

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX

NADINE JONES, by her next friend and father	)	
Kelsick Jones; CHRISTOPHER CARPENTER, by	)	
his next friend and father Malcolm Carpenter;	)	
FITZROY JOSEPH, by his next friend and father	)	
Felix Joseph; individually and on behalf of all other	)	
persons similarly situated	)	
	)	
v.	)	Case No. 1984 / 47
Plaintiffs	)	
	)	
HONORABLE CHARLES TURNBULL, Governor of	)	
The Virgin Islands; NOREEN MICHAEL,	)	
Commissioner of Education and CARRIE JOHNS	)	
Director of Office of Special Education,	)	
Defendants	)	

**CONSENT DECREE**

Plaintiff Class, as represented by Virgin Islands Advocacy, Inc., and the official Defendants, that being the Honorable Charles Turnbull, Governor of the Virgin Islands; Noreen Michael, Commissioner of Education and Carrie Johns, State Director of the Office of Special Education, and their successors, by and through Defendants' attorney, Kerry Drue, Attorney General respectfully move this Court for entry of this Consent Decree. Specifically, the parties stipulate to the following:

**I. INTRODUCTION**

1. Plaintiffs originally brought this class action under the Education of the Handicapped Act ("EHA"), 20 U.S.C. §1401 *et. seq.*, in 1984 and the Education of the Handicapped Act of the Virgin Islands, 17 V.I.C. §281 *et. seq.*, alleging that the policies and practices of the Department of Education deprived the Plaintiffs of their legal and statutory rights entitled to under the above named federal and territorial Acts. In 1990 Amendments to the EHA lead to the renaming of said law to the

Individuals with Disabilities Education Act ("IDEA"), 29 U.S.C. §794, *et. seq.* In the complaint, Plaintiffs specifically alleged that the EHA was violated because

(1) there existed no timely administrative mechanism for impartial due process hearings,

(2) The Department of Education (DOE) failed to provide a free and appropriate public education, in that there was a failure to provide related services, pursuant to a Plaintiff's Individualized Education Plan ("IEP"). The Plaintiffs also claimed that IEPs were changed without required notice under law. See Attachment 1.

2. On March 30, 1984, this action was certified as a class by the Honorable David V. O'Brien of the U.S. District Court for the Virgin Islands. This class consists of all students with disabilities in the Virgin Islands who have an IEP but are not receiving the services pursuant to their IEP. See Attachment 2.
3. There has been substantial litigation between the Plaintiffs and Defendants over the past twenty years. Each of the claims made by Plaintiffs centered upon violations of the EHA, as amended under the IDEA. Over the past twenty years, there have been several court orders entered by this court with the intent to have the government address the needs of the students with disabilities in the Virgin Islands. Most relate to direct enforcement of the EHA, as amended under the IDEA. The particularly significant interim orders which are incorporated into this agreement are listed below and attached hereto.
  - a. The January 2, 1985 Order (Attachment 3);
  - b. The June 22, 1987 Order (Attachment 4);

c. The June 12, 1991 Order of Judge Brotman (Attachment 5). This order is further buttressed by Judge Moore's decision and opinion cited at 896 F. Supp. 488; 32 V.I. 391;

4. Through the institution of this lawsuit, timely administrative mechanisms for due process hearings have been instituted, more federal agency assistance has been rendered to the Territorial Department of Education and other significant changes have been implemented over the past twenty years, which has caused the Virgin Islands public school system to vastly improve its method of providing services to students with disabilities. Although challenges remain, services have strengthened for Plaintiffs class since 1984.

5. Nationally, since the passage of the EHA, as amended under the IDEA became law in 1975, the number of young adults with disabilities enrolled in post-secondary education has tripled over the years.

