

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

C.P., individually and on behalf of F.P., a minor child; D.O. individually and on behalf of M.O., a minor child; S.B.C., individually and on behalf of C.C., a minor child; A.S., individually and on behalf of A.A.S., a minor child; M.S., individually and on behalf of her minor child, H.S.; Y.H.S., individually and on behalf of his minor child, C.H.S.; E.M. on behalf of her minor child, C.M.; M.M., individually and on behalf of K.M.; L.G., individually and on behalf of her minor child, T.M.; E.P., individually and on behalf of her minor child, Ea.P.; and on behalf of ALL OTHERS SIMILARLY SITUATED,  
Plaintiffs,

Civil Action No. 19-cv-12807-NLH-MJS

Noel L. Hillman, U.S.D.J.

Matthew J. Skahill, U.S.M.J.

v.

NEW JERSEY DEPARTMENT OF EDUCATION; ANGELICA ALLEN-McMILLAN, Acting Commissioner of Education, in her official capacity,  
Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION  
FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT**

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## I. INTRODUCTION

This class action concerns the system used by defendant New Jersey Department of Education (“NJDOE”) for processing, and issuing decisions on, due process petitions filed by children with disabilities and their families under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (“IDEA”). The corrected Second Amended Complaint (“SAC”), ECF No. 78, alleges that NJDOE has systemically failed, and continues to systemically fail, to decide due process petitions within the 45-day timeframe guaranteed by IDEA.

Plaintiffs sought certification of a class pursuant to Fed. R. Civ. P. 23(b)(2) to secure declaratory and prospective injunctive relief to redress the ongoing violations of IDEA in New Jersey’s due process hearing system. Plaintiffs also sought to certify an issues class under Rule 23(b)(3) by way of Rule 23(c)(4), contemplating relief in the form of the Court’s answering certain legal and factual questions affecting the entire class. By Opinion and Order dated August 19, 2022, this Court certified both classes. ECF No. 384, 385.

On September 2, 2022, Defendants sought permission to file an interlocutory appeal of the class certification decision pursuant to Fed. R. Civ. P. 23(f). *C.P. v. New Jersey Dep’t of Educ.*, No. 22-8804, Doc. 1-1 (3d Cir.). The court of appeals granted the appeal as to (1) whether the Court erred in including in the certified classes those plaintiffs who settled or abandoned their claims before the 45-day

period elapsed; and (2) whether the Court erred in certifying for class-wide resolution the issue of whether New Jersey’s entire controversy doctrine per se bars later individual actions. ECF No. 420. Plaintiffs agreed to strike from the class definition plaintiffs who settled or abandoned their claims and to withdraw the request for certification of the entire controversy issue. The parties agreed that the concession of all issues mooted the appeal and requested a 30-day adjournment of the trial to attempt to finalize a settlement. ECF No. 441. On January 11, 2023, the parties filed a Stipulation of Dismissal in the court of appeals. *New Jersey Dep’t of Educ., et al. v. C.P., et al.*, No. 22-2815, Doc. 16. Thereafter, the parties settled the issues in dispute in this matter.

The Classes respectfully submit this memorandum of law in support of their unopposed motion seeking (i) preliminary approval of the settlement of this action, in accordance with a Consent Order and Settlement Agreement, dated December 11, 2023 (the “**Settlement Agreement**”),<sup>1</sup> and the Exhibit A annexed thereto, and as further described in a Notice of Proposed Settlement of Class Action (“**Class Notice**”); (ii) approval of the proposed methodology for serving the Class Notice (the “**Notice Program**”), including mailing and emailing the Class Notice and posting the Class Notice and Settlement Agreement, including its Exhibit A, on a

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<sup>1</sup> The Settlement Agreement is annexed as Exhibit 1 to the Declaration of Catherine Merino Reisman, executed on December 11, 2023 (“**Reisman Decl.**”), accompanying this Motion. The Class Notice is annexed thereto as Exhibit 2.



website, [www.NJ45DayClassAction.com](http://www.NJ45DayClassAction.com), maintained by Class Counsel; (iii) a date for a Settlement Fairness Hearing; and (iv) deadlines for (a) compliance with the Notice Program, (b) the filing of objections (if any), (c) the filing of requests for exclusion (if any), (d) the filing of the motion for final approval of the Settlement Agreement, and (e) the filing of an application for attorneys' fees and expenses and incentive awards to the named plaintiffs.

