UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.P., Individually and on behalf of F.P., a minor, et al., Plaintiffs,	:	CIVIL ACTION NUMBER: 19-cv-12807
v.	:	
NEW JERSEY DEPARTMENT OF EDUCATIONS, et al., Defendants.	:	FINAL FAIRNESS MOTION HEARING

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
April 11, 2024
Commencing at 11:02 a.m.

B E F O R E: **THE HONORABLE EDWARD S. KIEL, UNITED STATES DISTRICT JUDGE**

A P P E A R A N C E S:

JOHN RUE & ASSOCIATES
BY: FRANCIS X. GEIER, ESQUIRE
100 Overlook Center, 2nd Floor, #9211
Princeton, New Jersey 08540
For the Plaintiffs

REISMAN CAROLLA GRAN & ZUBA, LLP
BY: CATHERINE M. REISMAN, ESQUIRE
BY: JUDITH A. GRAN, ESQUIRE
19 Chestnut Street
Haddonfield, New Jersey 08033
For the Plaintiffs

Ann Marie Mitchell, CRR, RDR, CCR, Official Court Reporter
AnnMarie_Mitchell@njd.uscourts.gov
(856) 576-7018

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

A P P E A R A N C E S (Cont.'d):

THURSTON LAW OFFICES LLC
BY: ROBERT C. THURSTON, ESQUIRE
433 River Road
Suite 1315
Highland Park, New Jersey 08904
For the Plaintiffs

LAW OFFICES OF DENISE LANCHANTIN DWYER LLC
BY: DENISE LANCHANTIN DWYER, ESQUIRE
3 Duxbury Court
Princeton Junction, New Jersey 08550
For the Plaintiffs

COYLE & MORRIS LLP
BY: DONALD A. SOUTAR, ESQUIRE
201 Littleton Road
Suite 210
Morris Plains, New Jersey 07950
For the Plaintiffs

EDUCATION LAW CENTER
BY: GREGORY G. LITTLE, ESQUIRE
BY: ELIZABETH ATHOS, ESQUIRE
60 Park Place
Suite 300
Newark, New Jersey 07102
For the Plaintiffs

DAVID GILES LAW
BY: DAVID GILES, ESQUIRE
34 Rynda Road
South Orange, New Jersey 07079
For the Plaintiffs

WASSERMAN LEGAL LLC
BY: JEFFREY I. WASSERMAN, ESQUIRE
1200 Route 22 East
Suite 2000, #2238
Bridgewater, New Jersey 08807
For the Plaintiffs

A P P E A R A N C E S (Cont.'d):

OFFICE OF THE NEW JERSEY ATTORNEY GENERAL
DIVISION OF LAW
BY: MATTHEW LYNCH, ESQUIRE
BY: COLIN KLIKA, ESQUIRE
RJ Hughes Justice Complex
25 Market Street
PO Box 112
Trenton, New Jersey 08625
For the Defendants

A L S O P R E S E N T:

GLADYS NOVOA, Courtroom Deputy

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I N D E X

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E X A M I N A T I O N S

Witness	Direct	Cross	Redirect	Recross
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(PROCEEDINGS held in open court before The Honorable EDWARD S. KIEL at 11:02 a.m.)

THE COURT: Good morning, everyone. Please be seated.

We're on the record in the matter of CP, et al., v. New Jersey Department of Education. It's case 19-cv-12807.

You're fortunate, or unfortunate, to be the first hearing that I have in person here in Camden. The people in Camden have welcomed me. I am a North Jersey guy from Newark, and so I'm glad to be here with so many smiling faces this morning.

So, the way we're going to proceed today is I just want to set out how we ultimately got here.

I understand that there are some witnesses that are going to be presented, and we'll talk about that in a second.

But let me just set out where we are and how we got here. I came into this case after Judge Hillman had it for a very long period of time, so I want to make sure that I got it straight.

So we're here for a final approval hearing that was scheduled for today by the parties' amended stipulation and consent order, ECF Number 559, and confirmed by my order on April 1, 2024, ECF 568, following the reassignment of this case to me.

There are two motions pending. First there is class

counsel's motion for final approval of class action settlement and attorneys' fees at ECF Number 564. Second, the parties have jointly moved for the appointment of a compliance monitor as contemplated by the settlement agreement, ECF Number 566.

So with that, let me first get the appearance on behalf of class counsel.

MS. REISMAN: Your Honor, Catherine Merino Reisman from Reisman Carolla Gran & Zuba.

MR. LITTLE: Gregory Little from the Education Law Center.

THE COURT: Anybody in the second row?

MR. THURSTON: If you want us, Your Honor. Robert Thurston here on behalf of the class counsel as well.

THE COURT: Mr. Thurston.

MR. GILES: David Giles, Your Honor, on behalf of class counsel.

THE COURT: Mr. Giles.

MS. ATHOS: Elizabeth Athos, Education Law Center.

THE COURT: Okay.

MR. SOUTAR: Good morning, Your Honor. Donald Soutar from Coyle & Morris. I represent the interests of seven of the individual plaintiffs.

And with me is Frank Geier of the law firm of John Rue & Associates.

THE COURT: Thank you very much.

Is that everybody for the class?

All right. How about for on behalf of the State?

Oh, there's more back there. Go ahead.

MS. DWYER: Denise Lanchantin Dwyer also on behalf of class counsel.

THE COURT: Okay.

MS. GRAN: Judith Gran, Reisman Carolla Gran & Zuba.

MR. WASSERMAN: Good morning, Your Honor, Jeff Wasserman, Wasserman Legal LLC.

THE COURT: Thank you very much.

And on behalf of the State?

MR. LYNCH: Deputy Attorney General Matthew Lynch representing the New Jersey Department of Education.

THE COURT: Great.

MR. KLIKA: Colin Klika, Deputy Attorney General representing the State defendants.

THE COURT: Thank you very much, everyone.

So I'm going to review briefly how we got to this point with everybody's help, including Judges Hillman, Skahill and former Judge Schneider.

This case was filed back in May 2019 at ECF Number 1 and as amended alleged systematic violations of the 45-day rule as set forth in federal and state regulations relating to the Individuals with Disabilities Education Act.

Those regulations require that within 45 days of the

conclusion of the 30-day period during which educational agencies and plaintiffs may resolve their dispute, the administrative law judge must render a final decision and mail a copy of the decision to the parties unless specific adjournments are requested.

The amended complaint sought, among other relief, for the New Jersey Department of Education to be permanently enjoined from continued violation of the 45-day rule and the appointment of a monitor to "oversee the development of special education dispute resolution procedures designed to remedy the current systems violations," ECF Number 78 page 80.

On August 19, 2022, Judge Hillman granted plaintiffs' motion to certify two classes, a Rule 23(b)(2) class and a Rule 23(b)(3) class, which I will define momentarily, and appointed proposed class counsel, ECF Numbers 384 and 385.

Judge Hillman thereafter denied the parties' competing summary judgment motions, ECF Numbers 391 and 392. The Third Circuit granted in part defendant's petition for certification on two issues later conceded by plaintiffs, ECF Numbers 416 and 441.

The parties proceeded towards trial, ECF Number 564-3, page 7.

Parallel to their motion practice and trial preparation, the parties participated in settlement conferences before Magistrate Judge Skahill during the spring

and summer of 2022, ECF Numbers 356 and 383, and later engaged in private settlement negotiations before former Magistrate Judge Schneider, ECF Number 564-3, pages 6 and 7.

Class counsel notified Judge Hillman in February 2023 that the parties had reached a settlement agreement, ECF Numbers 445 and 447. And Judge Hillman ordered plaintiffs to submit a fee demand and for the parties to work towards an agreement as to counsel fees at notice, ECF Number 448.

After multiple adjournments, plaintiffs moved for preliminary approval of the class action settlement on June 9, 2023, ECF Number 462. Internal issues among counsel led Judge Hillman to reconfigure class counsel pursuant to Rule 23(g), ECF Numbers 504, 505, 516, 530, and 531.

Plaintiffs again moved for preliminary approval of the settlement, ECF Number 546, which included revisions aimed towards addressing concerns previously raised by amici, ECF Number 564-3, page 9.

