass Member is not attending B&G, that student shall be given access to the Literacy Program after ordinary school hours.

15. In addition to their right to attend New York City public schools pursuant to New York Education Law § 3202, Compensatory Education Subclass Members are eligible for the following educational services:

- a. Access to the Service Center.
- b. Access to the Literacy Program.
- c. Any Compensatory Education Subclass Member shall be permitted to continue to attend a DOE High School beyond the end of the school year during which he or she turns 21 as follows:

- (i) A Compensatory Education Subclass Member seeking services under this subparagraph (c) must advise the DOE of his or her intent to do so by visiting and informing the Service Center no later than the end of the school year during which he or she turns 21 or the last day of the fall semester of the 2009/2010 school year, whichever is earlier.

- (ii) A Compensatory Education Subclass Member who is not currently enrolled may reenroll in a DOE High School any time before his or her 21st birthday.

- (iii) Any Compensatory Education Subclass Member who is enrolled in school pursuant to this paragraph shall be permitted to take the courses and examinations needed to obtain the High School Diploma sought and may continue to attend such program until the student obtains a High School Diploma, provided the student is making satisfactory progress toward the diploma sought.

- (iv) Any such student who is subject to a Superintendent's suspension that is upheld following a hearing shall no longer have the right to continue to attend a DOE High School.

(v) DOE will make reasonable efforts to place a Compensatory Education Subclass Member in a school that suits the student's needs and preferences, subject to individual school eligibility requirements and seat availability.

(vi) Students with disabilities who qualify for the protections of the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and/or New York Education Law § 4401 *et seq.* will be entitled to a free appropriate public education while attending a DOE High School pursuant to this Agreement.

d. Any Compensatory Education Subclass Member who has a GED or who, as of July 1, 2008, is (i) 17 years of age with fewer than 22 credits, (ii) 18 years of age with fewer than 33 credits, or (iii) 19 years of age or older may, subject to the requirements set forth in paragraphs 18, 19, 20, and 25, elect to enroll in a GED Program (either DOE or Non-DOE), a Career Training Program (DOE or Non-DOE), a DOE Adult Education Program, and/or a program pursuant to paragraph 25. Such election shall be made through the counseling sessions described in paragraphs 17 and 20 below. If prior to registering in a Non-DOE Career Training Program, a Compensatory Education Subclass Member must obtain a GED or be enrolled concurrently in a GED program, that Student will be permitted to enroll in a GED program and the Career Training Program, either concurrently or consecutively, provided that a slot in such a program in the future is available and the Compensatory Education Subclass Member is eligible to enroll in the program prior to February 28, 2011. Any such student will be provided with information at the counseling session on how to enroll in a Career Training Program in the future, if such program is still available.



16. Any Compensatory Education Subclass Member is eligible to receive the services of the Service Center or the Literacy Program through the conclusion of the fall semester of the 2010/2011 school year or until the student receives a High School Diploma, whichever comes first. Subject to seat availability, Compensatory Education Subclass Members who would like to use the Service Center or the Literacy Program can utilize these services until the end of the fall semester of the 2010/2011 school year, regardless of whether they attended a counseling session pursuant to paragraphs 17 and 20 of the Stipulation. The Compensatory Education Subclass Member may walk in during specific hours or call the Service Center to access services.

17. The DOE will administer counseling sessions for Compensatory Education Subclass Members as follows:

a. The counseling sessions will be conducted in conjunction with the Service Center.

The DOE will make reasonable efforts to ensure that the counseling sessions are adequately staffed.

b. Counselors will be made available to meet with students on a walk-in basis at an agreed-upon location during afternoon and evening hours Monday through Thursday for two consecutive weeks from December 1, 2008 to December 12, 2008 ("Session One") and then again for two subsequent one-week periods during the weeks of January 5 to January 9, 2009 and February 9 to February 13, 2009 ("Sessions Two and Three," respectively).

c. Additional counseling sessions will be scheduled on an as-needed basis for Compensatory Education Subclass Members who, due to special circumstances, are not able to make the scheduled sessions, and to accommodate any unanticipated volume. The information necessary for a Compensatory Education Subclass Member to schedule

an additional counseling session will be provided in the Settlement Notice. Although follow-up counseling sessions will be provided as necessary through the end of the fall semester of the 2010/2011 school year, no initial counseling sessions will be held after February 28, 2009.

