

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
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DISTRICT COURT E.D.N.Y.

★ DEC 31 2013

*D.F.F.*  
*Rec'd 12/31/13*

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
NEW YORK CITY BOARD OF EDUCATION, *et al.*,  
Defendants,  
and  
JOHN BRENNAN, *et al.*,  
Intervenors,  
and  
JANET CALDERO, *et al.*,  
Intervenors,  
and  
PEDRO ARROYO, *et al.*,  
Intervenors.  
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JOHN BRENNAN, *et al.*,  
Plaintiffs,  
v.  
ERIC HOLDER, *et al.*,  
Defendants.

BROOKLYN OFFICE  
Case No. 96-0374  
Honorable Frederic Block  
  
Case No. 02-0256  
Honorable Frederic Block

### NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

**A FEDERAL COURT HAS AUTHORIZED THIS NOTICE.  
PLEASE READ IT CAREFULLY. IT CONTAINS IMPORTANT  
INFORMATION THAT MAY AFFECT YOUR RIGHTS.**

The United States District Court is considering whether to approve a Settlement Agreement in two lawsuits alleging discrimination in connection with the hiring of Custodian Engineers to work in New York City public schools. These long-running cases are known as *United States v. New York City Board of Education, et al.* ("US v. NYBOE") and *John Brennan, et al. v. Eric Holder, et al.* ("Brennan v. Holder").

This Notice describes the proposed Settlement Agreement and how it may affect your legal rights. The proposed Settlement Agreement will not go into effect until (1) individuals whose rights may be affected by the proposed Settlement Agreement have had the chance to

object to it, and (2) the Court has a hearing and approves the Settlement Agreement as fair, adequate, and reasonable, and all appeals from that approval have been exhausted.

You may object to the proposed Settlement Agreement, but you do not have to object. The deadline for submitting objections is Friday, February 14, 2014. Additional information about how to object is below.

You may attend the court hearing about the proposed Settlement Agreement, but you are not required to attend. The hearing will occur at 11:00 AM on Wednesday, April 2, 2014 before the Honorable Frederic Block, United States District Judge, at United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201, in Courtroom 10C S. More information about the hearing is below.

#### What are these lawsuits about?

In 1996, the United States filed *US v. NYBOE*. In that lawsuit, the United States alleged that the New York City Department of Education (the “DOE”) violated Title VII of the Civil Rights Act of 1964 by engaging in race, sex, and national origin discrimination in connection with hiring Custodian Engineers to work in New York City public schools. When the term “Custodian Engineer” is used in this Notice, it refers to individuals who are either Level 1 or Level 2, as well as those who had the job title “Custodian” prior to the combining and reclassification of the Custodian and Custodian Engineer job titles.

After years of litigation in the *US v. NYBOE* lawsuit, the United States and the DOE entered into a Settlement Agreement in 1999 (the “1999 Settlement Agreement”). Under the 1999 Settlement Agreement, permanent positions as Custodian Engineers and/or retroactive seniority were provided to 59 Custodian Engineers identified as African-American, Asian, Hispanic, and/or female. Those individuals are the “Offerees.” Although the seniority and/or permanent positions received by the Offerees may have other benefits, they could be particularly useful for Custodian Engineers seeking:

- Protection in the event of layoffs (“**Layoff Protection**”);
- Transfers to new schools (“**School Transfers**”); and
- Temporary assignments of schools or buildings that are not assigned to any other Custodian Engineer (“**Temporary Care Assignments**” or “**TCAs**”).

In 2001, several Custodian Engineers who did not receive benefits under the 1999 Settlement Agreement intervened in *US v. NYBOE*. Also, they and other employees filed a separate class lawsuit against the United States and the DOE alleging that the retroactive seniority provided to the Offerees under the 1999 Settlement Agreement discriminated against them, and others, in violation of federal law, including the Equal Protection Clause of the U.S. Constitution and Title VII. That second lawsuit is known as *Brennan v. Holder*.

Various Offerees intervened to defend the seniority and other benefits that they received under the 1999 Settlement Agreement. For over two years, counsel for the various parties in these two lawsuits have had extensive settlement discussions, many with the assistance of the Court through United States Magistrate Judge Robert Levy. The Parties decided, in light of the unsettled nature of the law, the complex legal issues at stake, as well as the likelihood of years of burdensome and expensive litigation with highly uncertain outcomes, to enter into a Settlement Agreement (the “2013 Settlement Agreement”).

The 2013 Settlement Agreement is a proposed compromise of disputed claims. It is not a concession or admission of the truth of any claim or allegation by any party. This Notice is not an expression of any opinion by the Court about the merits of any part of these lawsuits.

