UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

YARMAN SMITH, a Minor, by LAGERTHA SMITH, his guardian *ad litem*, et al.,

Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE BERKELEY UNIFIED SCHOOL DISTRICT, et al.,

Defendants.
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No. C 04-3306 WDB

ORDER (1) PROVISIONALLY CERTIFYING CLASS FOR SETTLEMENT PURPOSES, (2) APPROVING PARTIES' PROPOSED NOTICE PLAN, (3) SETTING DATE FOR FAIRNESS HEARING, (4) PRELIMINARILY APPROVING CONSENT DECREE, AND (5) CONDITIONALLY GRANTING PETITION FOR APPROVAL OF THE ATTORNEYS' FEES PORTION OF THE SETTLEMENT

I. Introduction

A. Background

The plaintiffs in this case are African-American and Latino students who attended comprehensive middle school or high school in the Berkeley Unified School District prior to being excluded from school or re-assigned for disciplinary reasons to non-comprehensive community schools, continuation schools, or independent study programs. Civil Rights Complaint, filed August 13, 2004 ("Complaint"), ¶ 1. Plaintiffs allege that they were not provided appropriate notice or a hearing prior to being involuntarily excluded or transferred to sub-standard educational programs. Complaint, ¶ 1.

Plaintiffs assert that the lack of notice and a hearing violated their rights to due process under the United States Constitution, and their right to a public education under the Constitution of the State of California and the California Education Code. Complaint, ¶¶ 2,4. Plaintiffs also claim that defendants' alleged practice of excluding students from comprehensive school without due process had a disparate negative impact on African-American and Latino students, and that defendants' conduct was undertaken with the intent to discriminate against those students in violation of the equal protection clause. Complaint, ¶3. Defendants deny plaintiffs' claims.

Although defendants deny plaintiffs' claims, the parties reached a tentative settlement of those claims. On March 14, 2005, the parties filed a Joint Motion for Preliminary Approval of Proposed Consent Decree and Provisional Certification of Class for Settlement Purposes. The Court carefully reviewed the parties' joint motion, and on April 1, 2005, convened a telephonic conference to discuss the Court's questions about and concerns regarding the parties' joint motion.

On April 15, 2005, the parties filed a letter brief responsive to the questions and concerns raised by the Court during the April 1, 2005, conference and in its order following the telephonic conference. In some instances, the parties' letter brief addressed the Court's questions and concerns by proposing modifications to the proposed Consent Decree and proposed class definition. In other instances, the parties addressed the Court's questions and concerns by explaining more fully the reasoning underlying the relevant provisions in their joint motion and by citing additional relevant legal authorities.

After reviewing the parties' April 15, 2005, letter brief, the Court issued an order approving many of the parties' proposed modifications and accepting many of their explanations. See Order Following Review of April 15, 2005, submissions, e-filed April 21, 2005. The Order set forth several remaining concerns and questions, and directed the parties to jointly submit a revised proposed Decree (incorporating the modifications suggested by

the parties in their April 15, 2005, submission) and a revised notice (also incorporating the modifications suggested by the parties in their April 15, 2005, submission).

On May 3, 2005, the parties jointly filed a revised notice, revised Consent Decree, and a letter addressing the Court's remaining concerns.[1]

Upon review of the parties' most recent submissions, the Court is satisfied that all of its concerns have been adequately addressed by the parties. In this Order, the Court provisionally certifies the class for settlement purposes, approves the parties' proposed notice plan, preliminarily approves the Consent Decree, and conditionally grants the parties' petition for approval of the attorneys' fees portion of the settlement. The Court also sets deadlines by which (i) class members must file written objections (if any) to the proposed Consent Decree, and (ii) the parties must reply to any such objections. The final fairness hearing will be held on **Wednesday, July 27, 2005, at 1:00 p.m.**

II. Certification of Class for Settlement Purposes

1. Class Definition

The parties propose to certify the following class:

> All African Americans and Latinos self-identified as such in official records who have been students in the Berkeley Unified School District and who have been involuntarily excluded from comprehensive school or involuntarily reassigned from comprehensive school programs to non-comprehensive alternative programs for alleged violations of the District's student conduct rules without having received appropriate due process of law.

May 16, 2005, Letter, Exhibit A, p.2.

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[1] After reviewing the parties' May 3, 2005, submission, the Court contacted plaintiffs' counsel, via telephone, to discuss the Court's additional suggestions regarding the language of the revised Notice and the revised Consent Decree. After vetting the Court's suggestions with opposing counsel, the parties filed a second revised Notice and second revised Consent Decree. See Koski letter, e-filed May 16, 2005, Exhibits A and B.

2. The proposed class meets the requirements set forth in Federal Rule of Civil Procedure 23(a) and 23(b)

A class action must meet the requirements of Federal Rule of Civil Procedure 23, subsections (a) and (b), whether certified for settlement or litigation. Although a district court faced with a request for a settlement-only class certification need not inquire whether the case would present intractable problems of trial management, all other requirements for certification must be satisfied. Amchem Products v. Windsor, 521 U.S. 591, 620 (1997). Because a court's determination regarding settlement class certification is not informed by adversarial court proceedings, it must pay "undiluted, even heightened attention" to the requirements of Rule 23(a) and (b) in the settlement context to protect the interests of absent class members. Id.; In re Mego Financial Corp. Securities Litigation v. Nadler, 213 F.3d 454, 461-62 (9th Cir. 2000); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

We must first determine whether the proposed class satisfies the requirements of Rule 23(a). Rule 23(a) mandates that the following requirements be met: (1) impracticability of joinder, (2) commonality, (3) typicality and (4) adequacy of representation.

Rule 23(a)(1) provides that a class action is maintainable only if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. Proc. 23(a)(1). Rule 23(a)(1) is an impracticability of joinder requirement, of which class size is an inherent consideration within the rationale of joinder concepts. "Although the absolute number of class members is not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable. Where the class is not so numerous, however, the number of class members does not weigh as heavily in determining whether joinder would be infeasible. In the latter situation, other factors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining impracticability of joinder." Jordan v. County of Los Angeles, 669 F.2d 1311, 1319 (9th Cir. 1982) (internal citations omitted) (vacated on other grounds).