d. As part of the Settlement Notice, the DOE will send notice of the dates, times, and location of the counseling sessions and examples of the types of placements available.

e. Prior to the start of the counseling sessions described in this paragraph, the DOE will afford Plaintiffs' Counsel the opportunity to conduct an information session for all known DOE and Service Center staff who will be supervising, administering and/or providing the counseling services described in this paragraph and paragraphs 20 and 21.

f. The DOE shall make best efforts to ensure that the counselors hired by the Service Center to provide the counseling services have a degree in education, counseling, social work, or the equivalent, and a minimum of one year of relevant experience. In no event shall the counselors hired by the Service Center have less than a four-year degree. No counselor shall have been employed by the DOE to work at B&G at any time.

g. Because of their involvement with this litigation, Compensatory Educational Services for the Named Plaintiffs may be negotiated directly or by Plaintiffs' Counsel without requiring the Named Plaintiffs to attend counseling sessions as provided by this paragraph. Should services pursuant to paragraph 25 be sought by one or more Named Plaintiffs, the DOE will approve such services in lieu of the approval process of paragraph 25 upon the Named Plaintiff's showing of interest, need and eligibility. The DOE's liability for services provided to the Named Plaintiffs pursuant to paragraph 25 shall not exceed \$50,000 collectively, or \$12,500 individually. The Named Plaintiffs

shall be otherwise subject to the provisions of this Agreement concerning Compensatory Educational Services.

18. In order to be eligible for Compensatory Educational Services, the Compensatory Education Subclass Member must affirm in writing at the counseling session or at the Service Center that while on the school register at B&G, he or she was (1) denied a program with five and one-half hours of instruction designed to lead towards Graduation, unless fewer hours of instruction were necessary for Graduation, (2) wrongfully turned away from B&G, (3) subjected to Partial Day Exclusion, and/or (4) placed in the AAIP, also known as the “auditorium program.” The affirmation shall be made substantially in the form attached hereto as Exhibit E.

19. If DOE has reason to believe that, based on the information in the affirmation provided by a Compensatory Education Subclass Member pursuant to paragraph 18, the Student is not eligible for Compensatory Educational Services, Defendants’ Counsel shall notify Plaintiffs’ Counsel. If the parties are unable to resolve the dispute, Defendants shall bring the matter to the attention of the Honorable Cheryl L. Pollak, United States Magistrate Judge, for final resolution.

20. At the counseling session, the counselor shall explain in detail the Compensatory Educational Services available to the student. Based on the student’s transcript and discussions with the student regarding his or her interests, the counselor shall recommend services or programs he or she thinks will be suitable for the student, taking into account the student’s interests, abilities, and preferences. The counselor will not recommend DOE programs over Non-DOE programs based on any factor other than whether the program or service is suitable for the student. The counselor will then offer the student the program or service of the student’s choice, provided the student meets the eligibility criteria and there are seats available. Students in Session One will be offered placements according to student preference, eligibility, and space

availability within one week following the conclusion of Session One. Students in Sessions Two and Three will be offered placements according to the process described in this paragraph on a first-come, first-serve basis. Students shall be notified of their offers promptly, and all offers shall be confirmed in writing. All placement offers are contingent upon the student's acceptance into the program.

21. The counselors will conduct follow-up with students to confirm enrollment in the selected programs. Upon learning that a student has not been accepted into the selected program, or that the selected program has become unavailable, a counselor will promptly provide follow-up counseling services to identify an alternative placement subject to seat availability.

22. The DOE will maintain a record of the administration of the counseling sessions. The record will include (a) the number of counseling sessions broken down by student, (b) the programs and services recommended at each session, (c) the programs and services selected by the student at each session, (d) counselor follow-up to confirm enrollment in selected programs and (e) age and number of credits of each student served. These records in redacted form will be made available to Plaintiffs' Counsel upon request.