#### Why did I get this Notice?

The DOE’s records indicate that you may be a member of at least one of three groups who may be affected by the 2013 Settlement Agreement in this litigation:

- **Offerees Not Already Parties to the 2013 Settlement Agreement.** 59 individuals who were provisional or permanent Custodian Engineers in 1999 received a permanent appointment and/or retroactive seniority under the 1999 Settlement Agreement. As of November 13, 2013, 35 of these Offerees are still employed by the DOE. Two groups of Offerees are not receiving this Notice because they are represented by counsel and, through their counsel, are Parties to the 2013 Settlement Agreement: the 10 “Arroyo Intervenors” and the 24 “Caldero Intervenors” as listed in footnotes 2 and 3 respectively of the 2013 Settlement Agreement. The remaining Offerees listed in footnote 5 of the 2013 Settlement Agreement, who are still working for the DOE as of November 13, 2013, are receiving this Notice because they are not already Parties to the 2013 Settlement Agreement, although they will have an opportunity to become Parties, if they so choose, as discussed further below.
- **Injunctive Relief Class.** All Custodian Engineers whose seniority for purposes of School Transfers, Temporary Care Assignments, and Layoff Protection was adversely affected by the grant of seniority benefits to the Offerees. You may be a member of the Injunctive Relief Class if you are a non-Offeree Custodian Engineer with a seniority date on or after January 23, 1989.
- **Future Damages Class.** All Custodian Engineers, other than Offerees, with seniority dates for School Transfers purposes between January 23, 1989 and January 1, 2002, inclusive. All members of the Future Damages Class are members of the Injunctive Relief Class, but some members of the Injunctive Relief Class may not be members of the Future Damages Class.

If you are a member of any of these groups, you have a right to know about the 2013 Settlement Agreement and about all your options before the Court decides whether to approve it.

**Does the 2013 Settlement Agreement affect Layoff Protection?**

Yes. The 2013 Settlement Agreement adjusts the seniority dates of certain Offerees for purposes of Layoff Protection. In most cases, the adjusted seniority dates for purposes of Layoff Protection are later than the seniority dates that the Offerees received under the 1999 Settlement Agreement. The adjusted seniority dates for Layoff Protection purposes are listed in a chart included as Attachment A to the 2013 Settlement Agreement.

**Does the 2013 Settlement Agreement affect Temporary Care Assignments?**

No. Temporary Care Assignments will not be affected by the 2013 Settlement Agreement. The Offerees will continue to have the retroactive seniority provided by the 1999 Settlement Agreement for purposes of TCAs.

**Does the 2013 Settlement Agreement affect School Transfers?**

Yes. Offerees will receive all School Transfers that they are entitled to receive because of the job benefits they received under the 1999 Settlement Agreement or because of job qualifications that they otherwise obtained. For Custodian Engineers who are members of the Future Damages Class, the 2013 Settlement Agreement establishes a claims process (“the School Transfer Claims Process”) to provide compensation if they lose a School Transfer to an Offeree any time after the November 13, 2013 and satisfy certain other requirements summarized below.

**Who is eligible for compensation through the School Transfer Claims Process?**

Custodian Engineers eligible for compensation through the School Transfer Claims Process are members of the Future Damages Class. The Future Damages Class includes all Custodian Engineers, other than Offerees, with seniority dates for School Transfer purposes between January 23, 1989 and January 1, 2002, inclusive.

If you are a member of the Future Damages Class and you lose a School Transfer to an Offeree after November 13, 2013, you will be eligible for compensation from the DOE if you would have received that School Transfer under any of the following hypothetical circumstances:

- Offerees who were permanent Custodian Engineers before the 1999 Settlement Agreement had not received any retroactive seniority in the 1999 Settlement Agreement;
- Offerees who received a permanent appointment under the 1999 Settlement Agreement, and who have not changed from Level 1 to Level 2 had a seniority date of January 1, 2002; and
- Offeree Celestino Fernandez’s list number for his Custodian Engineer Level 2 seniority date reflected his actual permanent hiring date of March 6, 2000.



As explained below, members of the Future Damages Class may exclude themselves from, or “opt out” of, the Future Damages Class. If you opt out, going forward, you will not be able to receive compensation through the School Transfer Claims Process established by the 2013 Settlement Agreement. Instead, if you believe you have suffered a future loss attributable to the benefits provided to the Offerees pursuant to the 1999 Settlement Agreement, you may pursue a claim for compensation, for example by filing a lawsuit, at your own expense and with or without an attorney you choose.