Judge Hillman preliminarily approved the settlement following a December 18, 2023 motion hearing, ECF Numbers 549 and 552. And important to Judge Hillman at the preliminary hearing were the two levels of notices with a copy of class counsel -- class notice mailed to each identifiable member of the class as well as notice by email to attorneys who have represented class members and their clearly stated procedure for class members to object, or in the case of members of the

Rule 23(b)(3) class, to opt out, ECF Numbers 556, pages 10, lines 16 to 25, and page 11, lines 10 through 14.

Notices have been mailed to 5,483 class members with defendants providing email notice to attorneys who have represented class members before the New Jersey Office of Administrative Law, ECF Number 564-3 page 18.

Class counsel have maintained an informational website in both English and Spanish and managed an email address to respond to inquiries, *Id.* at pages 17 and 18.

As of the date of plaintiffs' motion for final approval, class counsel has responded to 45 email inquiries and spoken with 15 class members over the phone, *Id.* at page 19. To date, 19 class members have opted out of the Rule 23(b)(3) class, and class counsel has received four objections. One objector filed -- further filed their objection letter with the Court.

As referenced, the settlement pertains to two classes. The first is the Rule 23(b)(2) class, which is defined in paragraph 3 of the amended agreement as "all persons who pursuant to the IDEA have filed or will file during the period of time that the Court retains jurisdiction a due process petition with the Department of Education and whose cases are pending in the New Jersey Office of Administrative Law," ECF 564-3, page 33.

For this class the settlement provides that within 45

days of the expiration of the 30-day resolution period, an administrative law judge will provide a final decision, and the Office of Administrative Law will mail a copy of the decision to the parties absent any specific extension requested by the parties as contemplated by 34 CFR Section 300.515, *Id.* at page 36.

45 days is defined as the 45 calendar days beginning on the first day following the 30-day resolution period. And all pending cases as of this date will reset and begin to run on the calendar day immediately following approval, *Id.* at pages 35 and 36.

The Department of Education will have 18 months to reach 95 percent compliance defined "as the timely resolution of due process petitions in accordance with 34 CFR Section 300.515(a) and (c), in 95 percent of all special education due process matters at the Office of Administrative Law during the four-month period provided that when examined, each month of the four-month period there is no decrease below 95 percent of the compliance rate from that prior month," after which class counsel may seek relief for noncompliance, *Id.* at 34, 35 and 45.

The appointed monitor. The appointed monitor will render compliance reports every four months or a shorter time frame if they chose, *Id.* at pages 38 to 44.

The settlement also contemplates the use of a

standardized extension/adjournment request form, *Id.* at pages 55 and 56, which Judge Hillman opined will likely help avoid issues caused by a lack of formalization of the requesting of extensions and adjournments, ECF Number 553, page 7, lines 18 to 23.

The second class, the Rule 23(b)(3) class, is defined in paragraph 4 of the settlement as "all persons who pursuant to IDEA filed due process petitions with the Department of Education on or after May 23, 2016, who after their due process petition was transmitted to the Office of Administrative Law did not receive a decision within the timeline as defined in 34 CFR 300.515(a) and (c) and the violation occurred prior to the approval of the agreement," ECF Number 564-3, pages 33 and 34.

The settlement provides the Rule 23(b)(3) class two years from the date of approval to file a claim for individual relief for alleged violations of 34 CFR 300.515(a) and (c), *Id.* at page 37.

The settlement expressly does not release past, present or future claims for individual relief, *Id.* at pages 49 -- 48 and 49.

At this point, after that long recitation, which I hope I got correctly, I'm going to first turn to class counsel, who I assume is going to call your first witness and make a fairness presentation; is that correct?

MR. LITTLE: Your Honor, what we had contemplated was a brief opening statement and then we would call the witnesses.

THE COURT: That would be fine.

MR. LITTLE: Thank you very much.

THE COURT: So I'll throw it over to you. I note that there are four objectors who have sent letters and one that filed a letter with the Court. And if there is any here, I will certainly provide an opportunity for them.

So go ahead. Ms. Reisman, is it?

MS. REISMAN: Yes, Your Honor. Thank you.

And my opening statement is going to be even more brief than I had planned, because you have made most of it --

THE COURT: Well --

MS. REISMAN: -- by describing the terms of the settlement.

THE COURT: I did try to digest as much as possible. It's a very long docket.

MS. REISMAN: Yes.

THE COURT: And I know that the parties have worked very hard, so this is the culmination of the hard work that everybody in this room has done.

Go ahead.

MS. REISMAN: May it please the Court, I am here today with the other class counsel firms to request final

approval of the settlement agreement in this class action.

This morning with testimony we will address three areas: The requirements of federal special education law, the impact of noncompliance on New Jersey's children, and the benefits of the settlement for New Jersey's children and their families.

In legal terms, this case involves the application of the 45-day rule. But that purely legal summary does not come close and cannot come close to describing the importance of this litigation and the significance of this settlement.

In the opinion denying the motion to dismiss at the outset of the litigation, this Court wrote: We are reminded of how precious time can be, how precious time is, and how once lost it can never be recovered.

In nonlegal terms, and at its heart, this case is about the real and often heartbreaking cost of lost educational time for children with disabilities.

So what does the proposed settlement agreement do to address that?

THE COURT: I note also that Judge Hillman, when this case was moving along, it was noted in the first page of your case, this case involves both some of the most vulnerable in our society and how we treat them by the government. I think it's important to state that as well.

MS. REISMAN: Yes. Thank you, Your Honor.

And your description of the settlement was impressive. I thought I was going to come here today and have to explain to someone who hasn't been involved in the case that's been going on for five years what's in the settlement.

THE COURT: Well, I was talking to one of my law clerks. When I was a young associate, one of my very first cases I worked on was an education case. And I told them I never want to work on one of those again, because it's so complex and dense. And the parties did a great job in briefing everything, so I appreciate it.

MS. REISMAN: They are complex and dense, but today is a good day because it is one of those rare occasions where the parties have come together, and the State and amici and class counsel worked very hard, and the Court and Judge Schneider and Judge Skahill have worked very hard for an outcome that is going to be very significant for children with disabilities.

In addition to everything that you outlined, the settlement also provides for compliance monitoring. It specifically defines the duties of the compliance monitor and the elements of a compliance plan and the schedule for issuing monitoring reports by the compliance monitor.

To ensure accountability, class counsel and the State will work closely with the compliance monitor, as well as with the amici curiae in this case, a group of nonprofit

organizations and advocates committed to protecting the rights of children with disabilities and their families.

One final point related to accountability. The United States Department of Education contacted class counsel and asked us to inform the Court that the Federal Department of Education, as part of its continuing oversight of the New Jersey Department of Education's compliance with the Individuals with Disabilities Education Act, will be following closely the implementation of this settlement and reviewing the monitor's reports as they are issued.

In sum, the settlement of the 23(b)(2) claims, which you very aptly and completely described, easily meets the standard for approval of a class action settlement because it is a fair, reasonable and adequate attempt to ensure compliance with the 45-day rule going forward.

THE COURT: Has the US Department of Education also asked for any notification or any formal stipulation with the plaintiffs or the defendants? In other words, it's just that they're intending to monitor it? Is that it?

MR. LYNCH: Yes. Catherine --

MS. REISMAN: Right. I can tell you what they requested, that we send them the monitor's reports as we got them. And they told us that they had been in touch with the New Jersey Department of Education.

THE COURT: Okay.

MR. LYNCH: Yes. The State Department of Education has been periodically meeting with the United States Department of Education. In fact, there was a site visit -- I think a few weeks ago was the most recent contact.

And there was -- they issued -- they reported last October that they have been following up on meeting the -- I think they give 150 days to come to -- or was it 90? I forget. To meet certain benchmarks that they had set out.

So even prior to US DOE contacting Ms. Reisman, on the State Department of Education side, they have been tracking this litigation the whole time and -- both periodically and communicating with -- sorry -- the State Department of Education.

THE COURT: It wasn't as a result of the CAFA notice that went out for the settlement date; they had been looking at this for a while?

MR. LYNCH: Yes, far prior to that.