At this preliminary stage, the known class members number fourteen. See May 3, 2005, Letter Brief, at p.1. Plaintiffs believe[2] that the total number of class members substantially exceeds the fourteen known class members. Plaintiffs' belief is supported by school district data, which shows that 127 students were assigned to Berkeley Alternative High School during the 2003-2004 school year, and that 109 (86%) of those students are African-American or Latino. See California Department of Education Website: http//data1.cde.ca.gov/dataquest/. Additionally, there were 189 students assigned to Independent Study during the 2003-2004 school year.[3] Data currently available do not indicate how many of these were African-American or Latino.

Although a class action determination may not be based on mere speculation, the prevailing view is that the plaintiff need not allege the exact number or identity of class members. See, e.g., Robidoux v. Celani, 987 F.2d 931, 935 (2nd Cir. 1993) ("[p]laintiffs must show some evidence of or reasonably estimate the number of class members but need not show the exact number) (internal citations omitted); Pederson v. Louisiana State University, 213 F.3d 858, 868 (5th Cir. 2000) ("To satisfy the numerosity prong, 'a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members'.") (internal citation omitted); Senter v. General Motors Corp., 532

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[2] Defendants decline to draw any inferences from the data cited by plaintiffs, stating only that they "do not know" whether the number of class members exceeds fourteen. See May 3, 2005, Letter Report, at p.1.

[3] Plaintiffs also rely upon school district data which shows that the number of students recommended for expulsion from the Berkeley Unified School District has risen dramatically in recent years, while the number of students actually ordered expelled has declined significantly. May 3, 2005, Letter Brief, at p.2. Plaintiffs speculate that "the steep increase in the number of students recommended for expulsion, coupled with the sharp decline in the number of students reported expelled, coincides with the onset of the District's policy and practice of funneling students who are 'discipline problems' from comprehensive to non-comprehensive programs without providing them due process." Id.

F.2d 511, 523 (6th Cir. 1976) ("In ruling on a class action a judge may consider reasonable inferences drawn from the facts before him at that stage of the proceedings . . .").[4]

The school district data presented by plaintiffs shows that it is extraordinarily likely that the number of class members exceeds the currently known 14. There are 298 possible class members just from the 2003-2004 academic year -- and the period from which class members could emerge covers several years. Moreover, no evidence has been presented that would support an inference that the District had multiple policies or followed multiple practices in determining whether to exclude or re-assign students who were perceived as sources of disciplinary problems. For that reason, it appears to be safe to assume that the same policies and practices about which the 14 known plaintiffs complain were followed with respect to at least an appreciable percentage of the other students who were involuntarily excluded from or transferred out of the comprehensive school programs.

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[4] The quote from the Senter opinion occurs in the following context:

> Appellee argues that Appellant at trial only identified sixteen black employees who he claimed should have been promoted to supervisory positions. Appellee claims that this number does not warrant the conclusion that joinder would be impractical. However, Appellee is confusing evidence presented at trial on the merits with the altogether different question of whether there are facts alleged which would justify the case going to trial as a class action. Normally class certification will occur at a much earlier stage of the proceedings then it did in this case. In ruling on a class action a judge may consider reasonable inferences drawn from the facts before him at that stage of the proceedings . . .here the Judge determined that the definable class of persons for whom the action may be maintained consisted of all black employees who, during a period between July 2, 1965 and September 1, 1971, were denied an opportunity for promotion to supervisory positions although possessing seniority and qualifications equivalent to white employees who were so promoted. During this period blacks comprised approximately fourteen percent of the work force at Inland. It would be reasonable to infer that a substantial number of these individuals are includable in the class eligible for relief on the basis of Appellant's action and that their joinder would be impracticable.

Senter v. General Motors, 532 F.2d at 522-23 (emphasis added).

Accordingly, the Court concludes that plaintiffs have amassed substantial evidence that the class size exceeds, significantly, the fourteen currently known members.

Additional factors strongly support the conclusion that joinder is impracticable. The plaintiffs in the case are African-American and Latino children from low-income families who would not be able to bear the costs of individually litigating their cases. Moreover, because plaintiffs seek equitable relief and compensatory services (and do not seek damages), the costs of bringing their cases individually clearly outweigh the economic value of any potential recovery. In addition, as the parties point out, joinder is impracticable because plaintiffs seek "injunctive, unitary relief that by its very nature requires that their cases be heard as one." Parties' Joint Motion, p. 6, ll. 19-21.

Given all of the factors we are directed to consider, the Court finds that the "impracticability of joinder" requirement has been met in this case.

We next turn to the "commonality requirement." A class has sufficient commonality "if there are questions of fact and law which are common to the class." Fed. R. Civ. Proc. 23(a)(2). "Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation be common." Alba Conte and Herbert Newberg, Newberg on Class Actions (4th ed. 2003) Vol. 1, at p. 272. "The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases." Id., Vol. 1, at pp. 272-276.

In this case, a legal issue common to all class members is whether their alleged exclusion from comprehensive school and/or involuntary reassignment from comprehensive school to non-comprehensive alternative programs for alleged violations of the District's student conduct rules without a hearing, an opportunity to present evidence, or an opportunity to contest the reasons for the District's actions violated their due process rights. An additional legal issue common to all class members is whether the district's alleged practice, described above, had a disparate impact on African-American and Latino students. The

injuries suffered by members of the proposed class are also similar -- the exclusion or involuntary reassignment from comprehensive school. In light of all of the questions of law and fact common to the proposed class, the Court finds the commonality requirement easily satisfied.

Rule 23(a)(3) requires 'typicality'. "The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims." General Telephone Company of the Northwest v. Equal Employment Opportunity Commission, 446 U.S. 318, 330 (1980). "Thus, to some extent it overlaps with Rule 23(a)(2)'s requirement that there be questions of law or fact common to the class, except that each test proceeds from a different perspective. The typicality criterion focuses on whether a relationship exists between plaintiff's claims and the claims alleged on behalf of the class. The common-question test determines if a group of similarly situated persons shares claims that raise common questions." Newberg on Class Actions, Vol. 1, at p. 317.

The typicality requirement is also closely related to Rule 23(a)(4), which requires that the representative parties adequately protect the interests of the class members. Newberg on Class Actions, Vol. 1, at p. 318. "Both the typicality and the adequate representation requirement address the desirable characteristics of the representative of the class. While typicality of claims seeks to assure that the interests of the representative are aligned with the common questions affecting the class, the adequate representation criterion tests this alignment of interest in two significant ways, asking: Does the representative have any kind of a material conflict of interest with the class with respect to the common questions involved, and will counsel for the class vigorously prosecute the action on behalf of the class?" Newberg on Class Actions, Vol 1. at pp. 318-19, see also Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978).