**What compensation will be available through the School Transfer Claims Process?**

The DOE will compensate a member of the Future Damages Class who meets the criteria set forth above for up to three years. It will provide 85% of the difference between the salary for the school lost to the Offeree and (under most circumstances) the salary that the Custodian Engineer otherwise receives.

If, while still receiving this additional compensation, you receive a School Transfer that increases your compensation, then the amount paid will change to 85% of the difference between the compensation for the school that you lost to the Offeree and the new salary that you receive.

You will continue to receive compensation only if you reduce or “mitigate” any lost salary by applying to schools that are geographically close to the lost school and that pay more than your current school. Additional details about the School Transfer Claims Process are set forth in paragraphs 25 through 35 of the 2013 Settlement Agreement. If you believe you may be a member of the Future Damages Class, you should review those provisions carefully.

**I lost a school transfer to an Offeree a few years ago. Can I get compensation through the School Transfer Process?**

No. The School Transfer Claims Process provides only a process for compensation for losses of school transfers that occur after November 13, 2013. If you lost a transfer to an Offeree before then, and have not yet filed a claim of some kind for compensation, you can, if you wish, consult an attorney regarding your rights. The 2013 Settlement Agreement does not itself eliminate your right to sue on such claims, but it does not provide any compensation for them.

**What if I lose a School Transfer to someone who is not an Offeree, but I would have received the school I lost had the winner not been beaten by an Offeree for a different school? Can I get compensation under the School Transfer Claims Process?**

No. The School Transfer Claims Process compensates only those who lose a school transfer directly to an Offeree.

**How will the School Transfer Claims Process work?**

If a member of the Future Damages Class believes that (s)he has met the criteria for compensation set forth above, (s)he must make a claim in writing to the Division of School Facilities of the DOE within 90 days of the transfer date for the School Transfer allegedly lost to

an Offeree. The DOE will respond in writing if it concludes that the individual is not entitled to compensation. The member of the Future Damages Class may then ask the Court to resolve the dispute.

**If I am a member of the Future Damages Class, do I have to participate in the School Transfer Claims Process?**

No. Members of the Future Damages Class may request to exclude themselves, or “opt out,” and the Court will exclude them from the Future Damages Class. If you choose to opt out, you will have no right to receive any compensation under the 2013 Settlement Agreement if you lose a School Transfer to an Offeree. Additionally, if you opt out, then you may not object to the provisions of the 2013 Settlement Agreement related to the School Transfer Claims Process. However, as discussed above, all members of the Future Damages Class are also members of the Injunctive Relief Class, so you may still object to any other terms of the 2013 Settlement Agreement as set forth below, even if you have chosen to opt out of the Future Damages Class.

If you choose not to opt out of the Future Damages Class, the School Transfer Claims Process will be your sole option for seeking compensation for money damages that you may claim in the future as a result of the benefits provided to the Offerees under the 1999 Settlement Agreement. You will give up the right to bring your own lawsuit for money damages in such circumstances going forward. If you opt out, you will not give up that right, but if you bring your own lawsuit, it will be at your own expense and with or without an attorney that you choose.

To opt out of the Future Damages Class, please carefully review the enclosed Instructions (which are Attachment E to the 2013 Settlement Agreement) and then complete and send (via U.S. Mail or electronic mail) by Friday, February 14, 2014 the attached Opt-Out Form (which is Attachment G to the 2013 Settlement Agreement) to Class Counsel at the address listed below.

**Can I opt out of any other provisions of the 2013 Settlement Agreement?**

No. If you are a member of the Injunctive Relief Class, you may not “opt out” of the Injunctive Relief Class, although you may object to the terms of the 2013 Settlement Agreement using the process described below. That means that, if the 2013 Settlement Agreement is approved by the Court, and goes into effect, it will fully resolve all claims for injunctive and declaratory relief that were raised or could be raised in the future by members of the Injunctive Relief Class. As a result, members of the Injunctive Relief Class will not be able to bring a separate lawsuit or otherwise challenge or seek to deprive the Offerees of any job benefits that result from the grant of permanent positions and/or retroactive seniority under the 1999 Settlement Agreement—although members of the Injunctive Relief Class who are also members of the Future Damages Class and do not “opt out” may utilize the School Transfer Claims Process to receive compensation for School Transfers lost to Offerees.

**How can I tell the Court that I don't like the 2013 Settlement Agreement?**

If you do not like the 2013 Settlement Agreement, you can object — that is, you can give reasons why you think the Court should not approve the 2013 Settlement Agreement. Members

of the Future Damages Class who choose to opt out of the Future Damages Class cannot object to those provisions related to the School Transfer Claims Process, but they can object to any of the other terms of the 2013 Settlement Agreement.