MS. REISMAN: Yes.

THE COURT: Thank you.

MS. REISMAN: With respect to the 23(b)(3) class, the settlement does give them two years to bring claims against the New Jersey Department of Education. What we had originally sought was declaratory relief that would have given them the opportunity to argue that the statute of limitations should be tolled. What the settlement gives them is the

tolling that the declaratory judgment would have given them the opportunity to argue.

The briefing on the motion for approval articulates the compelling legal argument that the settlement is fair, reasonable and adequate. As set forth in the memorandum of law, there is a presumption of fairness because the settlement was the result of arm's length negotiations, assisted by two United States magistrate judges; there was sufficient discovery and case development -- in fact, we were ready for trial; the proponents of the settlement are experienced practitioners; only three class members objected, and we addressed those objections in the memorandum of law; and finally, as discussed at length in the briefing, and I don't need to go over here, the *Girsh v. Jepson* factors unequivocally support approval of the settlement.

The settlement includes an award of fees to class counsel, which of course is subject to judicial review, as is any award of fees in a class action settlement. The briefing explains that the parties negotiated the merits of the settlement before fees were ever even discussed.

Judge Schneider assisted in the negotiation of the fees. The negotiated fees are 70 percent of the total lodestar. And the State of New Jersey has stipulated that the total amount of negotiated fees is reasonable. And the State will not use IDEA funds to pay the fees.

But these dry legal arguments cannot possibly convey in human terms the potential benefit of this settlement to the class members. To do that, today we seek to present three witnesses. Although their time on the stand will be brief, we believe their testimony will provide further record support for approval of the settlement.

The first is a professor of law who has represented hundreds of families in special education matters and is very familiar with the settlement agreement as she contributed to its development. The remaining two witnesses are class members whose stories illustrate the real-life consequences of delays in provision of educational programming and who will explain to the Court why the settlement gives them hope.

In conclusion, Nobel Laureate Kofi Annan once said, "Education is the premise of progress in every society, in every family."

In human terms, that's what this case is about, families and children and the potentially irreparable impact of delaying educational access. The right to education is both the commitment of our civil society and the hallmark of our culture. The parties reaffirm and honor both with this settlement. We urge its approval.

THE COURT: Let me ask just you one question, and this is a question I was going to ask at the end.

There was some question before Judge Hillman that was

raised by Mr. Lynch, I think, during the preliminary hearing on the settlement concerning the legal fees that would be incurred during the monitoring process. And I think there was some discussion about that was going to be worked out, if there was some noncompliance, and there's a provision for and an attempt at resolution between the parties.

But if it doesn't get to a resolution, I think Judge Hillman had raised the issue of how those legal fees would be resolved.

MS. REISMAN: The settlement agreement provides that we try to resolve them internally first, and then if we cannot, we would present a petition for fees to the Court.

THE COURT: Okay. As part of the petition for noncompliance?

MS. REISMAN: It would actually be at the time of the monitoring report. Each monitoring report, there's going to be opportunity necessity -- I mean, the point of the post-judgment fees is to allow us to monitor. And I'm very hopeful that we will be able to work out the fees with counsel.

THE COURT: Yes, I would hope so too.

The monitoring fees are going to be paid by the State, I believe. But if there is noncompliance or alleged noncompliance and that application comes before me, I think there was some discussion about how you would bring that fee

application.

I presume that it would just be an application, a fee application just with the noncompliance issue?

MR. LYNCH: No, not exactly, Your Honor. If I may?

MS. REISMAN: Go ahead.

MR. LYNCH: So we contemplated that along with each monitoring report, each monitoring period, that there's going to be at least some limited fees for class counsel in relation to -- the agreement lays out that the monitor will be providing a draft report to both sides.

THE COURT: Right. And the class counsel has to take a look at it and expend some fees on that.

MS. REISMAN: Yeah, look at it and provide -- I think have a meet and confer with the monitor prior to her finalizing it and voicing those concerns about it.

So primarily, you know, or I guess in addition to whether or not there's some move -- motion to or something for noncompliance, those are the fees that will also be contemplated under it.

THE COURT: Right. And maybe I narrowed it too much.

So there would be fees in the compliance issues themselves, but that hasn't been worked out as part of the settlement agreement; that's going to be discussions between the parties?

MS. REISMAN: Right. With each monitoring report.

So there may no noncompliance, but there will be fees expended. And the State understands that we will present them at the end of each monitoring report. After we're finished with that cycle, we'll present them with a fee demand or fee request. And we will try to reach agreement on the amount of fees.

We have talked about agreeing ahead of time on a stipulated rate sheet, so --

THE COURT: Well, maybe in my final decision relating to the fees, maybe that will guide the parties in trying to resolve those issues.

MR. LYNCH: Thank you.

THE COURT: All right. Very good.

MS. REISMAN: Thank you very much, Your Honor.

THE COURT: I'll turn it over to you to call your first witness.

MR. LITTLE: Good morning, Your Honor. It is --

THE COURT: Oh, sorry.

MR. LITTLE: This is Greg Little, Gregory Little, with the Education Law Center.

And it is quite a privilege to be putting on the first witness in your courtroom.

THE COURT: Thank you.

MR. LITTLE: And I am very pleased to -- also it's a privilege to have Professor Valverde be that witness.

THE COURT: Come forward, ma'am.

MR. LITTLE: I don't want to jinx it, but I'm sure she will be setting a high bar for the rest of your career of witnesses.

THE COURT: I hope so.

THE COURTROOM DEPUTY: Please raise your right hand and place your left hand on the Bible.

(**JENNIFER ROSEN VALVERDE**, having been duly sworn or affirmed, testified as follows:)

THE WITNESS: I do.

THE COURTROOM DEPUTY: Please state your name and spell your last name for the record.

THE WITNESS: My name is Jennifer Rosen Valverde. My full last name is spelled R-O-S-E-N, new word, Valverde, V-A-L-V-E-R-D-E.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Have a seat, ma'am.

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. LITTLE:

Q. Professor, could you introduce yourself to the Court.

A. Good morning, Judge.

THE COURT: Good morning.

THE WITNESS: Welcome.

THE COURT: Thank you.

THE WITNESS: My name is Jennifer Rosen Valverde. I am -- my title at Rutgers Law School where I've taught since 2001 is as a distinguished clinical professor of law. And I teach in the education and health law clinic there.

THE COURT: Are you here in Camden or Newark?

THE WITNESS: Up in Newark.

THE COURT: Okay.

THE WITNESS: Your stomping ground.

THE COURT: Yes.

BY MR. LITTLE:

Q. And how long have you been doing that?

A. Since 2001 I've been there.

Q. Can you describe generally the scope of your responsibilities?

A. So they're fairly broad. So we have a couple of different buckets. The first is I provide direct client representation to parents of children with disabilities in special education and some related matters, and I am educating law students in that process.

So the law students learn by doing. So the law students become the student attorneys on the cases, and they're working under my supervision every step of the way.

I also do amicus work, like I have done here, both in district court as well as in the Third Circuit. And the students work with me on that. And that is all education

focused.

In addition, I participate in some policy initiatives, do some research, and also do some publicly engaged scholarship.

Q. It sounds like quite a bit. You can say yes.

A. Yes.

Q. When did you first become aware of this lawsuit?

A. So I first became aware of the lawsuit in the fall -- excuse me, in the summer of 2019.

Q. And how did you become aware of it?

A. John Rue, who was counsel on the case, or still is counsel on the case, he approached me and several other non-for-profit education advocacy organizations around the state to alert us of the filing.

And when we heard about the filing, and based on our own experience, we knew how important the issue was, we decided to seek permission to be involved as an amici.

Q. Okay. And why was it so important?

A. For two reasons. The first is that obviously time matters in the life of children. And so for every day that a child's -- a decision is delayed in terms of giving children appropriate developmental and educational services, that child suffers a harm. And that harm extends not just to the child directly but also to the families of children, because of the stress of having to fight for things that the school district should be giving and the additional stress compounded on that

of having to wait excessive amounts of time for judges to make decisions in these matters.