**WHEREAS**, students with disabilities, are entitled to a free and appropriate public education, and shall be entitled to full and equal access to accommodations, advantages, facilities, and privileges of a public education;

**WHEREAS**, the settling Defendants are the Government of the Virgin Islands, the Department of Education, and named officials in their official capacity;

**WHEREAS**, the class representative, on behalf of the alleged class, seek injunctive and declaratory relief, and seek to recover the costs of suit, including attorney's fees;

**WHEREAS**, the Parties recognize the uncertainties of the conclusion in the litigation and the likelihood that any final result would require further complex litigation with

substantial expense; and Plaintiffs' counsel on behalf of the settlement class, believes that settlement at this time as provided in the agreement will be in the best interest of the settlement class as defined herein;

**WHEREAS**, the class representatives, through Plaintiffs' counsel, have conducted informal discovery and conducted an independent investigation of the facts and an analysis of the legal issues;

**WHEREAS**, the Parties agree that the settlement provided in this agreement is fair, reasonable and adequate resolution of the litigation;

**WHEREAS**, the Parties desire to compromise and settle the litigation which has been brought on behalf of persons who are included in the settlement class;

**WHEREAS**, the Parties desire and intend to seek Court approval of their settlement as set forth in this agreement;

**NOW, THEREFORE**, it is stipulated and agreed that in consideration of the promises and mutual covenants set forth in this agreement and the entry by the Court of a final order and judgment dismissing the litigation with prejudice and approving the terms and conditions of the settlement as set forth in this agreement, as required by the Federal Rules of Civil Procedure, the litigation shall be settled and compromised under the terms and conditions contained herein.

## **II DEFINITIONS**

**IDEA Individuals With Disabilities Education Act**—The purpose of this legislation is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

meet their unique needs and prepare them, to the extent possible, for employment and independent living.

**Individual Education Program (IEP)**—An IEP is a written statement for a child with a disability that meets the child’s individual educational needs. It is written by a group of professionals and the child’s parent or guardian. An IEP must be in effect before any special education or related services are provided and it must be reviewed at least annually.

**Child Find**—Child Find is the requirement under the Individuals With Disabilities Education Act which states that the State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

**Free Appropriate Public Education (FAPE)**—Special Education and related services that are provided at public expense, under public supervision and direction, meet State Education Agency standards, include preschool, elementary school, or secondary school, and are provided in conformity with an IEP.

**Related Services**—Transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from

special education, and includes speech/language pathology, audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services, social work services in schools, and parent counseling and training.

**Extended School Year (ESY)**--Extended School Year is offered when a student requires uninterrupted instruction based on three factors. The first factor is whether the child is likely to lose critical skills or fail to recover these skills in a reasonable time following a school break. (Regression and recoupment) The second factor is consideration of whether a school break (summer vacation) will prevent learning a key skill that is in the developmental stage. (Emerging skill). The last factor is consideration of whether a school break will prevent the student from receiving some benefit from his/her educational program due to the nature and/or severity of his/her disability. Determination of whether a child needs ESY services is an IEP team decision.

**Compensatory Education**--if a student with an IEP did not receive services as indicated on the IEP for some period of time, the IEP team considers whether the child is entitled to Compensatory Education ("makeup services"). The purpose of Compensatory Education is to ensure that the child make the progress that would have

been made if an appropriate program had been available.

**Least Restrictive Environment (LRE)**—To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled. Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

**Procedural Safeguards**—Procedural Safeguards are the rights and protections afforded to children with disabilities and their parents under the IDEA. A copy of the Procedural Safeguards Notice must be given to parents of a child with a disability upon initial referral for evaluation, upon each notice of an IEP meeting, upon reevaluation of the child, and upon receipt of a request for a due process hearing.

### **III. AGREEMENT**

It is hereby agreed and acknowledged that the Department of Education as recipient of federal funds is obligated to comply with the IDEA as amended. The Parties acknowledge that those provisions as set forth under the federal act are an essential element to the provision of a free appropriate public education to students with disabilities and an essential and integral part of this agreement for compliance purposes and need not

be duplicated or restated in detail under this agreement. It is clearly acknowledged by all Parties to this agreement that each provision of said act are fully integrated into this agreement and are incorporated as if specifically set forth for purposes of compliance and enforcement.

