

SETTLEMENT AGREEMENT

PARTIES

The parties to this settlement agreement (hereinafter, “Agreement”) are the following:

The State of Oregon, by and through the Oregon State Board of Education (“Board”) and the Oregon Department of Education (“ODE”) (the Board and ODE are sometimes hereinafter jointly referred to as the “State”); and

Advocates for Special Kids (“ASK”); Edith Wyrick, by her guardian ad litem Catherine Wood Wyrick; Aaron Weingarten, by his guardian ad litem Darlene Weingarten; Tara Peterson, by her guardian ad litem Mary Peterson; Brett McNeil, by his guardian ad litem Cathie McNeil; and Shea Keith Ivey, by his guardian ad litem Cynthia Kay Brown (hereinafter, “plaintiffs”).

RECITALS

Whereas, plaintiffs have brought an action against the Board, its chair, Wayne Feller, and Oregon State Superintendent of Public Instruction Stan Bunn, in the United States District Court for the District of Oregon, Case No. CV99-263 KI (“the Litigation”), alleging that the Oregon statewide assessment program discriminates against children with learning disabilities in the Oregon public school system; and

Whereas, the parties agreed, in lieu of immediately pursuing the Litigation, to appoint a Blue Ribbon Panel to review Oregon’s statewide assessment program as it relates to students with learning disabilities, and to make recommendations to ODE on policies and procedures designed to ensure that students with learning disabilities (1) have equal opportunity to participate in and attain all of the benefits of the statewide assessment program and (2) are not denied any educational benefits otherwise available to eligible students based on their participation in the statewide assessment program; and

Whereas, the parties further agreed to stay the Litigation until the Blue Ribbon Panel of experts completes its work, and to thereafter negotiate in good faith a settlement agreement based upon the Panel's final report; and

Whereas, the Panel has now completed its review and has issued its final report, a copy of which is attached as Exhibit 1; and

Whereas, the parties agree that students with learning disabilities in Oregon's public schools would be better served by implementation of the Panel's recommendations as set forth in this Agreement than by further pursuit of litigation; and

Whereas, the parties have agreed to take the actions set forth in this Agreement to implement the panel's recommendations;

Therefore, in consideration of the mutual covenants and agreements contained herein, the parties agree as follows:

DEFINITIONS

Accommodations: An alteration in how a test is presented to or responded to by the person tested; includes a variety of alterations in presentation format, response format, setting in which the test is taken, timing or scheduling. The changes are made in order to provide a student equal access to learning and equal opportunity to demonstrate what is known.

Alternate Assessment: An assessment that is in addition to the regular Oregon State Assessment used to measure students' attainment of the Content and Performance Standards established by the State Board of Education.

Alternate Scoring: When necessary, a separate scoring procedure that addresses unique circumstances of testing; for example, assistive technology, disability characteristics, language of response, etc., made available on an individual student-by-student basis in order to produce a valid measure of the Content and Performance Standards established by the State Board of Education

Learning Disability: A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read write, spell or do mathematical calculations. Includes [such] conditions such as perceptual disabilities, brain injury, dyslexia, minimal brain dysfunction, and developmental aphasia. The term does not include learning problems which are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbances, or environmental, cultural, or economical disadvantage. (See OAR 581-015-0005). The term does not include learning characteristics which are the result of lack of instruction in reading or mathematics.

AGREEMENT

I. Adoption of Panel’s Recommendations.

ODE hereby adopts, and agrees to implement, the following measures to implement the recommendations of the Blue Ribbon Panel in accordance with the implementation schedule set forth in Section II of this Agreement. The report of the Blue Ribbon Panel may be consulted to provide context for the recommendations for the specific measures described below.