The second reason why it was important was because we knew that any decision that came out of this case was going to affect the children that we serve. And so we thought it was really important to request permission to weigh in with Judge Hillman.

Q. And how did you weigh in initially?

A. So we provided a somewhat different perspective. We represent some of the most vulnerable children across the state, children who are both poor and low income, so living in households that are at and below 200 percent of the federal poverty level, children whose --

(Court reporter clarification.)

BY MR. LITTLE:

Q. I was just getting ready to suggest that even though we are going to be brief, we can talk more slowly, although I understand from your students that you do have a tendency to speak fairly quickly anyway.

A. I speak very quickly. I am very sorry. I will slow down. I'm also not used to being over here, I'm used to being over there, where I'm usually a lot slower.

So now I lost my train of thought, I'm sorry.

Q. No. You were talking about why this lawsuit was needed.

A. So as I was saying, we represent some of the most

vulnerable children in the state, and we felt that it was very important to be able to share their perspective with Judge Hillman, if we could, and also knowing that the children we represent would be directly affected by anything that happens with this case.

Q. And it turned out you had a number of different responsibilities as amici counsel. Correct?

A. Yes, that's correct.

Q. And can you describe the roles that you played?

A. Absolutely. So first we engaged in motion practice. So we participated with the motion for class certification. We weighed in on the motion -- the first and second motions for preliminary injunction as well. Judge Hillman permitted us to participate in oral argument on those motions, which we did.

Then when the case was moving towards litigation, I was asked by Mr. Little to serve as the first witness for litigation to speak about the issues and how the 45-day rule breach affects children and families that we serve, so I engaged in a lot of preparation there. And --

Q. With respect to the settlement, did --

A. With respect to the settlement, we also participated. When the initial settlement was provided, was produced to the judge for preliminary approval, we advised Judge Hillman of concerns that amici had regarding that settlement.

Q. And how did you advise him of that?

A. Via letter. And following that, what --
Q. What was your -- I'm sorry.
A. Judge Hillman -- it's my understanding that Judge Hillman then instructed the parties to consider seriously the opinions of amici with respect to the settlement. And I'm very grateful that plaintiffs' counsel as well as the DAGs then went on to work with us to try to address those concerns.
Q. Could you describe in a bit more detail the nature of the discussions on modifying the proposed settlement.
A. So do you mean some of the concerns that we had?
Q. Some of the concerns. Because, I mean, when you first reviewed the proposed settlement, it's fair to say you did have some concerns. Correct?
A. Yes, that is correct.
Q. So if you could explain to the Court what those concerns were for the most part and how they were resolved.
A. So those concerns included the fact that the initial settlement did not define certain key terms, such as federal days and what 95 percent compliance actually was and how it would be calculated.

We felt that the monitor needed to have more teeth in the settlement, and that could be obtained by delineating the role, the authority and the duties of the compliance monitor and also setting forth the elements of a compliance plan.
Q. And why did you feel that teeth were necessary?

A. Because the monitor -- to bring in a monitor, we need to give the monitor like a structure to the authority that she has so that she can get the data that she requires in the format that she needs it in order to make proper determinations, not only about compliance but, more importantly, about what the root causes of noncompliance are. And so if the monitor is unable to identify and address the root causes of the noncompliance, then there's no point of having a settlement or trying to fix the system.

Q. And how -- were you satisfied with the response to the concerns that you raised?

A. So as I said, we were pleased to be able to engage in the process of amending the settlement agreement. And at this point, you know, is it perfect? No, but no settlement is perfect. I know that from all my years of practice. But do we think that it's a good start to fixing the system? We absolutely do.

Q. And is it fair to say that you were working not only with plaintiffs' counsel, but you also worked with the attorneys for the Department of Education as well?

A. Yes, absolutely. We were --

Q. And both --

(Court reporter clarification.)

BY MR. LITTLE:

Q. But they both worked with you to address many of your

concerns?
A. Yes, they did.
Q. And ultimately it's fair to say you were satisfied?
A. Yes.
Q. And if this settlement is approved, what do you believe the impact will be on the class members?
A. Well, my hope is that the impact will be significant, because the settlement will -- once implemented will actually result in a fixed system. So that is my hope, and I am cautiously optimistic that we will get there.

I think that with class counsel's involvement and the ability for amici to continue to kind of feed what we're seeing on the ground to the monitor through class counsel will be very helpful in getting there as well. But I think the terms of the settlement provide a good structure and, as I said before, a good starting point.

MR. LITTLE: Professor, you promised that you would be very brief, and you certainly were. And I do want to say on behalf of the mothers and fathers and the children with special needs, thank you for all the work you did. You did far more than any amici I've ever come across before in terms of filing briefs, arguing motions, agreeing to be leadoff trial testimony, dealing with me on practice sessions, and then also the significant work that you did on the settlement. And on behalf of all of the class, we thank you very much.

THE COURT: Cross?

MR. LITTLE: No further questions.

MR. LYNCH: None, Your Honor.

THE COURT: And I just want to tell you that the Court appreciates it as well. You know, amici is a friend of the court, and the amount of work that went in, I looked at the docket, was significant. And I appreciate it as well. So thank you.

THE WITNESS: Thank you very much.

(Witness excused at 11:35 a.m.)

THE COURT: You may call your next witness.

MR. LITTLE: The next witness is Marcia Podsiadlo.

THE COURT: Come forward, ma'am.

THE COURTROOM DEPUTY: Please raise your right hand, place your left hand on the Bible next to you.

(**MARCIA PODSIADLO**, having been duly sworn or affirmed, testified as follows:)

THE WITNESS: I do.

THE COURTROOM DEPUTY: Please state your name and spell your last name for the record.

THE WITNESS: My name is Marcia Podsiadlo. The last name is P-O-D-S-I-A-D-L-O.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Please be seated, and please speak slowly.

THE WITNESS: I'll try.

DIRECT EXAMINATION

BY MR. LITTLE:

Q. We will give it our best shot. Right? And I'll try not to interrupt you.

Could you just introduce yourself briefly to the Court, with a little bit of your background.

A. Yes. I'm Marcia Podsiadlo. I grew up in Montgomery Township, New Jersey. And that's the district that my children go to and my mother taught in for 25 years.

I had a career on Wall Street in the investment industry, which included getting an MBA from the University of Chicago, courtesy of Goldman Sachs. So I enjoyed a lot of years progressing along my career.

And I have two children. Andrew is age 22, and Matthew, who is age 21.

And I stepped back from my career because Matthew has special needs. He has profound autism. He's nonverbal. And there's a lot of work and services that he needs, so I no longer work, and I help him with his needs.

Q. With his needs. And we'll go into that in a bit more detail.

But if you could just describe generally, why are you here testifying? You were not a class representative. You heard about the case through the notice. Why did you want to

be here?

A. I wanted to be here because the long delays that we have been talking about occurred to me and my child when I needed to use the due process system to get services that I felt he needed through Montgomery Township. I had to do this three times in the last five years, and each one was well over 45 days till resolution. And the impact on us was very difficult and hard. One of them was over ten months. And there's a long gap between schools for my son that -- it's very difficult for a child when they're learning as a disabled person, they need to have continual teaching and no gaps like that. And I felt it was really unfair, and I didn't understand why there was this delay all the time.

So when I heard about the settlement and the lawsuit, I was very anxious to tell my story.

Q. Thank you very much for being willing to do so.

You've described some of the problems with noncompliance at the 45-day rule.

What was the impact on Matthew?

A. Well, the impact was great. He's 21 years old, and he has not really had a school since 2018. And he's been at home mostly and not getting the amount of teaching that he needs. And that -- as I keep telling everyone, when you're not teaching these children, they unlearn, they regress. And so when there's a big gap like that, we had a lot of regression.

For instance, my son was mostly toilet trained and he was in underwear, and then 2018 happened and we lost placement. And I went into the due process system. And he's in diapers right now. And that's because he, you know, unlearned it. All that time alone without the teachers, he forgot how to do that skill. So that's one example.

Q. And you're the one now for this -- your 20-year-old son, you're the one that changes his diapers on a daily --

A. Yeah. My job became much more great as he was home all the time instead of getting on the bus like the other children that I would see. And, you know, for just months I wasn't getting anywhere with my due process, so I just continued.