A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory. Baby Neal v. Casey, 43 F.3d 48, 57 (3rd Cir. 1994).

In this case, the claims of the proposed class representatives arise from the same practice or course of conduct that gives rise to the claims of other class members -- defendants' alleged practice of excluding students accused of violating the District's student conduct rules from comprehensive school without a hearing, an opportunity to present evidence, or an opportunity to contest the reasons for which each was being involuntarily excluded. Furthermore, the representative plaintiffs' claims are based on the same legal theories as those of the other class members. The representative plaintiffs' claims are essentially premised on defendants' alleged violation of their procedural due process rights, their rights (as ethnic minorities) to equal protection of the law, and their rights under the California Constitution to a public education. April 15, 2005, Letter Brief, at p.4.

Because the proposed representative plaintiffs' claims arise from the same alleged practice or course of conduct as that which gives rise to the claims of other class members, and because the proposed representatives' claims are premised on the same legal theories as those of the unnamed and unknown class members, the Court finds the "typicality" requirement satisfied.

Rule 23(a)'s final requirement is adequacy of representation. A class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a)(4). The purpose of this requirement is to protect the legal rights of absent class members. First, the representatives must not possess interests that are antagonistic to the interests of the class. See generally Anchem Products v. Windsor, 521 U.S. 591, 628 (1997). Second, the representatives' counsel must be qualified, experienced, and generally able to conduct the litigation.

The Ninth Circuit has formulated the following two-prong test for Rule 23(a)(4)'s adequacy of representation requirement: (1) do the named plaintiffs and their counsel have

any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).

In the first prong of the test, we ask whether the named plaintiffs and their counsel have any conflicts of interest with other class members. At the April 1, 2005, hearing, the Court noted that the Complaint states that defendants have agreed to offer the named plaintiffs enrollment in comprehensive programs but have refused to offer such enrollment to those similarly situated. The Court queried whether this situation persisted or could arise again between the time the parties submitted their joint motion and the time the Court grants final approval of the Consent Decree, thereby creating a conflict of interest between the named plaintiffs and other class members.

In their April 15, 2005, submission, the parties explained that the District "has reviewed the situations of newly identified class members on a case-by-case basis, and, to date, has offered timely reinstatement to all such identified students." April 15, 2005, Letter Brief, at p.3. Moreover, the parties point out that named plaintiffs "cannot exercise any leverage over the agreement that has been reached because the terms of the Consent Decree have been fully negotiated." April 15, 2005, Letter Brief, at p.3. Given this additional information, the Court finds that defendants' offer to the named plaintiffs (and all other known plaintiffs) of enrollment in comprehensive programs does not create a conflict of interest between the named plaintiffs and other class members.

Before the parties narrowed the definition of the class the Court was concerned that part of the proposed remedy for the alleged disparate impact on African-American and Latino students might create a conflict of interest between the representatives of the class and students who would have qualified as class members but who were neither African-American nor Latino. In response to the Court's concern, the parties amended the Consent Decree to limit the plaintiff class to African-American and Latino students. In its Order Following Review of April 15, 2005, Submission, filed April 21, 2005, the Court adopted this

amendment, thus eliminating any concern about tensions between the interests of the class representatives and students who were neither African-American nor Latino.

At the April 1, 2005, hearing, the Court also asked whether a potential conflict of interest might exist between the named plaintiffs and future class members, in that under the parties' proposed Consent Decree, future class members would purportedly be precluded from pursuing both equitable and monetary claims - despite not having received notice or an opportunity to contest the settlement. In their April 15, 2005, submission, the parties addressed this concern by suggesting that the proposed Consent Decree be amended to "explicitly state that students who are unlawfully expelled/reassigned in the future will not be bound by the waiver of any rights or claims, including the right to pursue damages." April 15, 2005, Letter Brief, at p.3. The Court adopted this suggestion in its April 21, 2005, Order. Therefore, any potential conflict of interest between named plaintiffs and future class members has been eliminated.

The Court discerns no other potential or actual conflicts of interest between named plaintiffs and other class members. We also discern no conflicts between class counsel and other class members.

We turn next to the 'vigorous prosecution' prong of the adequacy of representation requirement. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1021 (9th Cir. 1998). First, the Court has no doubt that class counsel -- Stanford's Youth and Education Law Clinic, Legal Services for Children, and Pillsbury Winthrop LLP -- have the resources and experience necessary to fairly and adequately represent the interests of the class.

Second, we must assess plaintiffs' rationale for not pursuing further litigation. The parties' joint motion provides the following rationale: "[c]lass counsel proceeded to settlement because numerous unidentified class members could continue to be excluded from

comprehensive school until the conclusion of this litigation. If the case were to proceed to trial, the Parties and Court concluded that it would likely extend into 2006. This lengthy litigation timeline, coupled with the inherent uncertainty of complex litigation, led Class counsel to logically conclude that the interests of all class members, especially unidentified class members, would be best served by a timely settlement of the litigation." See Joint Motion, at p. 9, l. 24 - p.10, l. 2. We are persuaded that class counsel's decision to settle the case reflects a good-faith and objectively sound assessment of the advantages and disadvantages of further pursuing this litigation.

Because we find no conflicts of interest between named plaintiffs (or their counsel) and other class members, and we find that named plaintiffs and their counsel have prosecuted this case with sufficient vigor, we are satisfied that the adequacy of representation requirement is met.

Having decided that the proposed class meets all of the requirements of Rule 23(a), we must now ask whether it is maintainable under Rule 23(b). In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (b)(2), or (b)(3). Rule 23(b), "functionally describes the different situations in which a class action was thought to be appropriate by the draftsmen [of the 1966 revisions to the Rule]." Parties' Joint Motion, p. 10, ll. 15-17, (citing Wright, Miller & Kane, Federal Practice & Procedure, § 1753 (2004).)

The parties seek certification of the class pursuant to Rule 23(b)(2). Rule 23(b)(2) provides that, "An action may be maintained as a class action if . . .(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ." Rule 23(b)(2).

By allegedly failing to provide members of the proposed class with a hearing, an opportunity to present evidence, or an opportunity to contest the reasons for which each was being involuntarily excluded from comprehensive school, defendants are accused of having

"acted or refused to act on grounds generally applicable to the class." Plaintiffs have abandoned their claims for damages and seek only injunctive relief. See April 15, 2005, Letter Brief, at p. 2. Accordingly, the Court finds that this case is properly maintained as a class action under Rule 23(b)(2).