23. A Compensatory Education Subclass Member who received a GED prior to attending a counseling session described in paragraph 17, and for whom no placement is available pursuant to paragraphs 24 and 25, may elect to be excluded from the Compensatory Education Subclass. Any such election must be made in writing within five (5) school days of being notified that no such placement is available and being provided a form substantially in the form attached hereto as Exhibit F. A Compensatory Education Class Member who has a GED and who, as a result of the counseling session and after being apprised of his or her right to elect exclusion pursuant to this paragraph, accepts a seat in a DOE High School, DOE Career Training or DOE Adult

Education Program, may not elect to be excluded from the Compensatory Education Subclass. Any Compensatory Education Subclass Member who elects to be excluded pursuant to this paragraph shall not be deemed to have released any of the Defendants with regard to his or her right to seek individual compensatory relief in an appropriate forum.

24. The DOE shall pay for tuition, fees, and required books and supply costs for placements in Non-DOE GED and/or Career Training Programs available pursuant to 15(d), as set forth in Schedule A, subject to the provisions herein.

- a. To the extent that any of the seats in Non-DOE GED and/or Career Training Programs as set forth in Schedule A remain unused following the conclusion of the counseling sessions, DOE, in consultation with Plaintiffs' Counsel, will make seats of equivalent value available in other programs listed in Schedule A in order to satisfy the needs of the Compensatory Education Subclass Members.
- b. In the event that (i) a program provider set forth in Schedule A fails to timely agree to ordinary and reasonable contract terms and conditions with the DOE, (ii) the DOE determines during departmental clearance that the provider is not a responsible party, and/or (iii) the price demanded by the provider is substantially higher than the price relied on in drafting Schedule A, the DOE may decline to contract with that provider. However, in the event that the DOE declines to contract with a provider in Schedule A, the DOE must notify Plaintiffs' Counsel and, with Plaintiffs' Counsel's cooperation and consent, make best efforts to identify and contract with a comparable provider at a comparable price for the same number of seats. In the event that such best efforts do not result in a replacement provider, DOE, in consultation with Plaintiffs' Counsel, will make seats of equivalent value available in other programs listed in Schedule A.

25. In the event that a Compensatory Education Subclass Member who meets the eligibility criteria described in paragraph 15(d) has a specialized interest or need that cannot be accommodated by a seat available pursuant to paragraph 24, such Subclass Member shall be eligible to apply for payment of the costs associated with enrollment in an accredited or otherwise licensed educational program of the student's choice. The project coordinator of the Service Center, in consultation with the counselors, shall be responsible for review and approval of the Compensatory Education Subclass Member's application for payment by the DOE of the costs of the student-selected program. In no event shall DOE's liability for such student-selected programs, including programs selected pursuant to paragraph 17(g), exceed a total of \$100,000 or \$12,500 per student.

26. Any Compensatory Education Subclass Member who elects to enroll in a Non-DOE GED Program, Non-DOE Career Training Program or a program selected pursuant to paragraph 25 following a counseling session must sign a statement acknowledging that DOE does not administer, accept responsibility for, or endorse these programs, and is not responsible for or liable in any way for the administration of such programs. Such student waives any and all causes of action or claims that could be asserted against DOE for any acts or omissions that occur during the administration of any of these Non-DOE programs and must execute any forms necessary to effectuate such waiver.

27. Compensatory Education Subclass Members enrolled in a Non-DOE GED or Non-DOE Career Training Program pursuant to this Stipulation shall be subject to the same requirements of such program as non-Class Members. In addition, the DOE shall be entitled to discontinue the placement of a Compensatory Education Subclass Member at a Non-DOE GED or Non-DOE Career Training Program if the individual (a) fails to attend the program eighty percent (80%) of

the time during one semester or term of the program, unless the student shows good cause for his or her non-attendance, (b) receives a failing grade for one semester or term of the program for attendance reasons or (c) receives a failing grade for two semesters or terms of the program for any reason other than attendance.

28. Compensatory Education Subclass Members enrolled in a DOE GED, Career Training, or Adult Education Program pursuant to this Stipulation shall be subject to the same requirements of such program as non-Class Members.

29. Defendants shall administer the services provided to Compensatory Education Subclass Members pursuant to this Stipulation and shall bear all costs for so doing.