A. Accommodations.

1. It is ODE’s intent to broaden the current list of allowable accommodations for students with disabilities. Accommodations shall be considered allowable, valid, and scorable if they are used during instruction¹ or classroom assessment and are listed on a student’s IEP or Section 504 plan, unless ODE can show that the accommodation invalidates the score interpretation.² Rather than consider all accommodations first invalid until proven to be valid, ODE shall consider all accommodations valid unless ODE can show that the accommodation would invalidate the score interpretation. Any list of approved or not approved accommodations published by ODE as a guide for school districts shall not be deemed exclusive by ODE. ODE will provide IEP and 504 Teams with a checklist with specified criteria to be used by ODE in determining the validity of an accommodation. When ODE can show that a particular accommodation would invalidate the score interpretation, ODE must provide an alternate assessment and/or alternate scoring procedures for students who request

¹ As indicated in the Blue Ribbon Panel Report, not all instructional accommodations are considered appropriate for the OSAS; only the ones that “accurately reflect an individual students performance” (page 15) should be allowed.

² Valid score interpretation requires that a test score accurately reflect the intended construct.

the disallowed accommodation to afford those students an assessment option that leads to the CIM.

2. If a component of the OSAS is an essential requirement for meeting or exceeding the standard benchmark for obtaining a CIM, then either an accommodation, alternate scoring, or alternate assessment shall be provided to any student with a learning disability requiring such an option.
3. ODE shall develop and provide an information collection sheet to be used by IEP teams, section 504 teams, and others involved in planning for assessment participation of students with learning disabilities. The collection sheet will be used to document information regarding the participation of the student in the assessment program, including information about accommodations, both approved and non-approved, provided to the student that is consistent with those used in instructional and/or classroom assessment, as specified in the IEP or 504 Plan. ODE will provide information, training, and assistance on the use of this data sheet.
4. IEPs and 504 Plans for all students with learning disabilities shall be reviewed in their next annual IEP or 504 Plan review and then annually thereafter for the presence and appropriateness of accommodations to be used in the OSAS consistent with those used in instructional and/or classroom assessment.
5. ODE will collect and maintain a listing for each school district of the person(s) identified by the district as responsible for being knowledgeable about IEP requirements, the person(s) responsible for being knowledgeable about section 504 requirements and the person(s) responsible for being knowledgeable about assessment requirements (e.g., test accommodations, psychometrics of the test, and other measurement issues). These persons shall serve as resource and point persons for IEP

and section 504 teams, upon request, and shall serve as a point of contact within the school district and a liaison with the ODE regarding on-going issues related to the OSAS. ODE will recommend that these persons should be involved in any and all district implementation of OSAS policies.

6. ODE will develop and provide, through districts and other agencies, information regarding the OSAS and options for participation by students with learning disabilities to parents and other members of IEP teams, 504 teams, and other instructional planning teams. The information will include descriptions of the options for participation in the OSAS by students with learning disabilities, the implication of each of the options, and the appeals process.
7. Training for parents involving the OSAS and the range of participation options for students with learning disabilities shall be planned and implemented by ODE. The training shall occur at least once per school year prior to the administration of the OSAS. The training will be developed and implemented in cooperation with the Coalition in Oregon for Parent Education (COPE) and other parent/advocacy groups in Oregon.
8. School districts, school sites, and ODE shall keep on-going information regarding student test results regarding benchmark (e.g., grades 3, 5, 8) results to ensure accurate records are kept on which students with learning disabilities passed necessary benchmarks ultimately needed for the CIM.
9. ODE shall continue its research studies on assessment accommodations needed or utilized by students with learning disabilities on the OSAS, including those accommodations that invalidate the construct(s) of the OSAS. ODE will continue at least annual meetings with the State accommodation panel to review the research on the validity of testing accommodations.

B. Alternate Assessments.

1. The OSAS assessment should not directly assess a student's learning disability and make that component an essential requirement for obtaining a CIM. ODE shall provide alternate assessment, and/or alternate scoring procedures for students with learning disabilities in a specific area that is assessed by OSAS and that is an essential requirement for meeting or exceeding the benchmark for obtaining a CIM so that a student's disability is not directly assessed.
2. Students with learning disabilities shall be provided with a statewide assessment option that leads to the CIM (either with approved accommodations, or through alternate scoring or an alternate assessment).
3. Another assessment option leading to the CIM, over and above broader accommodations, the Curriculum-Based Measures, and the CLREAS, shall be provided for students with learning disabilities. ODE shall develop and disseminate guidelines for what includes a body of student work that demonstrates a student's mastery of the content and performance standards leading to the CIM as well as criteria to use in considering whether or not a student meets or exceeds proficiency of the standards.
4. Students with learning disabilities will be waived from participating in the OSAS only through parent requests for nonparticipation.
5. ODE will provide guidance and information to IEP teams, 504 teams, other instructional planning teams, school districts, parents, and students concerning another assessment option leading to the CIM and CAM for students who are in need of a non-approved accommodation for the OSAS.