3. Designation of class representative and class counsel

The Court hereby designates Yarman Smith, a minor, by Lagertha Smith, his guardian *ad litem,* Juan Munoz, by Margarita Chavez his guardian *ad litem*, and Summer McNeil, by Sonobia Augustine her guardian *ad litem,* as class representatives. The Court hereby designates William Koski and Molly Dunn of the Stanford Law School Youth and Education Law Clinic, Abigail Trillin and Gabriela Ruiz of Legal Services for Children, and William Abrams and Peter Nohle of Pillsbury Winthrop, LLP as counsel for the class.

III. Approval of Parties' Proposed Notice Plan

The parties seek the Court's approval of their revised notice plan. Pursuant to Rule 23(e), before approving the settlement or compromise of a certified class, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. Proc. 23(e)(1)(B). Although Rule 23(e) affords the District Court wide discretion as to the form, content, and method of distribution of the notice, notice of a class action settlement must satisfy due process requirements. Mendoza v. United States, 623 F.2d 1338, 1350-51 (9th Cir. 1980) (internal citations omitted) (disapproved of on other grounds). "To meet this standard, the notice given must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'." Id. at 1351 (internal citation omitted). Notice must be given in "in a form and manner that does not systematically leave an identifiable group without notice." Id. (internal citations omitted).

Rule 23(e)(1)(B) and due process thus appear to require two reasonableness determinations. First, the Court must determine that the parties' proposed form (and content) of notice reasonably and accurately conveys to unknown class members (i) the class definition, (ii) the terms of the proposed settlement, and (iii) the procedure through which class members can object to the proposed settlement (including the date, time, and significance of the final fairness hearing). Second, the Court must determine whether the parties' proposed mechanism of notice is reasonably calculated to reach all class members.

First, the Court finds that the parties' proposed form of notice reasonably and accurately conveys the class definition, the terms of the proposed settlement, and the procedure through which class members can object to the proposed settlement.

The parties propose the following methods of distributing their notice:

- **By June 13, 2005**, defendants will send the Notice, via first-class mail, to each student attending any and all of the District's schools (comprehensive and non-comprehensive.) Five days after completing this mailing, defendants will file with the Court and on opposing counsel a declaration describing the mailing effort, including the number of notices that were mailed broken down by school of attendance. The declaration will be signed under penalty of perjury by the Superintendent of the Berkeley Unified School District.

- **By June 6, 2005**, defendants will post the Notice at its administrative offices, in the main office of each of its public schools, and in other visible areas in which students and parents/guardians are likely to see such posting. Defendants will ensure that the notices remain posted until the day following the fairness hearing. Within five days after posting the Notice, defendants will file with the Court and serve on opposing counsel a declaration describing the exact areas where defendants posted the Notice, and identifying the names of District personnel who accomplished the posting. The declaration will be signed under penalty of perjury by the Superintendent of the Berkeley Unified School District.

- **By June 13, 2005**, the Superintendent of the School District will contact the Alameda County Probation Department, Alameda County Department of Social Services, Alameda County Juvenile Court, Alameda County Family Court, the Berkeley Organization of Churches and Berkeley Youth Alternatives and request that each organization post the Notice in a visible place likely to come to the attention of class members and their families. The Superintendent will request that the notices remain posted until the day following the fairness hearing.

- **By June 6, 2005**, defendants will publish the notice and a complete copy of the proposed Consent Decree on their website. Defendants will ensure that the notice remains published on the District website until the day following the fairness hearing. Within five days after the above-described publication, defendants will file with the Court and serve on opposing counsel a declaration that the Notice and a complete copy of the proposed Consent Decree have been published on the District's website. The declaration will be signed under penalty of perjury by the Superintendent of the Berkeley Unified School District.

- **By June 6, 2005**, plaintiffs' counsel[5] will publish the notice and a complete copy of the proposed Consent Decree on their websites. Plaintiffs' counsel will ensure that the notice remains published on their website until the day following the fairness hearing.

- **By June 13, 2005**, defendants will publish notice of the proposed Consent Decree in summary form in the Berkeley High School *Jacket*, the school's student newspaper. Within five days after such publication, defendants will file with the Court and serve on opposing counsel a declaration that the Notice was published in the Berkeley High School *Jacket*. The declaration will be signed under penalty of perjury by the Superintendent of the Berkeley Unified School District.

[5] Plaintiffs are represented by Legal Services for Children, Stanford Law School's Youth and Education Law Clinic and Pillsbury Winthrop LLP. The Court expects each of these entities to post the notice and proposed Consent Decree on its website.

The Court finds that the methods of notice suggested by the parties are reasonably calculated to reach all class members. Accordingly, the parties must mail, post, and publish the Notice as described above.

In summary, the Court finds both the form of notice and methods of notice proposed by the parties to be reasonable and approves them in full.

IV. Objections to Consent Decree and Fairness Hearing

1. Any class member wishing to object to the terms of the proposed Consent Decree must do so in writing, by no later than **July 11, 2005**. The written objection must explain, fully, the substance of the class member's objection.

2. The parties are permitted, but not required, to file replies (separately or jointly) to any objections received pursuant to the above paragraph. Such replies must be filed by no later than **July 18, 2005**.

3. The Court will conduct a final fairness hearing on **Wednesday, July 27, 2005,** at **1:00 p.m.**, in Courtroom 4, 3rd Floor, United States Courthouse, 1301 Clay Street, Oakland, California, to consider whether the settlement should be given final approval.

4. At the hearing, class members who have filed written objections will be permitted to speak in support of their objections. Counsel for the parties must be prepared to address the substance of these objections.

V. **Preliminary** Approval of Consent Decree

In broad strokes[6], the revised proposed Consent Decree provides as follows:

1. Defendants will implement a comprehensive outreach plan which includes oral communications, written letters, and the posting of notices. These communications, oral and written, will acknowledge and describe defendants' obligation to provide sufficient hearing

[6] The full revised proposed Consent Decree is attached as Exhibit A to the parties' May 16, 2005, submission.

and notice prior to excluding or reassigning any student from comprehensive school for an alleged violation of the student conduct rules, and will inform Class members of their right to meet with a District representative to determine their eligibility to be reinstated in comprehensive school, receive compensatory educational services, and earn remedial credits.