6. Child Find Requirements

- a. Defendants will satisfy all requirements of the Child Find provisions of the IDEA and the Virgin Islands Department of Education, Special Education Rules (VIDESER), as these Rules become effective in accordance with Virgin Islands Law. See 20 U.S.C. §§1412 *et. seq.* and VIDESER.
- b. Defendants will prepare and submit to the Plaintiff's representatives a training document relating to Child Find explicitly outlining the federal legal requirements and obligations of the teachers and other educational personnel, which shall be distributed to all teachers, school based administrative staff, school administrators and all other educational personnel who have direct student contact, within all schools in the Virgin Islands within one hundred eighty (180) calendar days of the execution of this decree by the Court. This same or updated document shall be distributed to teachers, administrative staff, and administrators at the beginning of each school year.

7. Referrals for Evaluation

- a. If school personnel determine that the available general education interventions and or programs have been unsuccessful and there is reason to suspect that the student is eligible for special education and related services, the student shall be referred to special education services staff for a



comprehensive evaluation.

- b. Parental requests for evaluations shall be submitted to special education services for review and recommendation. The right of a parent to refer a student for evaluation shall not be denied or delayed by the procedure listed in the Rule pertaining to general education interventions. In the case of a parental referral, every effort must be made to implement the regular education intervention procedures in Rule II. B. of the VIDESER.

8. Procedures for Evaluation and Determination of Eligibility

- a. Defendants will satisfy all requirements of the Procedures for Evaluation and Determination of Eligibility in accordance with the IDEA and local mandates as established for initial evaluations, reevaluations, determination of eligibility and placement.
- b. No later than forty five (45) days after receipt of completed referral documents and parental consent to evaluate, the evaluation will be completed and the results presented at a meeting convened to determine eligibility.

9 Individualized Education Program (IEP)

- a. Upon determination of eligibility, Defendants will meet the requirements of the IDEA and the VIDESER as they pertain to the developing, reviewing and revising the IEP of a child with a disability.
- b. Following the conclusion of the IEP meeting, a placement will be made no later than ten (ten) working days.

10. Free Appropriate Public Education (FAPE)

- a. Defendants agree to ensure the timely provision of special education and

related services as set forth in each child's IEP. This includes, but is not limited to, involvement and progress in the general curriculum with appropriate supports and modifications, occupational therapy, physical therapy, speech and language therapy, psychological counseling, and transportation services that allow for a full school day and a full school year of special education and related services. Defendants agree to ensure that beginning at age 14 (or younger if determined appropriate by the IEP team) each student's IEP contains a statement of the transition service needs, and beginning at age 16 (or younger if determined appropriate by the IEP team) the needed transition services are listed in the IEP and provided to each student.

- b. Special Education students who transfer between districts or from another jurisdiction shall receive an interim IEP and the necessary services to implement said IEP without any undue delay.
- c. As part of providing an outlet for more person-centered transition planning and implementation, Defendants will cooperate and work with a designated parent support group or committee which will work to develop a career development center for students with disabilities to provide greater opportunities for internships, job shadowing or direct work experiences for students with disabilities.
- d. Should a child with a disability not receive FAPE as indicated on the IEP, the IEP team will meet to outline the type of service, the duration, and the location that the compensatory education will be offered. The consideration of whether a child is entitled to compensatory education will be discussed at

each IEP meeting.

- e. At each IEP meeting, the IEP team will discuss whether a child needing special education and related services should be provided Extended School Year Service.

11. Least Restrictive Environment (LRE)

- a. Defendants agree to ensure that access to a full continuum of placement options, including, but not limited to the general curriculum, and access to facilities and programs is available to students in all disability classifications and that services and programs are provided in the Least Restrictive Environment.
- b. If regular education teachers demonstrate an inability to understand the requirements of the IDEA LRE provisions, or display an unwillingness to allow students in class with appropriate supports and modification, the teacher(s) shall undergo additional training with regard to the requirements of the IDEA and/or ADA sensitivity training at the Defendant's expense.
- c. Defendants shall ensure that special education teachers understand the requirement of general education so that they are better able to assess the propriety of a special education student being placed in a regular education class with appropriate supports and modifications.
- d. All educational facilities that are designated as the primary accessible facilities by the VIDE shall be in full compliance with current and applicable provisions of the Americans with Disabilities Act and the Americans with Disabilities Act Guidelines. All other facilities, to the extent possible shall be addressed and become accessible to the greatest extent practicable.

- e. Special Education classrooms shall not be isolated from the regular education classrooms.