C. Problem Resolution and Appeals Process.

1. ODE will broaden the reasons for appeal beyond re-scoring to include OSAS participation for students with learning disabilities, including but not limited to, appeals of decisions that an accommodation is not valid,

allowable, and scorable; appeals of decisions regarding whether a student will take an alternate assessment or have an assessment alternately scored; and appeals of decisions regarding whether a student will be allowed to retake a section of the OSAS.

2. ODE will implement a systematic and timely team approach to resolve OSAS appeals. The process will provide for informal resolution at the building level, formal resolution at the district level, and appeal and formal resolution at an intermediate or state level. ODE will provide information on the appeals process to all members of IEP teams, 504 teams, and other instructional planning teams and to district administration responsible for assessment. The appeals process is distinct from the dispute resolution procedures available under IDEA and Section 504, and these dispute resolution procedures may be available if OSAS issues cannot be resolved through the three-tiered appeals process.
3. The team members involved in the appeals process developed under recommendation 2 shall include persons with expertise in learning disabilities and the use of accommodations.
4. The appeals process shall be clearly delineated in all information for parents, teachers, and other professional staff regarding participation of students with disabilities within the OSAS. In addition, the information shall include how the appeals process interfaces with the dispute resolution procedures under IDEA and Section 504. The information will be incorporated into training and written information provided on the OSAS.
5. ODE will carry out broad information dissemination and statewide training regarding the appeals process for school personnel, parents, parent advocates, and others who are involved in the OSAS decision-making and administration of the OSAS Appeals Process.

6. ODE will develop and implement a process to monitor and evaluate the implementation of the Appeals process and its efficacy at each level of the process.

D. IEP and Section 504 Processes.

1. Assessment options for students with learning disabilities utilized within the OSAS, as determined within the IEP and 504 team decision processes, shall be broader than currently provided.
2. The Standard IEP form shall include a checklist of all OSAS assessment options; IEP references to assessment exemptions shall be modified as needed. The State shall issue guidance encouraging school districts to modify Section 504 forms to include a checklist of all OSAS assessment options.
3. Detailed guidance shall be developed and disseminated to IEP teams, 504 teams, and other instructional planning teams for use in informing team members of the options available for participation by students with learning disabilities in the OSAS, and the implications of each option regarding receiving or not receiving a CIM.
4. Training will be offered to and provided for members of IEP teams, 504 teams, and other instructional planning teams in the OSAS. The training shall be provided at least once per school year prior to the administration of the OSAS. The training will provide a comprehensive description of the OSAS, the options for participation for students with learning disabilities, and the implications of each option.
5. Information will be disseminated to parents regarding the OSAS and options for participation by students with learning disabilities, including information regarding options which do and do not lead to awarding the CIM.

6. Training will be planned and implemented by ODE. The training shall be provided at least once per school year prior to the administration of the OSAS. The training will be developed and implemented in cooperation with the Coalition in Oregon for Parent Education (COPE) and other parent / advocacy groups in Oregon. The training will be offered to and provided for parents, as members of IEP teams, 504 teams, and other instructional planning teams, in the OSAS. The training will provide a comprehensive description of the OSAS, the options for participating for students with learning disabilities, and the implications of each option.

E. Use of Test Results.

1. Issues related to students with learning disabilities will be systematically and specifically included in future test development and psychometric analyses. ODE will conduct studies regarding reliability, validity, and fairness of the OSAS as applied to students with learning disabilities similar to those applied to gender, race, and ethnic groups.
2. ODE shall utilize a record keeping system and database that will support analyses regarding the psychometric quality of the OSAS for students with learning disabilities.
3. Consistent with ODE and Board policy, the OSAS shall not be used inappropriately for any high stakes consequences for students with learning disabilities. ODE shall track potential misuses of the OSAS within school districts and be proactive in its efforts to actively discourage inappropriate uses of the OSAS for students with learning disabilities that are inconsistent with the April 22, 1999, Board Policy Statement and Memorandum No. 60-1999-00. ODE shall develop a plan for actively discouraging such inappropriate uses of the OSAS.
4. An advisory panel made up of national and in-state experts shall be created to advise and monitor the psychometric quality of the OSAS for all

students, including specific representation relative to students with learning disabilities.