2. Defendants will promptly schedule and convene a meeting with each student (and his or her parent or guardian) who submits a 'Compensatory Education Claim'. At the meeting, defendants will decide whether the student qualifies as a class member. A District determination that the student does not qualify as a class member may be appealed to a designated Neutral.

3. Immediately upon determination that a student is a class member, defendants will offer the student reinstatement to an age- and grade-level appropriate comprehensive educational program within the District, unless reinstatement is not appropriate because of the student's age or residence.

4. Shortly after a determination that a student is a class member, and that the student's suspension or expulsion was unlawful under the California Education Code, defendants will also expunge or modify the class member's educational records to remove any language stating that the student had been properly expelled, and to indicate that any exclusion from comprehensive school for more than five consecutive school days or more than twenty school days in any school year was unlawful.

5. The Board of Education will revise defendants' suspension and expulsion policies, devise a student suspension/expulsion monitoring system, and conduct comprehensive training with staff members and administrators on these new policies.

6. Defendants will not authorize or participate in any practice that "involuntarily" excludes or reassigns students from comprehensive school without providing appropriate notice and an appropriate hearing.

7. Shortly after the determination that a student is a class member, defendants will develop, with the student, an individualized plan for the student to earn appropriate credits towards graduation.

8. Defendants will formulate a comprehensive plan, subject to plaintiffs' approval, which aims to reduce racial/ethnic disproportionality in student discipline "through such endeavors as staff and faculty training in cultural diversity, behavioral intervention strategies that are alternatives to suspension and expulsion, and ensuring that students are appropriately referred and provided with all requisite procedural protections before transferring them from comprehensive to non-comprehensive school programs."

9. The parties will put into place a system of District reporting and monitoring defendants' compliance with the terms of the settlement. Monitoring will include formation of a Students' Rights Monitoring Committee.

10. The Court will retain jurisdiction over the case to ensure implementation of the Consent Decree.

11. Defendants will pay $50,000 in attorneys fees to plaintiffs' counsel.[7]

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Federal Rule of Civil Procedure 23(e) requires us to determine whether the proposed Consent Decree is fundamentally fair, adequate, and reasonable. Fed. R. Civ. Proc. 23(e). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1026 (9th Cir. 1998).

When assessing a settlement proposal, we are required to balance a number of factors, including (but not necessarily limited to) the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and

[7] The attorneys' fees portion of the settlement is discussed in more detail in section VI. of this Order.

the stage of the proceedings; the experience and views of counsel; and the reaction of the class members to the proposed settlement[8]." Id. The "relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." San Francisco NAACP v. San Francisco Unified School District, 59 F.Supp.2d 1021, 1028 (N.D. Cal. 1999), quoting Officers for Justice v. Civil Service Comm'n of City and County of San Francisco, et al., 688 F.2d 615, 625 (9th Cir. 1982).

Given the specific facts and circumstances of this case, one of the most important factors in our assessment of the proposed Consent Decree must be the "risk, expense, complexity and likely duration of further litigation". The parties suggest that "[t]imely resolution of this case is perhaps the most important consideration in evaluating the 'fair, adequate, and reasonable' nature of the proposed Consent Decree." Parties' Joint Motion, p. 21, ll. 5-6. The Court agrees. If the case were litigated through trial, another school year would pass before class members are given the comprehensive educational opportunities made available to them in the Consent Decree. In the life of a teenager, one year is a substantial amount of time - and could well be the difference between graduating and not graduating from high school.

In addition, for at least another year, defendants would not be bound by the provision in the proposed Consent Decree precluding them from authorizing or participating in any practice that excludes or involuntarily reassigns students from comprehensive school for alleged violations of the District's student conduct rules without providing 'appropriate notice and an appropriate hearing.' Without the Consent Decree, defendants could continue, for a

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[8] At this stage, the reaction of class members other than the lead plaintiffs (who presumably are in agreement with the provisions of the proposed Consent Decree) is unknown. The Court will be better positioned to reliably analyze this factor after reviewing objections (if any) to the proposed Consent Decree and conducting the final fairness hearing.

substantial period, practices that allegedly violate students' fundamental rights and wrongfully deprive them of much needed education.

In addition, the risk to plaintiffs of pursuing the litigation rather than settling the case at this juncture is considerable.[9] The proposed Consent Decree provides an impressive array of equitable relief - offering to class members real and otherwise unavailable opportunities to get 'back on track' with their educational pursuits - as well as setting in motion a process that could reduce the allegedly disproportionate impact on African-American and Latino students of some disciplinary measures. It is not clear whether plaintiffs would be able to match the equitable relief they have achieved through negotiation by taking this case to trial.

We also note that the expense of further litigation would very likely be quite high. In the joint motion, plaintiffs assert that "in addition to extensive document discovery concerning District disciplinary records, plaintiffs intended to engage in substantial motion practice, including motions for Class Certification and Summary Judgment." Parties' Joint Motion, p. 22, ll. 2-4. The parties believe that the trial would have lasted twelve days, and would have included testimony from at least sixty-three witnesses and three experts. Parties' Joint Motion, p.22, ll. 4-6 (citing Parties' Joint Case Management Conference Statement, filed December 13, 2004, Defs.' Initial Disclosures ¶ 1; Pls.' Initial Disclosures at 3-14.) As the parties point out, the money expended on these efforts on behalf of both the defendants

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[9] Analysis of the 'risk of further litigation' factor appears to overlap largely, it not completely, with analysis of the 'strength of plaintiffs' case' factor. Although plaintiffs contend that they have a strong case, they concede that there is "still a large risk inherent in going to trial in any complex litigation where issues and evidence are hotly contested." Parties' Joint Motion, p. 22, ll. 11-12. In particular, plaintiffs point to defendants' denial of several critical aspects of plaintiffs' claim -- including plaintiffs' assertion that defendants' policies and procedures are discriminatory. Parties' Joint Motion, p. 22, ll. 12-14. Given the complexity - both legal and factual - of plaintiffs' case, the Court does not disagree with the parties' statement that "trial would be a time-consuming, expensive, and risky proposition for all involved." Parties' Joint Motion, p. 22., ll. 18-19.

and the Court[10] would have been borne by the taxpayers. The expense of such additional litigation, and the fact that much of it would have been borne by the taxpayers, clearly weighs in favor of approving the settlement.

For all of these reasons, we find that the 'risk, expense, complexity, and likely duration of further litigation' weighs heavily in favor of approval of the parties' proposed Consent Decree.