To object to any of the terms of the 2013 Settlement Agreement, please carefully review the enclosed Instructions (which are Attachment E to the 2013 Settlement Agreement) and then complete and send (via U.S. Mail or electronic mail) by Friday, February 14, 2014 the enclosed Objection Form (which is Attachment F to the 2013 Settlement Agreement) to Class Counsel at the address listed below. Only written objections will be considered. If you mail your written objection on time, the Court can consider it when deciding whether to approve the 2013 Settlement Agreement. You do not have to come to Court to talk about it in order to object.

**Who are counsel and the class representatives of the Injunctive Relief Class and the Future Damages Class?**

The contact information for Class Counsel in this litigation is as follows:

Michael Rosman  
General Counsel  
Center for Individual Rights  
1233 20<sup>th</sup> Street N.W., Suite 300  
Washington D.C. 20036  
rosman@cir-usa.org

Any member of the Injunctive Relief Class or Future Damages Class who wishes to be represented by his or her own lawyer may hire one at his or her own expense and may enter an appearance through that attorney if he or she desires.

The class representatives of the Injunctive Relief Class are John Brennan, James Ahearn, Scott Spring, Dennis Mortensen, John Mitchell, and Eric Schauer. The class representatives of the Future Damages Class are John Brennan, John Mitchell, Eric Schauer, and Scott Spring.

**What are the Offerees' views of the 2013 Settlement Agreement?**

The 10 Offerees who are Arroyo Intervenors and the 24 Offerees who are Caldero Intervenors are represented by counsel in this litigation and, through their respective counsel, they have signed on as Parties to the 2013 Settlement Agreement and agreed to be bound by its terms. The remaining Offerees not already Parties to the 2013 Settlement Agreement may choose to sign the 2013 Settlement Agreement on or before the date of the Fairness Hearing on Wednesday, April 2, 2014 and thereby become a Party to it. They may do so by notifying Counsel for any of the Parties, who are listed on page 28 of the 2013 Settlement Agreement. Those who do not choose to sign the 2013 Settlement Agreement may object to it, using the procedures discussed further below.

Except for purposes of Layoff Protection as described above, the pensions, current and future salaries, current and future positions, permanent appointments, and other job benefits and



conditions of the Offerees, including those who have retired or are otherwise separated from the DOE, will not be adversely affected by the 2013 Settlement Agreement. Although members of the Future Damages Class may receive compensation under the School Transfer Claims Process established by the 2013 Settlement Agreement, all Parties, as well as Local 891, will be prohibited from attacking the Offerees' pensions, current and future salaries, current and future positions, permanent appointments, and other job benefits and conditions, based on any allegations regarding the lawfulness of the 1999 Settlement Agreement.

**How will the attorneys be compensated for their involvement in the litigation?**

The United States and the DOE have agreed to pay counsel for the Injunctive Relief Class and the Future Damages Class a total of \$875,000 for attorneys' fees and costs incurred in *US v. NYBOE*, *Brennan v. Holder*, and three other related lawsuits in which claims for past damages have been asserted. All Parties have agreed to waive any other attorneys' fees or costs with one exception. As just noted, certain Custodian Engineers filed individual damages claims for past School Transfers that they allegedly lost to Offerees in *Brennan v. Holder* and the three related lawsuits. The 2013 Settlement Agreement does not resolve those individual damages claims (although some have been separately settled).

In addition, under the 2013 Settlement Agreement, each of the six individuals who are class representatives for the Injunctive Relief Class will receive \$2,000 from the DOE.

**What happens next?**

U.S. District Court Judge Frederic Block will hold a hearing to determine whether, as recommended by the lawyers representing all the Parties, the 2013 Settlement Agreement should be approved. If there are objections filed on time, the Court will consider them. The hearing before Judge Block has been scheduled for Wednesday, April 2, 2014, beginning at 11:00 AM, at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201, in Courtroom 10C S. If the hearing is not concluded on Wednesday, April 2, 2014, the hearing will continue on a later date.

Any interested person may attend the hearing.

**Do I have to attend the hearing?**

No. The attorneys will answer any questions that Judge Block may have. But you are welcome to come at your own expense. If you send an objection or opt out, you do not have to come to the Court to talk about it. As long as you submit your written Objection Form or Opt-Out Form on time, the Court can consider it when deciding whether to approve the 2013 Settlement Agreement. You also may have your own lawyer, retained at your own expense, attend the hearing.