II. Implementation of Panel’s Recommendations.

ODE shall take all necessary action to implement each of the Panel’s recommendations set forth in Section I above. Implementation of these recommendations shall be phased-in pursuant to the schedule set forth below:

<u>Recommendation</u>	<u>Implementation Begins</u>	<u>Implementation Complete</u>
<u>Section I A. Accommodations</u>		
1	Spring 2001 Assessment	Same
2	Spring 2001 Assessment	Same
3	February 2001 (Collection Sheet) April 2001 (Training)	August 2001 August 2002
4	March 2001	November 2003
5	Ongoing	November 2003
6	Ongoing	November 2001
7	Ongoing	November 2003
8	2001 Assessment	2001 Assessment and thereafter
9	On-going	On-going
<u>Section I B. Alternate Assessments</u>		
1	Ongoing	October 2001 and thereafter
2	Ongoing	October 2001 and thereafter
3	Ongoing	May 2001
4	Ongoing	Ongoing

5 Ongoing August 2001 and thereafter

Section I C. Problem Resolution Appeals Process

1 Ongoing November 2002
2 Ongoing (Establishing Process) October 2001
May 2001 (Notification) January 2002
3 May 2001 October 2001 and thereafter
4 March 2001 November 2002 and thereafter
5 May 2001 November 2003
6 March 2001 November 2003

Section I D. IEP and 504 Processes

1 On-going November 2003
2 September 2002 August 2003
3 Ongoing November 2001 and thereafter
4 Ongoing November 2002 and thereafter
5 Ongoing November 2002 and thereafter
6 Ongoing November 2002 and thereafter

Section I E. Use of Test Results

1 Ongoing November 2003
2 Ongoing November 2003
3 March 2001 September 2001 and thereafter
4 On-going November 2001

III. General Provisions.

A. Certificate of Advanced Mastery

It is the intent of the parties and the goal of ODE that the general principles contained in this agreement concerning the OSAS and students with learning disabilities will be applied to the extent applicable to the Certificate of Advanced Mastery (CAM) when and if the CAM is implemented.

B. Approval and Class Certification.

1. The parties stipulate to certification at the time of the Fairness Hearing of a settlement class as follows:

All children with learning disabilities attending Oregon public schools who participated in, sought to participate in, or sought to be excluded from, the Oregon Statewide Assessment System for the period from February 22, 1999 to the effective date of this Agreement.

This stipulation is contingent upon the Court granting Final Approval of this Agreement.

2. The parties shall jointly move for an order tentatively approving this Agreement, directing Notice to the Class as described below, and setting a hearing for Final Approval allowing for at least 30 days notice.
3. Any Class Member may object to the proposed Agreement by filing with the Clerk of the Court a written objection filed or postmarked no later than a date set by the Court in this case after Preliminary Approval of the Agreement.
4. The Court shall hold a hearing to establish the fairness of the final settlement of the claims of the class and to decide whether there will be Final Approval of the Agreement and certification of the settlement Class. This hearing shall take place at a date allowing for a period of notice to the Class as the Court may direct.
5. Upon entry of Final Approval, the action shall be dismissed with prejudice except that the Court shall retain jurisdiction to resolve (a) any dispute

over plaintiffs' claim for attorney fees and costs; (b) resolve, if necessary, the claim regarding separate CIMs that is excluded from the release in section III E.4 below; and (c) enforce the Agreement and the Dispute Resolution provisions.

6. The State will bear the cost of Notice to the Class. Notice shall be provided to the class in a manner to be established by the Court.