Another example is he's nonverbal. He can't talk, so he uses a communication computer. And he was -- he was actually starting to learn to type before he lost his placement. And I was in the due process.

And when you can't talk and you have autism, you can get very frustrated. So he will do things like bang his head on the wall and the floor and the tables. And I have holes all over the place, ER visits with a cracked head. And I really feel it's -- would not have happened if he had a way to talk and he didn't forget how to do it. You know, all the buttons that he has, he only uses one now. I want cheese. And he used to be able to say a lot of things, and now he can't.

Q. A lot of times we've used the phrase "time is of the

essence" in this lawsuit.

How did it impact you, and how did it impact Matthew?

A. This matter was urgent to me. Every time I filed -- it was three times -- you know, there's an urgency to it, because he lost a placement. He needed to get something else. And I tried to just collaborate with my district and work with them. I wrote to the board.

And so eventually I had to go through the due process, and I was excited to -- I felt like, well, okay, this is how we get to where we need to negotiate.

And the delays were excessive, and they very much impacted me. I had to take out loans to help pay for people to come to my house to help me, because this was a very monumental task to care for him. And I went into debt. And it was very distressing.

I was also taking my mother's pension from the very district -- my father was collecting pension. She's no longer with us. And that pension was being used to help pay for, you know, the care of my child. And it was very, very upsetting to me, and I felt really bad about it. And I couldn't even help pay for my father, who is in a nursing home. My siblings had to pick up my share.

All this, you know, led me to a depression state that was very difficult for my other son to see and just to do my duties.

Q. Did the district ever convey to you a sense of urgency that time was of the essence?
A. No, no. I was always upset because they would, you know, find delays, changing the next meeting, call, the settlement calls. Everything was -- you know, we were supposed to set up something in March, and we settled in December, you know, so everything just kept -- I was always ready. You know, I'm there to take the call.

So there's just to me not a sense of urgency in any way. And I was just flabbergasted by it, because this is a child that every day he's getting closer to graduation, every day matters. And every day is urgent to get him back into teaching and not sit on the couch and do nothing all day.
Q. And you mentioned -- in terms of the impact, you mentioned Matthew banging his head consistently against the wall, even denting the walls. You mentioned being in diapers after he had already been sort of potty trained?
A. Yeah.
Q. One thing you mentioned when we had talked previously, that sometimes because of the delay, he was going to schools and you referred to them as what?
A. Well, yeah. We did get him placed in --
Q. Rubber rooms?
A. -- the padded room, you know, severe behavior facility for -- these are for short terms to just help shape the

behavior the child is having.

You know, they're not meant to be long term. I had him in one of these facilities for two years as we tried to sort this out. So -- and it was not a school. You know, he was in a room. And I don't consider that a replacement for a school in any way. And I felt it was not helping him to not be out and about with -- you know, he's not been in the community for years now. And that's a whole other thing that's difficult for him.

Q. Now, do you approve of the settlement?

A. I do. I approve of it because this 45-day rule is now going to have accountability, which is what I always felt was lacking. There's now someone going to be watching and making sure that we, you know, find a way to a settlement within 45 days. And I'm just -- when I heard about it, I was thrilled to know that this isn't going to happen to other families, what happened to me.

Q. So you're doing this in large part for all the people out there that are in some similar situations and hope that they don't go through what you went through?

A. Yeah.

Q. But has there been something specific that has caught your attention about the 45-day rule and the commitment by the State to comply with the 45-day rule, has that had any impact on you recently?

A. Yes, it has. As I mentioned, my son graduates in eight weeks. And he had about five years of chaos with us trying to get through due process three times. And he needs a make-up year. And I am not getting an agreement with my district. So I am hopeful, and I filed due process last week. And I'm going to --

Q. Even though he's graduating in a couple weeks?

A. Well, 45 days is in there, so we're going to have a decision. And I'm really hopeful that he'll get a make-up year, because he's not ready for the adult world.

Q. One last question. When we were talking, you mentioned that you had actually moved to this district because of your mother. Correct?

A. Well, I did. My mother taught in Montgomery Township for 25 years. She was a beloved teacher. She died before my children were born. She didn't know them. But I know she would want me to be here to tell the story and to, you know, help the system get back on track.

MR. LITTLE: And I'm confident that she is very proud of you right now, and so am I. And you've done great things for the class. And we deeply appreciate it. Thank you so much.

THE COURT: Any questions from the State?

MR. LYNCH: No, Your Honor.

Thank you for your testimony.

THE COURT: You may step down. Thank you, ma'am.

(Witness excused at 11:46 a.m.)

THE COURT: You may call your next witness.

MR. LITTLE: The plaintiffs call Elizabeth Perry.

THE COURT: Ms. Perry, come on up.

THE COURTROOM DEPUTY: Ma'am, please raise your right hand and place your left hand on the Bible next to you.

(**ELIZABETH PERRY**, having been duly sworn or affirmed, testified as follows:)

THE WITNESS: Yes.

THE COURTROOM DEPUTY: Please state your name and spell your last name for the record.

THE WITNESS: Elizabeth Perry, P-E-R-R-Y.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Please be seated, ma'am.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. LITTLE:

Q. Elizabeth, could you tell the Court a little bit about yourself.

A. Sure. My name is Elizabeth, and I am the proud mother of Erica Perry, who is very bright, and she's so capable. And she's come such a long way, but she has had her setbacks too.

She started with early intervention. She had difficulty communicating. That's how we got started with early

intervention. She had social communication issues.

And she started in the public school district when she was 3 years old. And they put her in a completely disabled classroom, which her developmental pediatrician felt she needed to be around kids who were developing typically because she was so bright, she was so capable, and that she would learn from these other kids. She would learn to model from these other kids.

And that didn't happen. And I would say that's where our nightmare began is when I started going through the due process.

Q. If I could just a little bit -- we could go back just a little bit where you described -- I know -- and we are going to spend more time talking about Erica. But your background also ties into this a bit as well, in terms of where you were in your education when you had Erica and how that impacted you, and then also how you found out that she had some issues.

So if you could just talk -- I know you're very modest, but if you could talk a little bit about yourself.

A. Sure. I found out that I was pregnant with Erica when I was a junior in college. It was my spring semester. And I was scared, but along the way, I just -- I felt this very deep connection with her. And, you know, you do what you have to do.

I grew up in Kearny, and I lived there until I went to

college. And when I was pregnant, I moved back in with my parents when I was eight months pregnant. And she was due at the end of September of my first semester my senior year. And I took that semester off. And she was induced at 37 weeks and three days.

And then I went -- I went back to school for the spring semester. I graduated relatively on time. I walked with my graduating class, and I am really proud of that. I did do internships, and I worked part time that summer, and I finished two classes, and I got my degree that August.

And then I went to work for the attorney general's office as an investigator.

Q. And is part of that because you had always been interested in that? And at one point, as I understand, you actually were planning on going to law school. Correct?

A. I was planning on going to law school. And my life completely changed when I became pregnant with Erica. And I had always hoped -- I thought that, you know, I'll take a little bit of a break from school. I'll get that degree, and I did, the bachelor's degree. But I'll go back when she's older, when things are more settled. And that never happened.

Q. Why not?

A. Erica had developmental delays. And she's so smart, but she had developmental delays. And when she was about 16, 17 months old, she was not showing any signs that she was going

to talk. She wasn't babbling. She wasn't on the cusp of talking. There were no signs of that.

So I called a psychologist, Dr. Mark Pesner. And he came to the house, and he evaluated Erica. And he told me that she was on the spectrum.

Q. And how did you react to that?

A. I was in denial. I thought that I just wasn't making it as a mother, that if I was better at being a mom, then he wouldn't have said that. But that's such an ignorant thing for me to say. He had been in practice for over 25 years, and his practice was solely dedicated to kids who were on the spectrum. He knew what he was talking about.

But what really hit me was Dr. Pesner told me, take my diagnosis, don't take it, but she needs help now; and the longer you wait, the harder it is going to be for her to catch up. You need to do something now.

And I couldn't get that out of my head. So I had to move from feeling bad about the situation we were in to getting her the help she needed.