Another factor courts are instructed to take into account when reviewing the proposed settlement of a class action is the "amount" of the settlement. Assessing this component of a proposed agreement would be relatively straightforward (in theory, at least) if a significant element of a settlement package was monetary compensation for harms suffered by members of the class. The proposed settlement in the case at bar, however, includes no direct monetary compensation for members of the class. That circumstance is attributable, in part, to the fact that it would be extremely difficult to measure or assess the dollar value of the harms suffered by members of the class as a result of the kinds of alleged wrongs that are attributed to defendants.

The absence of direct monetary compensation from the settlement agreement is also a reflection of the class representatives' value priorities. At the top of those priorities is a recognition that quality substantive education, coupled with full re-integration into the educational community from which they were removed, will be of much greater long-term value to members of the class than any cash that they might reasonably expect to recover in this litigation. In the Court's judgment, the class members have made a rational and wise assessment of the relative value of the kinds of relief that might be secured here. The comprehensive equitable relief negotiated by counsel for plaintiffs is quite impressive. Eligible plaintiffs will be reinstated to a comprehensive school, have their educational

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[10] And if, following trial or substantial motion activity in which an attorneys' fees award was appropriate, the Court awarded plaintiffs additional attorneys fees - the taxpayers also would bear plaintiffs' additional litigation costs.

records expunged/ modified, and will receive compensatory educational services and academic credit repair. In addition, in the future, defendants will provide appropriate notice and a hearing to students who have been identified as potential expulsion or reassignment candidates. Finally, defendants will take steps to reduce the alleged racial disproportionality in student discipline. Taking all pertinent considerations into account, the Court finds that the equitable terms of the proposed settlement will deliver value to the members of the class that is significant and that is appropriate in "amount" (i.e., commensurate with the harms suffered as a result of the challenged conduct).

The experience and qualifications of counsel on both sides of this litigation are considerable. Plaintiffs are represented by Legal Services for Children, Stanford Law School's Youth and Education Law Clinic, and the law firm of Pillsbury Winthrop LLP. These organizations have good reputations in the legal community and are experienced in constitutional and education law, complex and class action litigation, complex educational reform, and youth advocacy. Defendants are represented by Atkinson, Andelson, Loya, Ruud & Romo, a law firm that has specialized in counseling and representing educational and other public agencies for over twenty-five years. Given counsel's considerable experience and qualifications, we give substantial weight to their views that the proposed settlement is 'fair, reasonable, and adequate.'[11]

The final factor we consider is the extent of the discovery completed and the stage of the proceedings. In their joint motion, the parties state that, "[a]lthough [they] had not yet commenced formal discovery at the time they agreed to the terms of the proposed Consent

[11] It also is noteworthy that there is nothing about the proposed attorneys' fees that would cause us to question the independence and integrity of the views on this subject expressed by counsel for plaintiffs. Such questions might arise if the proposed compensation for plaintiffs' counsel were quite generous or out-of-proportion with the value the settlement delivered to members of the class. In the case at bar, however, the proposed attorneys' fees represent only a fraction of the market value of the hours spent and services rendered by plaintiffs' counsel. Nor is the court aware of any basis for inferring that the size of the fee award exceeds the value of the relief that members of the class will receive.

Decree, they had a strong understanding of the strengths and weaknesses of each other's cases gained through months of informal discovery and negotiation, Public Records Act requests propounded to the District, and initial disclosures." Parties' Joint Motion, p. 23, ll. 4-7.

It also is significant that the notification procedures suggested by the parties (and approved by the Court) are well-calculated to alert interested members of the community (including, primarily, potential members of the class) to the existence of the lawsuit, the nature of the allegations and claims, and the proposed terms of relief. It is reasonable to assume that these notification procedures would cause to surface any persons who might have been harmed in ways not fully understood by the class representatives or their lawyers -- or persons for whom the proposed relief would be off target or clearly insufficient. If any such persons present objections to the terms of the proposed decree the Court (and the parties) will be well-positioned to make any appropriate adjustments in the final version of the order. Thus, the comprehensiveness of the notice distribution mechanisms and the opportunities they create for acquiring additional information reduce the need for formal discovery.

Moreover, formal discovery is not a prerequisite to the approval of a class action settlement. In re Mego Financial Corp. Securities Litigation v. Nadler, 213 F.3d 454, 459 (9th Cir. 2000). The law requires the parties to have "sufficient information to make an informed decision about settlement," but does not dictate how that information is to be acquired. Id. Given the number of informal discovery vehicles utilized by the parties, as well as the notice that will be provided to class members prior to the final fairness hearing, and the nature of the negotiated relief, we find that the parties had sufficient information with which to make an informed decision regarding settlement.

At this juncture, it appears that all of the factors weigh in favor[12] of finding the proposed Consent Decree 'fair, reasonable, and adequate', and the most pertinent factors (the

[12] The 'extent of discovery completed and stage of proceedings' factor is at worst neutral.

'risk, expense, complexity and likely duration of further litigation', and the 'amount of the settlement') weigh heavily in favor of such a finding. Accordingly, the Court hereby makes a **conditional**[13] finding that the proposed Consent Decree is 'fair, reasonable, and adequate'.

In the case of Hanlon v. Chrysler Corporation, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit adopted the rule of several sister circuits that settlement approval that takes place prior to formal class certification requires a "higher standard of fairness." Hanlon at 1026. The Ninth Circuit adopted this heightened standard primarily to protect the interests of absent class members and to protect against the dangers of collusion[14] between class counsel and defendant.

Giving these concerns the full consideration that they deserve, the Court concludes that the proposed Consent Decree, as modified, treats absent class members and the named plaintiffs equally well. The Consent Decree does not provide for the payment of damages only to named plaintiffs. No settlement fund is created that plaintiffs could deplete. Furthermore, the proposed Consent Decree does not limit the number of plaintiffs who may qualify to receive comprehensive services or reinstatement, nor does it limit the value of the comprehensive services any individual plaintiff may receive. Finally, the proposed Consent Decree provides for a (i) comprehensive outreach plan, (ii) monitoring of defendants' compliance by a committee, a majority of whose members will be selected by plaintiffs, and (iii) the retention of jurisdiction by this Court over the implementation of the decree -- considerations which the Hanlon opinion indicates weigh in favor of a finding that the heightened fairness standard has been met.

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[13] The Court will not make a final assessment of the fairness, adequacy and reasonableness of the proposed Consent Decree unless and until it has carefully considered any and all objections by class members.

[14] We discuss the dangers of collusion below.