### **ENFORCEMENT**

30. Should a Compensatory Education Subclass Member, including but not limited to the Named Plaintiffs, believe the Defendants have not substantially complied with their obligations under paragraphs 13, 14, 15, 16, 17, 20, 21, 23, 24, and/or 25 of the Stipulation with respect to that Subclass Member, he or she may seek only appropriate injunctive relief for enforcement of the allegedly breached provision of the Agreement as to that student in the United States District Court for the Eastern District of New York. The Compensatory Education Subclass Member shall, directly or through counsel, notify Defendants' Counsel and DOE's Office of Legal Services in writing ten (10) school days before seeking the Court's assistance or intervention.

31. Should a Class Member, including but not limited to the Named Plaintiffs, believe that, during the Agreement Period he or she has been excluded from B&G or transferred or discharged from B&G in violation of paragraph 7 of the Stipulation, he or she may, in the absence of or after exhausting available administrative remedies, seek any appropriate injunctive relief for enforcement of the allegedly breached provision of the Agreement as to that student in

the United States District Court for the Eastern District of New York. The Class Member shall, directly or through counsel, notify Defendants' Counsel and the DOE's Office of Legal Services at least three (3) full school days prior to the time that he or she seeks the Court's intervention or assistance. The Class Member shall apprise Defendants' Counsel of the factual basis of his or her dispute and provide copies of all documents on which he or she is relying, to the extent known at the time, at the same time that notice of intention to seek judicial assistance or intervention is provided.

32. In the event the Defendants have not substantially complied with a material term of the Stipulation, Class Members, through Plaintiffs' Counsel, may, except as set forth below and in paragraph 36, seek an order only for specific performance of the allegedly breached provision of the Agreement in the United States District Court for the Eastern District of New York.

Plaintiffs' Counsel shall notify Defendants' Counsel and the DOE's Office of Legal Services in writing five (5) school days before seeking the Court's assistance or intervention. In addition, Class Members may seek an order of contempt on the basis of (1) systematic noncompliance with paragraphs 7 and/or 8 of this Agreement, or (2) DOE's failure to comply with an order for specific performance obtained pursuant to this paragraph. Neither a single incident nor a series of incidents involving a single student shall constitute systematic noncompliance. In the event that Plaintiffs' Counsel intends to seek an order of contempt, Plaintiffs' Counsel shall notify Defendants' Counsel and the DOE's Office of Legal Services in writing at least ten (10) school days before seeking the Court's intervention. The provisions of this paragraph do not provide the Court with jurisdiction beyond the time frames set forth in paragraphs 35, 36, 37 and 38.

33. As soon as possible after notice is provided pursuant to paragraphs 30, 31, or 32, the parties or their representatives shall meet to discuss the basis for the request for relief and



possible solutions that would obviate the need for judicial intervention or assistance. Should the parties be unable to meet before the notice period expires, the meeting requirement may be dispensed with and the Class Member may seek the Court's assistance or intervention at the conclusion of the notice period without first meeting with Defendants.

34. Class Members shall be entitled to seek an award of attorneys' fees, costs, and disbursements associated with work performed in pursuing and prevailing in judicial enforcement of the terms of this Agreement under the same terms and conditions as such fees and costs are available under 42 U.S.C. § 1988 for post-judgment enforcement work.

#### **DURATION OF ORDER AND RETENTION OF JURISDICTION**

35. This Agreement shall become effective on the Effective Date. The Agreement and the Court's jurisdiction over it shall terminate at the end of the fall semester of the 2010/2011 school year, except as provided in paragraph 36 and subject to the payment of attorneys' fees according to paragraph 47. However, Compensatory Education Subclass Members enrolled beyond that date in a program pursuant to paragraphs 15(c), 15(d), 24 and/or 25 of the Stipulation shall be permitted to complete the program and the DOE's obligations under those paragraphs will continue, subject to the provisions of paragraphs 15(d), 27 and 28 where applicable.