C. Monitoring and Reports

1. The State shall provide written reports on a semi-annual basis to class counsel and the third party facilitator regarding work performed to implement this Agreement. The reports shall detail (a) what steps the State has taken to comply with the Agreement since the last report, (b) whether the State has met the deadlines for implementation set forth in Section II of this Agreement, and if not, the extent to which such work has been completed and an explanation for any gaps, (c) what problems if any the State has encountered in complying with the Agreement, (d) what if anything the State plans to do to remedy these problems, and (e) any complaints and any responses to such complaints the State has received regarding the Oregon Statewide Assessment System with respect to students with learning disabilities. The first such report shall be due one hundred and five (105) days after the effective date of this Agreement.
2. A third party facilitator ("Facilitator") shall be appointed by the parties to monitor compliance with this Agreement. Former Oregon Supreme Court Justice Richard L. Unis shall serve as Facilitator. Facilitator shall be compensated by the State in an amount not to exceed \$10,000 per year. Facilitator shall have the powers to obtain from either party any non-privileged documents or information relevant to implementation of this Agreement, and to assist in resolving disputes by the parties as set forth in Section III D of this Agreement.

3. If Judge Unis becomes unavailable to serve as Facilitator, the parties will agree to appoint a substitute person to act as Facilitator. If the parties cannot agree on a substitute person, the parties will submit the matter of who to appoint as a substitute Facilitator to the Court for resolution.
4. The State shall designate a State official as the point person responsible for collecting information concerning compliance with this Agreement, producing the semi-annual reports referenced in Section III C.1 above, and producing any information requested by the Facilitator. This point person shall report directly to, and have direct access to, the Director of ODE. The point person shall be provided with sufficient resources to collect all necessary information. The State shall bear all costs and expenses of this point person.
5. In addition to monitoring by Facilitator, Class Counsel shall receive the semi-annual reports required by this Agreement for purposes of monitoring the State's compliance. The State agrees to pay Class Counsel reasonable and documented fees and costs of up to a maximum of \$10,000.00 per year commencing on the effective date of this Agreement and continuing during the term of the Agreement for work performed in connection with the monitoring process. Class Counsel will submit records of any such fees and costs quarterly.
6. In the event that Class Counsel concludes that there has been a significant pattern of violation of the terms of this Agreement, Class Counsel is not precluded from seeking additional fees and costs for increased monitoring by motion to the Court.

D. Dispute Resolution.

1. The parties will attempt to resolve any claim of material violation of this agreement through negotiations. An attempt at informal resolution, as described below, will be a prerequisite to either party's request for relief from the court for an alleged material violation of this agreement.
2. The court will retain jurisdiction solely for the purposes of enforcing compliance with this Agreement and adjudicating fees if the parties are unable to reach agreement. Before relief is sought from the court, the following process will be used by the parties:
3. Either party claiming that a material violation has occurred under this Agreement will give notice of the claim in writing to opposing counsel and will propose a resolution of the issue to the other party.
4. The responding party will have twenty (20) days following receipt of the written claim to respond in writing, unless the period is enlarged by Agreement of the parties.
5. If the party asserting the claim is dissatisfied with the other party's response, or if no response is received, the party asserting the violation may, after providing ten (10) days' written notice to opposing counsel, submit the matter to Facilitator for mediation and a non-binding determination. If either party is dissatisfied with Facilitator's determination, that party may request relief from the United States District Court for the District of Oregon. Facilitator's determination will be considered a recommendation to the court.
6. In any dispute resolution procedure, attorneys' fees and costs may be claimed under any legal basis available under the law.

E. Releases.

1. In return for the consideration provided for in this Agreement, on the date of Final Approval, the Named Plaintiffs and all Class Members both

individually and as a class shall release the State, the Board, ODE, and their officers, agents, employees, and assigns, from any and all claims for declaratory and injunctive relief arising out of the matters set forth in plaintiffs' complaint. The Named Plaintiffs also release any and all claims for damages or other monetary compensation they may have against the State, the Board, ODE, and their officers, agents, employees and assigns, whether known or unknown, arising out of the matters set forth in plaintiffs' complaint.