Consideration of the above factors, in particular the equal treatment of absent class members, leads us to the **preliminary**[15] conclusion that the heightened standard of fairness governing court approval of pre-certification settlement agreements is met in this case.

In addition to assessing the fairness, adequacy and reasonableness of the proposed Consent Decree under a heightened standard of fairness, we must also "reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." Hanlon, 150 F.3d at 1027.

In their joint motion, the parties describe nine months of arms-length negotiation, culminating in a final mediation in the presence of the Honorable Read Ambler, retired judge of the Superior Court of Santa Clara County.[16] There is no evidence in the record that suggests that the parties' settlement negotiations were not arms-length, or that the settlement was reached in an a suspiciously short period. Accordingly, the Court is satisfied that the proposed Consent Decree "is not the product of fraud or overreaching by, or collusion between, the negotiating parties." Id.

In light of our view that the proposed Consent Decree is fundamentally 'fair, adequate, and reasonable', the Court hereby APPROVES it subject to any objections that may be raised by class members in the manner specified above.

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[15] Again, the Court will not reach a final conclusion until it has considered all class members' objections to the proposed Consent Decree.

[16] Berkeley Unified School District is in Alameda County.

VI. Conditional Approval of the Attorneys' Fees Portion of the Settlement

Plaintiffs[17] ask the Court to conditionally[18] approve a negotiated fee award of $50,000.[19] "Under certain circumstances, the court may enter an order conditionally approving attorneys' fees to the attorneys for the class representative. When a common fund has been created for the class, counsel for the class are entitled to fees out of the common fund. Alternatively, class suits brought under a statute authorizing fees payable by the nonprevailing parties will entitle counsel to compensation." Newberg on Class Actions, Vol. 4, p. 62. (citing Aleyska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) for proposition that class suits brought under a statute authorizing fees payable by the nonprevailing party entitle the prevailing party's counsel to compensation).)

Plaintiffs bring their class action lawsuit under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202. See Civil Rights Complaint, e-filed August 13, 2004. The Civil Rights Attorneys' Fees Awards Act of 1976 provides that a prevailing party may be entitled to reasonable attorneys' fees for actions brought pursuant to 42 U.S.C. § 1983. Because the Consent Decree would impose substantial, legally enforceable burdens on defendants that they would otherwise not be required to bear, it is clear that the prosecution of this lawsuit has resulted in a real change in the legal relationships between the parties.[20] It follows that

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[17] For purposes of the instant motion, defendants do not dispute the reasonableness of the fees provision of the Consent Decree. The Court acknowledges that, if the proposed Consent Decree is not ultimately approved by the Court, no party would be bound by the $50,000 figure.

[18] The condition being that, after all objections from class members are considered and the final fairness hearing is conducted, the Court approves the parties' revised proposed Consent Decree (or some closely related version thereof).

[19] We construe plaintiffs' request as a motion for an award of attorneys fees under Rule 23(h)(1).

[20] The Supreme Court has held that a plaintiff who has secured a court-ordered consent decree is considered a prevailing party. Buckhannon Board v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 604 (2001). "Although a consent decree does not always include an admission of liability by the defendant, it nonetheless is a court-ordered, 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant." Id. (internal citations omitted).

plaintiffs' counsel are entitled to compensation upon approval by this Court of the proposed Consent Decree.

Having decided that plaintiffs' counsel are (conditionally) entitled to a fee award, we must determine whether the amount requested is fair and reasonable in the circumstances of this case. "Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable'." Staton v. Boeing Co., 327 F.3d 938, 963 (9th Cir. 2003). "To avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." Id. (internal citations omitted).

We review the reasonableness of the attorneys' fees portion of the settlement under the 'lodestar calculation method.' Id. at 966, Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1149, n.4 (9th Cir. 2001). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996) (opinion amended on denial of rehearing on other grounds, Morales v. City of San Rafael, 108 F.3d 981 (9th Cir. 1997).) "Although in most cases, the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it." Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1149, fn. 4 (9th Cir. 2001).[21] Because the lodestar figure is presumptively reasonable, adjustments

[21] Before the lodestar method was developed, the Ninth Circuit applied the twelve-factor test adopted in Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975). The twelve Kerr factors included: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case,

should be made only in rare cases. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

In support of their petition for attorneys' fees, plaintiffs have submitted the following declarations:

- Declaration of William S. Koski In Support of Motion for Preliminary Approval of Proposed Consent Decree, filed March 14, 2005 ("Koski Dec.");
- Declaration of Peter H. Nohle In Support of Joint Motion For Preliminary Approval of Proposed Consent Decree And Provisional Certification of Class for Settlement Purposes, filed March 14, 2005 ("Nohle Dec."); and
- Declaration of John Toole, filed March 14, 2005 ("Toole Dec.").

Six attorneys from three different legal organizations performed substantial work on plaintiffs' behalf. William Koski's declaration details the legal background, experience, and 'billing rate'[22] of all six attorneys,[23] Koski Dec., ¶¶ 1-6, and describes the division of labor between the three legal organizations, Koski Dec., ¶¶ 7-9. Mr. Koski's declaration also contains a 'lodestar' type-calculation for each legal organization, multiplying the billing rates

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(11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Id.

The Ninth Circuit has concluded that at least five of the Kerr factors have been "subsumed in the initial lodestar calculation." Morales v. City of San Rafael, 96 F.3d 359, 363-64 (9th Cir. 1996).

[22] We recognize that Stanford University's Youth and Education Law Clinic and Legal Services for Children do not actually bill their clients. As to these two non-profit organizations, we use the term 'billing rate' as shorthand for the rates charged in comparable markets by private attorneys with comparable backgrounds and experience.

[23] Peter Nohle's declaration also sets forth the legal background, experience, and billing rate of the Pillsbury Winthrop attorneys -- William Abrams and himself, and describes the professional services which they have rendered in this litigation. Mr. Nohle's declaration also states that, "[e]ach attorney from Pillsbury Winthrop LLP who worked on this matter was required to account for the work he performed on a contemporaneous basis. Work performed by an attorney must be recorded by identification of the date on which the work was done, the amount of time spent on the work, and a description of what work was done." Nohle Dec., ¶ 7.

and the hours spent on the litigation. The total of the three lodestar calculations is $141,580.18. Koski Dec., ¶ 10. Finally, Mr. Koski's declaration states that (i) plaintiffs' counsel have agreed to reduce their total bill amount from $141,580.18 to $50,000; (ii) Stanford University's Youth and Education Law Clinic has not sought any fees for the substantive and significant work of its law students; (iii) plaintiffs' counsel has not sought fees in connection with finalizing the Consent Decree, preparing the joint motion for provisional certification of a settlement class and preliminary approval of the proposed Consent Decree, or for preparing further written submissions in response to this Court's questions and concerns regarding the parties' joint motion,[24]; and (iv) Pillsbury Winthrop LLC has agreed to donate its portion of the fee award to its non-profit co-counsel. Koski Dec., ¶ 10.