36. In the event that Plaintiffs believe that Defendants have failed substantially to comply with paragraphs 7 and/or 8 of this Agreement and no sooner than September 2009, Plaintiffs' Counsel may make a motion in the United States District Court for the Eastern District of New York to extend the injunctive and monitoring provisions, as outlined in paragraphs 7 through 11 of this Agreement. Such extension shall terminate no later than the end of the fall semester of the 2011/2012 school year.

37. In the event that Plaintiffs seek a motion to extend the injunctive and monitoring provisions of this Agreement pursuant to paragraph 36, Plaintiffs' Counsel shall notify Defendants' Counsel and the DOE's Office of Legal Services in writing at least thirty (30) days before the termination of the Agreement and before bringing the motion for an extension. Plaintiffs' Counsel shall apprise Defendants' Counsel of the basis of the alleged noncompliance for purposes of the motion for an extension. Plaintiffs' Counsel shall give Defendants the opportunity to meet to discuss the alleged noncompliance and possible solutions that would obviate the need for judicial intervention or assistance. If Plaintiffs' Counsel do not provide such notice in writing at least thirty (30) days before the termination of this Agreement the jurisdiction of the Court shall terminate and the action shall be dismissed pursuant to paragraph 35.

38. The administration and consummation of the Settlement as embodied in this Stipulation shall be under the authority of the Court, and the Court shall retain jurisdiction for the purpose of entering orders providing for awards of attorneys' fees and expenses to Plaintiffs' Counsel and enforcing the terms of this Stipulation. The Parties consent to the jurisdiction of the United States District Court for the Eastern District of New York to adjudicate any dispute or controversy between the Parties concerning the terms and conditions of this Stipulation. Notwithstanding any extension of this Agreement as outlined in paragraph 36, this Agreement and the Court's jurisdiction over it shall automatically terminate for all purposes no later than the end of the fall semester of the 2011/2012 school year, subject to the payment of attorneys' fees according to paragraph 47.

#### **SETTLEMENT PROCEDURES**

39. The Parties agree to take all necessary steps to obtain court approval of this settlement in the following sequence:

- a. Promptly after this Stipulation has been fully executed, Plaintiffs' Counsel shall make a motion to the Court for entry of the Order for Notice and Hearing, substantially in the form annexed hereto as Exhibit B. In connection with that application, Plaintiffs' Counsel shall apply to the Court for preliminary approval of this Agreement and for a finding that the Class as defined in paragraph 5 and the subclass defined in paragraph 6 should be certified for settlement purposes. Plaintiffs' Counsel shall also request the Court to set a date for a fairness hearing on the proposed settlement no earlier than November 1, 2008 and to approve the Settlement Notice, in substantially the form annexed hereto as Exhibit C.
- b. The DOE shall mail the Settlement Notice to all students on the register at B&G during the Compensatory Education Subclass Period who have not received a High School Diploma on or before June 30, 2008, at the addresses currently maintained in DOE's electronic records within ten (10) business days of the Court's entry of the Order for Notice and Hearing.
- c. The DOE shall cause notice to be published one time in *The Brooklyn Daily Eagle*, *Our Time Press*, and *The Daily News* in substantially the form annexed hereto as Exhibit D as soon as practicable after the Settlement Notice is mailed, but in no event more than ten (10) business days after such mailing.
- d. Reminder notices of the dates of the counseling sessions will be sent to those Compensatory Education Subclass Members who request a reminder in accordance with the Settlement Notice.
- e. Defendants shall bear all the costs incurred in connection with subparagraphs 39.b-d.

40. If the Settlement contemplated by this Stipulation is approved by the Court, Counsel for the Parties shall jointly request that the Court enter the Order and Final Judgment substantially in the form annexed hereto as Exhibit A.

41. Plaintiffs' Counsel and Defendants' Counsel agree to cooperate fully with one another with respect to the Parties' seeking Court preliminary approval of the Settlement Agreement and class certification; entry of the Order for Notice and Hearing; approval of the Settlement Notice, the Stipulation, and the Settlement; and entry of the Order and Final Judgment; and to promptly agree upon and execute all such other documentation as may be reasonably required to obtain final approval by the Court of the Settlement.