12. Sufficient Qualified Personnel

- a. Defendants shall use their best efforts to ensure an adequate supply of qualified, prepared and trained special education teachers, regular education teachers, related service personnel, and paraprofessionals that meet territorial and federal standards. All vacancies for these positions must be filled as expeditiously as possible.
- b. The lack of adequate and qualified special education teachers, regular education teachers, related service personnel, and paraprofessionals shall not preclude a special education student from obtaining the services that she or he is entitled under his/her IEP.

13. Complaint Resolution and Procedural Safeguards

- a. Defendants will disseminate to students and parents of students the Procedures for Resolving Complaints under the Individuals with Disabilities Education Act upon the initial referral of a student, at each IEP, or when a due process complaint is filed.
- b. Due process complaints shall be resolved within an appropriate time line as set forth under the federal laws and regulations. Failure to resolve a due process complaint according to law shall result in default judgment in favor of complainant, as determined by the hearing officer, unless a justifiable explanation exists. A Hearing Officer may vacate an entry of default

judgment for good cause or in the interest of justice.

14. Complaint Resolution Procedures

- a. An adequate number of hearing officers, with the requisite qualifications as set forth under the IDEA and the VIDESER, shall be available to implement each due process hearing within the time parameters as set forth under the federal regulations and territorial rules.
- b. An adequate number of qualified mediators shall be made available to implement the required mediation proceedings.

15. Miscellaneous

Defendants agree to introduce legislation through the appropriate legal procedures that will allow bypassing the regular procurement process if the amount being requested is less than \$50,000 in relation to requisitions or expenses that are expressly to be expended for special education matters.

**III. SETTLEMENT APPROVAL AND CLASS NOTICE**

The parties shall present this settlement agreement to the Court as soon as practicable and will take all appropriate steps to obtain an order (a) preliminarily approving the settlement, (b) conditionally staying all matters in place for students with IEP's as of the start of the school year 2006-2007 for the class that was certified and are now the present class for settlement purposes as provided in this agreement, (c) approving the forms of notice (d) scheduling a hearing on the fairness of the proposed settlement and dismissal of

the litigation with prejudice, reserving the class and jurisdiction of the court for enforcement of this agreement and (e) directing that settlement class members be notified of this proposed settlement by mail and/or publication pursuant to the terms of this agreement.

Notice of the proposed settlement shall be mailed/served upon the members of the settlement class, a summary notice of proposed settlement and where it can be obtained for review shall be published in at least four daily issues of the Virgin Islands Daily News and four issues of the Avis, in easily legible type, for at least once a week for four consecutive weeks. The cost of all notices, publication, and expenses for public meetings, and requested teacher trainings shall be borne by the Defendants in lieu of payment of attorneys fees in this matter.

Subject to approval by the District Court of the Virgin Islands, the parties stipulate and agree that notice will be provided to all identified parents and those persons eligible for Special Educational services and such identified persons, along with their names and addresses will be given to VIA by Defendants to monitor the mailing of the notice to such identified persons. Such notices will bear the return address maintained by Plaintiff's counsel as follows:

Disability Rights Center of the Virgin Islands  
Attn: IDEA Settlement Notice  
63 Estate Carlton, Frederiksted  
St. Croix, VI 00840

The parties agree that these efforts plus those described in this agreement constitute reasonable identification of settlement class members.

It is the responsibility of Plaintiffs' counsel to respond to all inquiries from settlement class members.

Any settlement class member who wishes to be excluded from the class must send

a written request for exclusion at the address set forth in the mailed notice postmarked by January 22, 2007. Plaintiffs' counsel will provide to the settling Defendants and to the Court copies of all requests for exclusions.

DOE will provide to Plaintiffs' counsel a list identifying all students eligible for FAPE services as of August 1, 2006. DOE will also provide information regarding the total number and names of students awaiting evaluations, either initial or reevaluations as of the most recent report for school year sent to the Office of Special Education for the U.S. Department of Education.

Settling Defendants shall have the sole responsibility for giving the published notice and VIA will be responsible for the mailed notice provided by this section and approved in accordance with orders of the Court regarding such notice. The respective parties shall serve and file before this court affidavits of compliance with such orders by January 31, 2007.