**May I speak at the hearing?**

If you are a member of the Injunctive Relief Class or the Future Damages Class or if you are an Offeree who is not a Party to the 2013 Settlement Agreement, you may ask the Court for permission to speak at the hearing by submitting an Objection Form on time and checking the box requesting an opportunity to be heard at the hearing. The Court will, taking into account the number of requests to speak and time available, determine whether your request to speak can be granted, the order of speakers, and the time allocated for each speaker.

**What happens if I do nothing at all in response to this Notice?**

The 2013 Settlement Agreement, if it goes into effect after approval by the Court, will bind all Parties, as well as all other Offerees, with respect to the injunctive relief and the School Transfer Claims Process. You will waive your right to bring an independent lawsuit seeking injunctive or declaratory relief. If you are a member of the Future Damages Class, you will also lose your right to bring a lawsuit for any damages as a result of any lost school transfer occurring after the execution of the 2013 Settlement Agreement and that you claim was caused by the benefits to the Offerees in the 1999 Settlement Agreement. The Court will retain oversight to review disputes related to the implementation of the 2013 Settlement Agreement.

Specifically, the provisions governing the release of claims in Paragraphs 58-60 of the 2013 Settlement Agreement state:

58. Upon the Effective Date of this Agreement, as consideration for agreeing to the terms of this Agreement and to the entry of the Final Judgment attached hereto as Exhibit C, except as set forth in Paragraphs 59 and 60, all Parties hereby waive, release, and discharge any and all claims, causes of action, motions, or requests for equitable or monetary relief (including, without limitation, as to attorneys' fees, costs, indemnification, and contribution), whether known or unknown, against any and all of the other Parties, that: (i) accrued on or before the Execution Date; (ii) have been or could have been raised in any case listed in Paragraph 56 or any administrative proceeding related to any of those cases; and (iii) arose out of, or are related to, the facts or circumstances at issue in any case listed in Paragraph 56 or any administrative proceeding related to any of those cases. Any Offeree not Party to this Agreement who is still working for the DOE as of the Execution Date shall also be bound by the provisions of this Paragraph in accordance with 42 U.S.C. § 2000e-2(n).
59. This Agreement shall not be construed as a waiver or release by the Brennan Class Members of any claim for non-class, individual damages against DOE based upon events prior to the Execution Date, including the pending claims against the DOE for individual damages in the cases listed in Paragraph 56 [of the 2013 Settlement Agreement].
60. This Agreement shall not be construed as a waiver or release by the Brennan Class Members of their right or ability to pursue and/or receive reimbursement from the DOE for attorneys' fees or other costs incurred or expended on or after January 1,

2013 in connection with any claim for individual damages in any of the cases listed in Paragraph 56.

**Can the 2013 Settlement Agreement be voided?**

The 2013 Settlement Agreement may be voided on several grounds, including if the Court does not approve it. In addition, if more than 5% of the Future Damages Class members opt out of the Future Damages Class, the DOE may choose to void the 2013 Settlement Agreement. If the 2013 Settlement Agreement is voided, the litigation will proceed as if the 2013 Settlement Agreement had not been reached.

**How do I learn more about the 2013 Settlement Agreement?**

Additional information regarding the 2013 Settlement Agreement, including the full document and all its attachments, is available at the following websites: <http://www.cir-usa.org/>; <http://www.nydsf.com>.

Members of the Injunctive Relief Class and the Future Damages Class may obtain further information by contacting Class Counsel Michael Rosman at 1-202-833-8400 or 1-877-426-2665, extension 104, or [rosman@cir-usa.org](mailto:rosman@cir-usa.org). You may, instead, seek the advice and guidance of your own attorney if you desire.

For Offerees seeking further information, if you are one of the 10 "Arroyo Intervenors" listed in footnote 2 of the 2013 Settlement Agreement, please contact your counsel at the NAACP Legal Defense and Educational Fund, Inc. If you are one of the 24 "Caldero Intervenors" listed in footnote 3 of the 2013 Settlement Agreement please contact your counsel at the ACLU Women's Rights Project. If you are an unrepresented Offeree, you may obtain further information from counsel for the DOE or counsel for the United States. Contact information is listed on page 28 of the 2013 Settlement Agreement. You may, instead, seek the advice and guidance of your own attorney if you desire.

**Should I contact the Court prior to the hearing to get answers to my questions?**

No. Please do not contact the Court or its Clerk. Neither can respond to any questions regarding this Notice or the 2013 Settlement Agreement.

ISSUED THIS 30 DAY OF DECEMBER,

BY USDT BLOCK

Judge Frederic Block  
United States District Court