So I called early intervention that he suggested.

Q. And how was that initiated? Someone came to your house?

A. Yes. They came to my house. They evaluated Erica. They qualified her for speech therapy one time a month. And I thought that was all that she needed until the speech therapist came for one day and -- into the daycare setting and

saw Erica at daycare. And she told me that she went to her car and cried after meeting Erica once, because Erica needed so much more help than what they were giving her.

And again, I felt like I was a bad mother, but at the same time, I also appreciated how fortunate I was that her therapist Laura, her speech therapist Laura, she fought for Erica to get more services. And she did. She had speech therapy multiple times a week. She got occupational therapy. And she got development intervention multiple times a week through early intervention. And she made gains.

Q. And that was up to what age?

A. She aged out of early intervention at 3.

Q. And then what happened?

A. So then we were told to go to the local school district. And they evaluated Erica, and they found her eligible for special education and related services.

Q. And then how did they respond with providing those services?

A. They didn't. They told me that they had -- the only classroom that they had for preschool students was a completely disabled classroom and that that was where they were going to place her.

So I was a little nervous about that. I was concerned. I met with Dr. Pesner and I met with the developmental pediatrician, and they also -- they strongly felt that she

needed to be with typically developing peers; but if that was all the district was going to offer, they were hopeful that the district would see how Erica is, how capable she is but how much help she needs and that that was the wrong environment for her, and then they would do what was necessary to give her the program that she really needs.

Q. And did they do so?

A. That never happened.

Q. So how did you react to that?

A. I wrote many letters, I made many phone calls. And I was ignored until I asked for an IEP meeting, which occurred in March or April, more than three quarters of the way through her pre-K 3 year.

Q. Okay. And what steps did you ultimately end up taking?

A. We had that meeting. And they agreed that she belonged in a less restrictive environment, but they told me that they didn't have that, so they were not able to give it to her, even though I think it was her right to go to a district that had it, but they didn't have it, so they offered to send my 3-and-a-half-year-old into a kindergarten classroom.

Q. Okay. So let's pause for a minute and let that soak in a bit.

So she's 3 and a half, and they didn't have a facility her age where she could interact with children in similar situations, so they offered to put her in a normal

kindergarten class?
A. Yes.
Q. And how did you react to that?
A. I thought that was crazy. I had to do a double take. And then I thought, well, I mean, if that's all that they can offer and we're three quarters of the way through and she's in her pre-K 3 year, I thought maybe they would then create a plan for the next year and that that would give them the time that they needed to create that plan. So I agreed to it.
Q. What happened next?
A. I don't think she ever went to that kindergarten classroom more than once or twice, if that. They never sent an aide with her, which I don't understand how you put a 3-and-a-half-year-old in with 5- and 6-year-olds when they have a communication delay, but...
So I waited for the annual IEP meeting, which was in June. It was quickly approaching. And I thought that they were going to offer her a program for pre-K 4.
Q. What did they do?
A. They told me that I had two options: I could stop fighting for the less restrictive environment and they would let her stay in their program for one more year, and in kindergarten she could have everything she needs; or I could continue to advocate for Erica for what she's entitled to, and they would move to pull her entire program that summer.

Q. And how did you react to that?
A. I thought that when I looked at the PRISE rights, Parental Rights in Special Education, booklet and they said that these due process hearings would be completely concluded within 45 days, I was very empowered, so I turned around and filed a due process petition.
Q. How would you characterize their threat to you that if you accept what we're doing, you're going to be -- we'll provide that service; if you don't accept that, we'll provide no service? How did that make you feel?
A. I was horrified that they were essentially blackmailing me. I don't -- I don't know if they've done that to anyone else, but the fact that they did it so smoothly with me really makes me wonder how often they've been successful doing that.
Q. And did you get any sense of urgency from the district at all when you were trying to get these services for Erica?
A. Not at all.
Q. What is the current situation?
A. So she -- when she entered the public district at 3, she had a social communication pragmatic language disorder. With all the therapy she was getting from early intervention, she was -- she went from class -- you know, qualifying for autism to being on the cusp of qualifying for autism. And now, a couple years later after all of her services have been pulled, she met the mark for autism.

And she's always had anxiety, but now she has what they call double depression. So she has generalized depression that lasts for months, and then she has longer, more severe, major depressive episodes within that. And I don't have the expertise to say that this is all connected to her not getting the services she needed in the time that she needed it, but when I look at the fact that she was making gains when she was receiving services and then there was this period of regression, I have a hard time believing that if she had gotten the services she needed when she needed it that we would be where we are today.

Q. Now, you are a class representative in this case. Correct?

A. Yes.

Q. Why did you agree to become a class representative?

A. Time is important. Not just for Erica, although it is extremely important for her, it's important for all the children no matter where they are. And there are kids that are -- have more significant situations. There are families that come from -- I don't come from many means financially, but there are families doing worse or struggling with more significant issues. And if this can help them and their children, then I'm hopeful that they can all be heard within the time that they need.

Because it wasn't just the fact that -- our due process

petition took about four years to conclude. We didn't even have a trial date until nearly a year after I filed it. That's nowhere near 45 days.

And so if they can wrap these cases up within those --

Q. Did you object to that while it was happening?

A. Of course. I asked for earlier trial dates, and I was told that there was no additional -- there was no earlier opportunity to be heard. And then when we were given trial dates, which was about six to eight months after the due process petition was even filed, the judge didn't even have -- he set it for three dates, but he didn't even have three consecutive dates. So like we were scheduled -- I filed in June. We were scheduled for the end of January and then the end of February and then I think March or April.

And so, I mean, that was a little confusing to me to have such a disjointed potential trial, but it was even more concerning that we couldn't get a trial until basically she was done with pre-K 4, which was an entire year later. And she didn't have that time to waste.

Q. Now, you've been involved in the lawsuit then from the very beginning as a class representative. You've gone through depositions. You've gone through trial prep. You were going to be a witness if there was going to be a trial. And now there's this proposed settlement.

How do you feel about this settlement?

A. I feel hopeful. It would -- it would have changed our entire life if the due process system, if that entire process actually took the 45 days. I would have even taken 60 days. But for us to have been heard, for a decision to have been made so I would have known which way we were going to go in that so that she could have had a program in place for her pre-K 4 year, which was ultimately what it's supposed to be, I can help another family in their specific situation, then I'm hopeful.

Q. Is there anything else you would like to add to your testimony?

And that's not -- I just want to -- I know this has been so hard, and I just want to make sure that you've had your time to make your points about what you want.

There's nothing in particular that -- I don't think you left anything out. It's just I want to make sure that you feel comfortable you have told your story. I think you've told it very well.

A. I mean, I'm just -- so the families who are struggling, to the children who are struggling, there are children who are struggling, contemplating whether life is worth living for. There are children who are nonverbal. There are children who have so much potential to be a meaningful part of society, and all of them are meaningful parts of society, but there are children who may not ever make their impact on society. And

it's not because they can't or because they couldn't, it's because the system took too long to recognize the help that they needed and it didn't give them the help that they needed.

And so I hope that the State complies with the 45-day rule, and I hope that they take it seriously, because I think that we would -- we would have different statistics.

MR. LITTLE: Thank you very much.

And on behalf of the entire class, for all you've done as a class representative, getting ready for trial, getting ready for this testimony, thank you for all that you've done. I appreciate it.

THE COURT: Thank you. You can step down, ma'am.

THE WITNESS: Thank you.

(Witness excused at 12:05 p.m.)

THE COURT: Anything further?

MR. LITTLE: No further witnesses, Judge.

THE COURT: Anything from the State?

MR. LYNCH: Just briefly, Your Honor.

The New Jersey Department of Education is looking forward to working with the monitor to come into full compliance. And, you know, Judge Moscowitz, who came in as the chief OAL judge a few years ago, has made, you know, some significant strides in the area of due process petitions. He informed me a couple weeks ago that he's got more administrative law judges to -- hearing them now than the OAL

ever has.

But he also -- I am confident that he is also looking forward -- although he's not my client technically, because the Department of Education is the only defendant in this case. In my communications with him, I know that he's also looking to be a full partner in this with DOE and with the monitor.