Any settlement class member who intends to object to the fairness of the proposed settlement must serve any objections in writing to the address set forth in the mailed notice postmarked by January 22, 2007, stating in writing all objections and the reasons therefore, and including any and all supporting papers, and, if applicable, his or her statement of intent to appear at the fairness hearing. Plaintiff's counsel will provide to the settling Defendants and the Court copies of any and all such objections. Any settlement class member who does not serve timely written objections to the notice will not be permitted to object to the settlement at the fairness hearing, and will be foreclosed from seeking review of the settlement or dismissal of the litigation by appeal or otherwise.

#### **IV. APROVAL OF THE TERMS OF SETTLEMENT**

All terms under this section shall be reviewed by the public through at least two town meetings held jointly by the parties hereto. The meetings shall allow all who attend to make suggestions with regard to the proposed settlement, prior to its final acceptance by the court. The suggestions of the public, that are within the resources and capabilities of the Department of Education, shall be considered for incorporation into this agreement and made a part hereof, provided that any suggestions are reasonable and agreed to between the parties. No suggestion should be unreasonably denied by either party.

#### **MODIFICATION**

16. No extension, change, modification or amendment to or of this Consent Decree shall have any force or effect, except when in writing and signed by both parties to this Agreement.

#### **ENTIRETY OF THIS AGREEMENT**

17. This Decree contains the full and entire agreement between the parties hereto and neither they nor their employees, agents, attorneys, or anyone else acting in participation with them, shall be bound by any terms, conditions, statements, or representations, oral or written, not contained herein.

#### **AUTHORITY**

18. Both Parties have all necessary power and authority to execute and deliver this Decree, to consummate the transactions contemplated by this Decree, and to perform all the terms and conditions of this Decree.

#### **SURVIVAL OF TERMS**



19. The covenants and agreements herein contained shall be binding upon Plaintiffs and Defendants, any successive government administrations, and any successive Commissioners of the Department of Education.

**APPLICABLE LAW**

20. This agreement is made and executed in the U.S. Virgin Islands, and shall be subject to the laws of the U.S. Virgin Islands. Federal and/or U.S. Virgin Islands' law, rule, or regulation shall take precedent to the extent that any provision in this Consent Decree is inconsistent with such applicable federal or U.S. Virgin Islands' law, rule or regulation.

**DUPLICATE COUNTERPARTS**

21. This Agreement may be signed in duplicate counterparts, each of which shall be deemed an original, but all of which, together, shall constitute but one instrument. Facsimile transmitted copies of signatures shall be deemed effective.

**JURISDICTION**

22. This Court shall retain jurisdiction of this matter for the purposes of enabling any of the parties to this Consent Decree to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Consent Decree, for the enforcement of compliance therewith, for the punishment of violations, or for the remedies for the violations thereof.

FOR PLAINTIFFS:

Date: \_\_\_\_\_

\_\_\_\_\_  
Amelia Headley Lamont, Esq.  
Disability Rights Center of the Virgin  
Islands  
63 Cane Carlton

Frederiksted  
St. Croix, Virgin Islands 00840  
(340) 772-1200

Date: \_\_\_\_\_

\_\_\_\_\_  
Archie Jennings, Esq.  
Disability Rights Center of the Virgin  
Islands  
63 Cane Carlton  
Frederiksted  
St. Croix, Virgin Islands 00840  
(340) 772-1200

FOR THE DEFENDANTS:

KERRY E. DRUE, ESQ.  
ATTORNEY GENERAL

Date: \_\_\_\_\_

\_\_\_\_\_  
Carol Thomas-Jacobs, Esq.  
Assistant Attorney General  
Department of Justice  
34-38 Kronprindsens Gade,  
2<sup>nd</sup> Floor GERS Bldg  
St. Thomas, USVI 00802  
(340) 774-5666

SO ORDERED THIS \_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Curtis G. Gomez  
District Court Judge

Attested by:

Wilfred Morales

Clerk of the Court

By: \_\_\_\_\_  
Deputy Clerk

Copies to:

Archie Jennings, Esq.  
Amelia Headley Lamont, Esq.  
Carol Thomas-Jacobs, Esq.