**EFFECTIVE DATE OF SETTLEMENT, WAIVER OR TERMINATION**

42. The "Effective Date" of the Settlement shall be the date when all the following shall have occurred:

- a. Approval by the Court of the Settlement, following notice to the Class and a hearing, as prescribed by Rule 23 of the Federal Rules of Civil Procedure; and
- b. Entry by the Court of the Order and Final Judgment, substantially in the form set forth in Exhibit A annexed hereto, or, in the event that the Court enters an order and final judgment in a form other than the Order and Final Judgment ("Alternative Judgment") and none of the Parties hereto elect to terminate the Settlement, the date of entry of such Alternative Judgment.

43. Defendants or Plaintiffs' Counsel shall have the right to terminate the Settlement and this Stipulation by providing written notice of their election to do so to all other Parties hereto within thirty (30) days of: (i) the Court's declining to enter the Order for Notice and Hearing in any

material respect; (ii) the Court's refusal to approve this Stipulation or any material part of it; or (iii) the Court's declining to enter the Order and Final Judgment in any material respect.

44. In the event of appeal or anticipated appeal of the Court's final approval of the Settlement, Defendants' Counsel or Plaintiffs' Counsel may seek to stay the Effective Date of the Settlement.

45. Except as otherwise provided herein, in the event the Settlement is terminated, reversed, or fails to become effective for any reason, then the Parties to this Stipulation shall be deemed to have reverted to their respective positions in the Action immediately prior to the execution of this Stipulation and, except as otherwise expressly provided, the Parties shall proceed in all respects as if this Stipulation and any related orders had not been entered.

#### **ATTORNEYS' FEES AND COSTS**

46. Defendants agree that Plaintiffs are entitled to counsel fees as though they are prevailing parties and agree not to contest Plaintiffs' entitlement to seek fees under 42 U.S.C. § 1988. The parties agree to negotiate the amount of fees and, if they are not able to do so within ninety (90) days of the Effective Date, Plaintiffs' Counsel may submit an application for counsel fees to the United States District Court for the Eastern District of New York, to which Defendants shall have an appropriate opportunity to respond consistent with this paragraph.

47. Plaintiffs also are entitled to reasonable attorneys' fees and reimbursement of expenses for time spent executing and enforcing the terms of this Stipulation. Plaintiffs' Counsel will submit a request to Defendants' Counsel for these fees no later than June 30 of each calendar year and within sixty (60) days following the completion of the Agreement Period. If Counsel

cannot agree within ninety (90) days of Plaintiffs' request for fees, Plaintiffs' Counsel will apply to the Court for an award of attorneys' fees and reimbursement of expenses.

### **MISCELLANEOUS PROVISIONS**

48. Nothing in this Agreement is an admission of liability by DOE or any of the Defendants. Nor shall it have precedential value with respect to any obligation of the City of New York, DOE, or the Defendants. This Agreement shall not be admissible in, nor is it related to, any other litigation or settlement negotiation, except with regard to an action to enforce the terms of the Agreement. This Agreement, however, may be raised by a Current B&G Student or Compensatory Education Subclass Member during any meeting with the DOE for the purpose of obtaining the benefit of any provision of the Agreement. Nothing herein shall be deemed evidence of a policy or practice of the City of New York or DOE. Nothing in the Agreement shall be deemed evidence of any wrongful act or omission of the City of New York, DOE, or any of the Defendants in their individual or official capacities.

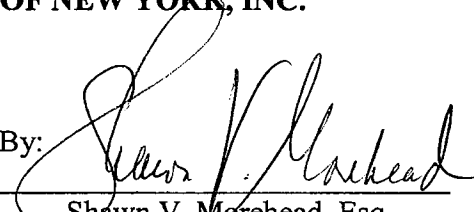
49. This Agreement contains all the terms agreed to by the parties. It can only be changed by subsequent written agreement of the parties or by order of the Court entered following application by the Plaintiffs or Defendants.

Dated: New York, New York  
August 27, 2008

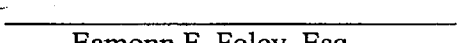
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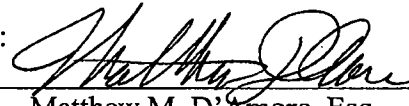
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**Counsel for Plaintiffs**

Dated: New York, New York  
August 27, 2008

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