2. This release does not preclude class members from seeking to enforce individualized obligations that the State or any educational entity may have to specific students under the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act of 1973.
3. This release does not apply to any potential claims for damages by class members who are not named plaintiffs in the litigation.
4. This release does not apply to, and the settlement does not cover, the Panel's recommendation on awarding separate CIMs in each subject area as set forth on page 34 of the Panel's report. The State has not agreed to implement that recommendation. Plaintiffs reserve the right to present that issue to the United States District Court for the District of Oregon for resolution. If plaintiffs decide to submit that issue to the court, they shall submit a motion to the court no later than 60 days after the date of Final Approval of this Agreement. If a motion is not filed within that time period, the right to litigate that issue shall be waived. The parties agree that, if the issue is presented to the court, it shall be resolved by cross-motions for summary judgment and without an evidentiary hearing.

F. Term of Agreement.

1. The effective date of this Agreement is the date on which all parties have signed the Agreement and final court approval is obtained. This

Agreement shall be considered binding only when final court approval is obtained. Upon receipt of such final court approval, the effective date of the Agreement for the purposes of the obligations imposed by the Agreement shall be deemed to be the date on which all parties signed the Agreement.

2. This Agreement shall terminate on December 31, 2004. This Agreement shall be extended by written modification if not fully implemented as currently scheduled in Section II for an amount of time as necessary for complete implementation.
3. The parties understand that agreements purporting to require future legislatures to make appropriations are subject to Article XI, section 7 of the Oregon Constitution. The parties are not intending by this agreement to bind future legislatures in contravention of the Oregon Constitution. Sufficient funds are available under ODE's current legislatively-approved budget to allow ODE to comply with this agreement for the remainder of the current biennium; ODE believes that sufficient funds will be available as part of the subsequent budgets to be approved by the legislature to allow ODE to fully comply for the remainder of the term of this agreement.

G. Attorneys' Fees, Expenses and Costs

1. Counsel for the parties shall meet and confer within thirty (30) days of the effective date of this Agreement in an effort to reach agreement on reasonable fees and costs. In the event the parties are not able to agree on fees and costs, plaintiffs may seek to recover their reasonable attorneys' fees and costs incurred in connection with the Litigation by filing a motion for costs and attorney fees for binding determination by the Court or by submission to a neutral and mutually acceptable decision maker. The State reserves the right to object to all or any part of plaintiffs' request to recover attorneys' fees and costs on any basis, except that the State will

not dispute that plaintiffs are the prevailing party for purposes of recovery of costs and attorney fees.

H. Miscellaneous Provisions.

1. This Agreement is the compromise of disputed claims and shall not be deemed to be an admission of liability or wrongdoing by any party for any purpose.
2. If any provision of this Agreement shall be found to be unenforceable, the remaining parts shall not be affected and shall remain in full force and effect.
3. This Agreement contains the entire agreement between the parties. The Agreement may not be modified, except in writing by mutual agreement of the parties.
4. The State shall not be required to comply with any provision of this Agreement that is contrary to federal requirements or court order. If the State believes that a court or the federal government, through Congress, the United States Department of Education, or otherwise, has imposed requirements upon the State that are directly contrary to the terms of this Agreement, the State shall inform class counsel in writing and will specifically identify which requirements are being imposed on the State as well as which provisions of this Agreement the State believes are directly contrary to those requirements. The parties will then utilize the Dispute Resolution procedures set forth in this Agreement if there is any disagreement over whether a provision of this Agreement is contrary to court order or federal requirements.
5. This Agreement shall be governed by the laws of the State of Oregon.
6. There are no third party beneficiaries to this Agreement.
7. This Agreement may be signed in duplicate originals.

Dated this ____ day of _____, 2001.

STATE OF OREGON

by and through the Oregon State Board of
Education and the Oregon Department of
KIDS
Education

By: _____
Stan Bunn
Oregon State Superintendent of
Public Instruction

PLAINTIFFS:

ADVOCATES FOR SPECIAL

By: _____

Catherine Wood Wyrick

Darlene Weingarten

Mary Peterson

Cathie McNeil

Cynthia Kay Brown

Approved as to Form:

Stephen K. Bushong
Assistant Attorney General

Sid Wolinsky
Disability Rights Advocates