Plaintiffs also have submitted a declaration from John O' Toole, an attorney specializing in "federal court litigation brought on behalf of indigent clients, particularly children and adolescents." O' Toole Dec., ¶ 3. Most of Mr. O' Toole's experience has been in class action litigation. Id.

Mr. O'Toole is the Director of the National Center for Youth Law ("NCYL"), a position he has held since 1981. O' Toole Dec., ¶¶ 5-7. During Mr. O'Toole's tenure as director of the NCYL, the Center has recovered more than seven million dollars in attorneys' fees and costs. O' Toole Dec., ¶ 7. During this period, "[Mr. O' Toole has] overseen all of NCYL's attorneys' fees litigation and [has] acquired expertise in the law governing the recovery of attorneys' fees." Id.

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[24] Given the pertinent sequence of events, the parties' joint motion does not list, 'preparing further written submissions in response to this Court's questions and concerns regarding the parties' joint motion' as one of the items as to which plaintiffs' counsel will not seek fees. We assume, however, that (if the Court ultimately approves the Consent Decree) plaintiffs will not seek additional fees in connection with preparing these submissions -- even though counsel obviously have devoted considerable time to this work.

Mr. O'Toole has familiarized himself with the instant litigation through conversations with plaintiffs' counsel and through reading the pleadings and other documents associated with the case. O' Toole Dec., ¶ 8. In Mr. O'Toole's opinion, given the complexity of the case, the total amount of time spent by plaintiffs' counsel is reasonable -- indeed, even modest. O' Toole Dec., ¶ 11. He also opines that the fee structure applied to those hours is reasonable. O'Toole Dec., ¶¶ 13 - 19. Finally, he states his belief that, "the substantially discounted fee request by Plaintiffs' Counsel of $50,000, just over one-third of the actual fee total, is extremely reasonable in light of the time and effort expended in pursuit of this litigation, and in light of the experience of the attorneys involved and the high quality of representation afforded to Plaintiffs in this matter." O' Toole Dec., ¶ 19.

Based on our review of the legal background, experience, and 'billing rate' of the six plaintiff-side attorneys who performed substantial work in this case, we agree with Mr. O'Toole's assessment that each of those attorneys' rates are consistent with the market rate of attorneys in this area with comparable experience. Accordingly, we find their quoted 'hourly rates' reasonable.

We must next assess the reasonableness of the number of hours expended by plaintiffs' attorneys on this litigation.

Attorneys from Stanford University's Youth and Education Law Clinic rendered 125.83 hours of professional service through December 12, 2004. This service included:

> legal research on due process requirements for school discipline, various federal state and race discrimination standards, and class action guidelines; preparation of initial disclosures materials; preparation of most of the major documents produced in this matter, including the original complaint, the Consent Decree, the newsletter to clients keeping them informed of the progress of the litigation, the Joint Case Management Conference Statement and ADR certification, and the Mediation Position Statement; individual client representation of several class members; numerous conferences and meetings with individual clients and with the larger group of identified class members; numerous meetings with co-counsel; extensive correspondence with Defendants' counsel; exhaustive reviews of documents and records; case

> management conferences with the court, and preparation time in advance of and review time following all of the aforementioned activities.

Koski Dec., ¶ 8.

Attorneys from Legal Services for Children rendered 175.54 hours of professional service through December 12, 2004. The work of Legal Services for Children, "focused on the investigation of the claims, counseling, and individual representation of Plaintiffs." Their professional services included:

> extensive correspondence and case strategy meetings with co-counsel; numerous conferences and meetings with individual clients and with the larger group of identified class members; extensive document and record reviews; individual representation on behalf of class members in matters related to their wrongful exclusion from school; extensive correspondence with Defendants' counsel; participation in the preparation of a demand letter, the original complaint, several settlement proposals, the Consent Decree, and numerous other documents and materials prepared in the course of settlement negotiations; case management conferences with the court.

Koski Dec., ¶ 7.

Attorneys from Pillsbury Winthrop LLP rendered 137.5 hours of professional service as of January 31, 2005. Professional services rendered by Pillsbury Winthrop LLP included:

> research, evaluation of strategy, and strategy analysis of case; correspondence and case strategy meetings with co-counsel, conferences and meetings with individual clients and with the larger group of identified class members; document and record reviews; participation in correspondence [sic] with Defendants' counsel; participation in the preparation of a demand letter, the original complaint, several settlement proposals, the Consent Decree, and numerous other documents and materials prepared in the course of settlement negotiations; preparation of case management statement submitted to the Court; and preparation time in advance of and review time following all of the aforementioned activities.

Koski Dec., ¶ 9.

Because plaintiffs' counsels' declaration does not specify how much time was spent on each task performed, it is difficult for us to know whether all of the 438.87 (125.83 + 175.54 + 137.5) hours were reasonably expended. However, as mentioned above, plaintiffs'

counsel have agreed to a substantially reduced fee of $50,000. Given the information that was provided by plaintiffs' counsel, Mr. O' Toole's 'expert' assessment, and the substantial complexity of this case, we have no doubt that the number of hours for which plaintiffs now seek fees (roughly one third of the hours spent before preparation of the joint motion) was reasonably expended.

Because both the hourly rate and the hours expended appear reasonable, we (conditionally) find the negotiated fee award reasonable under the 'lodestar calculation method.' We have also considered whether the circumstances of this litigation warrant adjusting the lodestar figure to account for the Kerr factors not subsumed within the lodestar calculation. Ferland v. Conrad Credit Corp, 244 F.3d 1145, 1149, fn. 4 (9th Cir. 2001). We conclude that the lodestar figure need not be adjusted.

Accordingly, we **conditionally** grant plaintiffs' petition for approval of the attorneys' fees portion of the settlement.

IT IS SO ORDERED.

Dated: May 17, 2005

/s/ Wayne D. Brazil
WAYNE D. BRAZIL
United States Magistrate Judge

Copies to:
Parties, WDB, stats.