And I think that the monitor is going to prove to be a key and effective fulcrum between the Department of Education and the Office of Administrative Law, with important input from class counsel along the way.

You know, we look -- Ms. Knudtson, Lenore Knudtson, happily and luckily, the class counsel and the Department of Education, we both agreed that she was the right person for the job. And everyone is looking forward to getting to work and to coming into compliance as defined by the agreement, which is also full compliance as defined by the United States Department of Education. That -- I don't know if it's in a guidance document or where it is, but that's what the State Department of Education has been advised by the United States Department of Education, is the -- what they consider to be fully compliant with the regulation in 34 CFR.

So I'd just like to thank the Court and thank everyone here today and say that the State and the State Department of Education ask that the Judge -- that the Court,

rather, enter this order finalizing the settlement agreement so everyone can start getting to work.

THE COURT: Thank you very much.

I noted before that there were a number of written objections.

Is there anybody here present in Court that would like to be heard on any objection?

Come on up, ma'am. Come right up to the podium. The podium over here.

Ma'am, could you state your name.

THE WITNESS: Dominique Acosta.

THE COURT: Can you spell your last name for us.

THE WITNESS: A-C-O-S-T-A.

THE COURT: Okay. Go ahead, Ms. Acosta.

MS. ACOSTA: So basically, you know, I was listening to the other stories of what the other parents, and it's very similar to mine.

You know, this will be my second due process. And it is true that these -- these students do need help getting services and, you know, not just saying that the services are cut and you cannot help the student and, you know, things like that. I just wanted to say that.

THE COURT: Okay. So it sounds like that you support this settlement.

THE WITNESS: Yes.

THE COURT: Okay. Well, thank you for that statement.

THE WITNESS: Okay. Thank you.

THE COURT: Thank you.

Anybody else want to be heard?

Seeing none, let me just advise everybody how we're going to proceed.

I very much appreciate the testimony of the three witnesses. And I think there's a recurrent theme throughout the testimony that every day matters and time is never recovered, as I heard before, and time is important. And the two mothers who testified today spoke very eloquently about why time matters and how development of their children would have benefitted from early resolution of their due process claims. And because time matters, I put this on for today, on the same day that Judge Hillman had put it on. I didn't want to delay it any further.

And I also thank the work of our esteemed and very smart law clerks who prepared me for this and going through the docket and making sure everything was on the up and up.

So in order to resolve it quickly, and rather than issuing written report, I'm going to issue my decision orally. And for the small bit of time that we're going to spend here and all you listening to me drone on on this motion, I think it's worthwhile to get the order up and docketed as soon as

possible.

So, pursuant to Federal Rule of Civil Procedure 23, a court may not approve a proposed settlement unless it finds that it is fair, reasonable and adequate upon consideration of class representative and counsel's adequate representation of the class, whether the proposal was negotiated at arm's length, the adequacy of relief, and the equitable treatment of class members. Federal Rules of Civil Procedure 23(e)(2); *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410, 436 (Third Circuit 2016).

Class settlements are presumptively fair when negotiations are conducted at arm's length, there's sufficient discovery, the proponents are experienced in similar litigation, and only a small portion of the class has objected. *Id.* at 436.

I find that that presumption is appropriate here. As noted at the preliminary hearing, the parties engaged in extensive negotiations before both Judge Skahill and former Judge Schneider and further worked to address concerns raised by amici. ECF Number 553, pages 4, line 16 to 19; page 6, line 14 through 7. I'm sorry, 7 -- well, it begins at line 14.

Attorneys' fees were negotiated separately from the agreement on the merits. ECF Number 447.

Discovery was extensive, and the case proceeded

through summary judgment motion practice. The parties' joint pretrial order contained 546 total proposed exhibits. ECF Number 326.

Counsel's expertise in education law was highlighted in Judge Hillman's original certification opinion and more recently in the opinion granting plaintiffs' motion to appoint substitute counsel. ECF Numbers 384, page 46; 530, pages 15 to 17.

I am independently satisfied by counsel's experience after reviewing the declarations accompanying their motions. ECF Numbers 564-4 through 11 and ECF Number 565.

Finally, as will be discussed in greater detail momentarily, only four of the 5,483 notified class members have filed objections. ECF Number 564-3, page 18.

Courts within the Third Circuit have determined whether class action settlements satisfy Rule 23(e) by considering the *Girsh* factors, which consist of, first, the complexity, expense and likely duration of the litigation; second, the reaction of the class to the settlement; three, the stage of the proceedings and the amount of discovery completed; four, the risks of establishing liability; five, the risk of establishing damages; six, the risk of maintaining the class action through trial; seven, the ability of the defendants to withstand a greater judgment; eight, the range of reasonableness of the settlement fund in light of the best

possible recovery; and, nine, the range of reasonableness of the settlement fund to a possible recovery in light of the all the attendant risks of litigation. *Girsh v. Jepson,* 521 F.2d 153, 157 (Third Circuit 1975).

The *Girsh* factors have been utilized within this district for class actions involving IDEA claims. See *Adam X. v. New Jersey Department of Corrections,* Case Number 17-00188, 2022 WL 621089 at pages 6 to 9 (DNJ March 3, 2022).

In evaluating the relevant factors, I note that it is the settling parties' burden to establish that the *Girsh* factors weigh in favor of approving the settlement. *In re Pet Food Products Liability Litigation*, 629 F.3d, 333, 350 (Third Circuit 2010).

I find that the first *Girsh* factor, the complexity, expense and likely duration of litigation, favors approval. The regulatory scheme underlying New Jersey's IDEA compliance efforts is complex. See *Tallman v. Barnegat Board of Education*, 43 F. App'x 490, 495 (Third Circuit 2002).

Litigation costs have already accumulated, as evidenced by the fee applications and supporting records provided by counsel and would no doubt continue to inflate through post-trial appellate practice. As will be referenced again below, any post-trial appellate practice will delay the significant benefits offered to the respective classes by the settlement terms.

Second, plaintiffs have reported that they have received four objections to the class settlement out of 5,483 members notified. And there was nobody else here today. Only one person spoke, Ms. Acosta, in support of the settlement.

Three of these objections have come from class members themselves. They are at ECF Number 564-3, pages 88 to 93. One is AnnMarie Torres from Union County; the second from George Hynes from Passaic County; and the third from Yoel Dutch from Monmouth County. I have reviewed all of them, and I find that the reasons set forth in those letters do not provide a basis for the rejection of this settlement.

Additionally, Jamie Epstein, an attorney who has represented students in numerous matters, filed his objection both with the parties and with the Court. *Id.* at pages 84 to 86; ECF Number 561.

Plaintiffs dispute Mr. Epstein's standing to object to the settlement but nonetheless ask the Court to consider the merits of his letter. Mr. Epstein submits that the Department of Education should be given 30 days as opposed to 18 months to comply with the 45-day rule and advocates for a fund to monetarily compensate class members. ECF Number 561, page 1.

Mr. Epstein also argues that the agreement should include, among other things, examples to illustrate how the 45-day rule works in practice, a requirement that the

Department of Education provide the Office of Administrative Law with significant resources and terms prioritizing administrative hearing days scheduled as close together as possible. *Id.* at pages 1 through 3.

I have reviewed the written objections and heard Ms. Acosta today. I find that these objections and the support from Ms. Acosta have thoughtfully submitted and raised valid concerns and suggestions grounded in personal experience. Ultimately, I conclude that these objections, both in number and substance, do not weigh in favor of rejecting the settlement.

While compensatory payment to class members may be desirable, such relief was not sought in the underlying amended complaint. ECF Number 78. And while some class members may believe they're entitled to incentive payments, such payments are reflective of services provided by the named plaintiffs and the risks they incurred during the course of the litigation. See *Henderson v. Volvo Cars of North America, LLC*, Case Number 09-04146, 2013 WL 1192479 at 19 (DNJ March 22, 2013).

I am also cognizant of the practical considerations, as noted by Judge Hillman, associated with the Department of Education seeking to achieve compliance in a shorter time frame -- ECF Number 75, page 69, line 9, to page 70, line 6 -- and the complications that may arise in any mandate

implicating the appointment of administrative law judges which are made by the governor and confirmed by the Senate. And we certainly don't have any authority to require that.

I conclude that the second *Girsh* factor weighs in favor of approval.

Important to this consideration is the fact that the settlement does not extinguish individual claims and provides for potential additional relief if the objectors' skepticism is validated by the Department of Education's noncompliance. ECF Numbers 564-3, pages 45, 46, 48 and 49.

Next I find that the third *Girsh* factor, the stage of proceedings and quantity of discovery, heavily favors approval. This case has been ripe for trial for well over a year. Summary judgment motion practice concluded more than a year-and-a-half ago. And Judge Hillman filed several trial notices that were stayed or adjourned as the parties worked towards settlement.

The parties' pretrial order prepared in February 2022 contained 546 total proposed exhibits. And Judge Hillman acknowledged the extensive discovery conducted during the course of this case during his preliminary hearing in October -- I'm sorry, in December.

The fourth and fifth *Girsh* factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefit

of an immediate settlement." *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 537 (Third Circuit 2004). I find that these factors also support approval of the settlement.

There is risk inherent in any trial, and while relief, if granted, may have differed following trial, I am persuaded by class counsel's representation that the settlement provides the injunctive relief contemplated by the amended complaint, and in the case of the Rule 23(b)(3) class, provides greater relief than contemplated as it extends the statute of limitations for those class members without requiring factual bases for tolling.

I am also cognizant of the time considerations contemplated by the parties and the risk of delay caused by potential post-trial motion practice and appeals. As noted by Judge Hillman during the preliminary hearing, a trial and subsequent appellate practice would be unlikely to produce the 95 percent compliance rate within 18 months set forth in the settlement. ECF Number 553, page 13, line 24, to page 14, line 8.

Finally, I agree with plaintiffs that the sixth factor, the risk of maintaining the class through the trial, is neutral, ECF Number 564-1 at 40, and with Judge Hillman that the remaining *Girsh* factors pertaining to monetary judgment and the settlement fund are inapplicable as the settlement does not provide for damages.

Further, while the utilization of an independent compliance monitor does not fit neatly within the *Girsh* factors, I agree with the former judge of the district that the inclusion of a monitor is "an additional safeguard that the settlement reforms are real, will be implemented and will provide the class with the increased treatment that they have bargained for." *Alves v. Main*, Case Number 01-00789, 2012 WL 6043272 at page 22 (DNJ December 4, 2012).

For these reasons, I will enter an order granting final approval to the class action settlement. That order will also provide for the attorneys' fees and incentive payments sought. The settlement provides for incentive payments totalling $50,000, $5,000 for each named plaintiff. While one objector believes they too should receive an incentive payment, there is no objection to the named plaintiffs' receipt of incentive payments. The named plaintiffs have made important contributions to this litigation, including responding to discovery, participating in depositions and preparing for trial, and these payments reflect those efforts and attendant risks.

The settlement also provides that defendants will not object to an award of attorneys' fees and costs not to exceed $4,750,000 -- ECF Number 564-3, pages 46 and 47 -- a sum that was negotiated after an agreement on the merits was reached by the parties.

There has been no objection filed related to the award of attorneys' fees. Rule 23(h) provides that a court may award attorneys' fees and costs as authorized by agreement. The IDEA also provides for attorneys' fees. 20 U.S.C. Section 1415(i)(3)(B). And in cases providing for statutory fee shifting, the lodestar is the appropriate method for fee calculation. *Adam X.*, 2022 WL 621089 at page 10.

Lodestar analyses calculate a reasonable fee by multiplying the number of hours reasonably worked by a reasonable hourly rate, *McKenna v. City of Philadelphia*, 582 F.3d 447, 445 (Third Circuit 2009).

The applicable rate is generally "the prevailing rate in the forum of the litigation." See *Interfaith Community Organization v. Honeywell International, Inc.*, 426 F.3d 694, 705 (Third Circuit 2005). And the prevailing rate within the vicinage is that of the Philadelphia/New Jersey legal market. See *D'Ottavio v. Slack Tech*, Case Number 18-09082, 2022 WL 15442211 at page 8, (DNJ October 26, 2022).

The rate is to be determined at the time of the fee application as opposed to the time services were rendered. See *Warner v. Township of South Harrison*, Case Number 09-06095, 2013 WL 3283945 at page 7 (DNJ June 27, 2013).

Class counsel submits that they have collectively expended 11,986.9 hours litigating this case for a total lodestar of $6,747,078.74, meaning that the award of

$4,750,000 represents just over 70 percent of the applicable lodestar figure.

I have reviewed counsel's declaration in support of the fee award. Time expended has been tracked to at least a quarter of an hour and often to the tenth of an hour. And I conclude that the hours spent were reasonable in light of the length and complexity of litigation, scope of discovery, extensive motion practice and significant efforts to reach a settlement. See *Doe v. Ohio*, Case Number 91-00464, 2020 WL 728276 at page 12, (Southern District of Ohio February 12, 2020), report and recommendation adopted, 2020 WL 996561 (Southern District of Ohio March 2, 2020), in which the court concluded that 11,614.85 attorney hours and 4,305.6 paralegal hours expended over the course of nine years were appropriate in an IDEA class action case.

I have also reviewed the rates sought and compared them with the fee ranges published by the Community Legal Services of Philadelphia. The Third Circuit has approved of lodestar calculations based upon the Community Legal Services fee rates. See *School District of Philadelphia v. Kirsch*, 722 F. App'x 215, 230 (Third Circuit 2018).

Further, Community Legal Services' ranges have been used within this vicinage for IDEA fee awards. See *KN v. Gloucester City Board of Education*, case 17-07976, 2022 WL 613846, at pages 3 to 6 (DNJ March 2, 2022).

Many of the participating counsel in this case possess 20 years or more of experience and seek rates that represent the low end of the applicable ranges or in many instances fall below the applicable ranges. Though there are counsel here whose rates exceeded the Community Legal Services range, those rates fall within or below the applicable range when multiplied by the discount of just over 70 cents on the dollar set out in the settlement. In other words, any reduction that may have been applicable to the underlying lodestar amount are already contemplated in the settlement.

I also note that several members of counsel seek costs totaling, by my account, approximately $81,000, which is to be included in the $4.75 million figure. Those costs are well documented and are for the expenses including research, travel, courier services and deposition and transcript fees. Costs of such expenses have been awarded in class actions within this district and will be awarded here. See *Koertge v. LG Electronics USA, Inc.*, Case Number 12-06204, 2013 WL 12156331 at 4, (DNJ December 3, 2013).

Lastly, I will approve the parties' selection of Lenore Knudtson of Pingora Consulting, LLC as compliance monitor. Ms. Knudtson holds a juris doctorate from William Mitchell College of Law and a master of science in education from the University of Wisconsin, ECF Number 566, page 4.

Ms. Knudtson also has worked as a school psychologist

and IDEA compliance officer for the Minnesota Department of Education and served as a consultant, investigator, mediator, and monitor for numerous entities, including state departments of education. *Id.* at pages 4 and 5. I find Ms. Knudtson well qualified to serve as the monitor and will enter an order granting the parties' motion.

And before I do so, I want to thank everybody. I've taken a long time to look through the docket, and I know the amount of work that it has taken to get to this point.

I also want to thank Judge Hillman who shepherded this case for a long time and also Judge Skahill and Judge Schneider for the incredible work that they did in mediating this matter to get it to this point.

Also for amici back there and all the hard work she did.

In sum, I will review the proposed orders.

I believe that there's no objection to any of the orders, proposed orders?

No. And no further editing to them. And I will incorporate my decision today in those orders and enter those orders as requested.

Anything further from plaintiffs' counsel?

MS. REISMAN: No.

THE COURT: Anything further from the State?

MR. LYNCH: No, Your Honor.

THE COURT: Thank you very much.

We're off the record.

THE COURTROOM DEPUTY: All rise.

(Proceedings concluded at 12:28 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Ann Marie Mitchell *17th day of April, 2024*

Court Reporter/Transcriber *Date*