Because the Settlement Agreement is presumptively fair, and the benefit of the Settlement Agreement falls within the range of possible approval, we respectfully request that the Court grant this Motion. Defendants do not oppose this request.

## **II. SUMMARY OF THE LITIGATION AND THE SETTLEMENT AGREEMENT**

### **A. Procedural History of the Litigation**

Plaintiffs filed the initial Complaint in this action on May 22, 2019, and filed a First Amended Complaint on August 26, 2019. ECF No. 1, 21. Plaintiffs subsequently moved for class certification, and twice moved for preliminary injunctions. ECF No. 30, 31, 69. The Court heard argument on these motions on February 18, 2020, and orally granted Plaintiffs leave to file the SAC.

Plaintiffs filed the SAC on February 27, 2020. ECF No. 78. Defendants moved to dismiss the SAC. ECF No. 90. On May 22, 2020, the Court denied the motion, except as to one of the plaintiff families. ECF No. 98.

Plaintiffs filed a renewed motion to certify the class on June 7, 2020, which Defendants opposed. ECF No. 108, 117. On November 24, 2020, the Court announced its intention to advance the full trial on the merits and consolidate it with the hearing on the preliminary injunction motions. ECF No. 140. The Court also denied the motion for class certification, without prejudice, pending further discovery. *Id.* at 6-7, 15.

The parties engaged in extensive discovery. On November 22, 2021, Plaintiffs renewed their motion for class certification, seeking certification of a Rule 23(b)(2) Class and a Rule 23(b)(3) Issues Class. ECF No. 240, 241. Also on November 22, 2021, the parties cross-moved for summary judgment. ECF No. 243, 247. The Court certified the Classes on August 19, 2022. ECF No. 384, 385. The Court denied the cross-motions for summary judgment on September 1, 2022. ECF 391.

#### **B. Settlement Discussions**

In April 2022, the Court urged the parties to participate in mediation to resolve the matter prior to trial. ECF No. 352; Reisman Decl. at ¶ 7. The parties jointly requested referral to Magistrate Judge Skahill, ECF No. 355, before whom the parties engaged in settlement discussions during the summer of 2022. ECF No. 356, 379, 383; Reisman Decl. at ¶ 8.

After certification of both Classes, the parties engaged in private settlement discussions mediated by the Honorable Joel Schneider, U.S.M.J. (retired). Reisman Decl. at ¶ 9. After many sessions, the discussions proved fruitful, resulting in a Consent Order and Settlement Agreement presented to the Court by motion for preliminary approval filed on June 9, 2023. ECF No. 462; Reisman Decl. at ¶¶ 10, 12.

On June 23, 2023, counsel for *amici curiae* raised limited concerns with the original Consent Order and Settlement Agreement. Reisman Decl. at ¶ 13; Declaration of Jennifer N. Rosen Valverde (“**Valverde Decl.**”) at ¶ 2; ECF No. 464. On July 11, 2023, the Court instructed the parties to revise the original Consent Order and Settlement Agreement to address the concerns raised by *amici curiae*. ECF No. 474; Tr. 7.11.2023 at 12-13; Reisman Decl. at ¶ 13.

On August 23, 2023, John Rue & Associates informed the Court of its intention to withdraw as class counsel, and recommended appointment of Reisman Carolla Gran & Zuba LLP (“**RCGZ**”) as interim class counsel pending formal appointment of substitute class counsel. ECF No. 503. On August 23, 2023, the Court issued an Order to Show Cause why RCGZ should not serve as interim class counsel. ECF No. 505. On August 31, 2023, the Court appointed RCGZ as interim class counsel. ECF No. 511. By Opinion and Order dated October 27, 2023, the

Court approved the current Class Counsel team. ECF No. 530, 531; Reisman Decl. at ¶ 14.

After RCGZ’s appointment as interim class counsel, beginning in early September 2023, the parties entered into negotiations to revise the original Consent Order and Settlement Agreement to address the concerns raised by *amici curiae*. Counsel for *amici curiae* participated actively in the negotiations. The current proposed Consent Order and Settlement Agreement—*i.e.*, the Settlement Agreement that is the subject of the instant motion—reflects those negotiations. Reisman Decl. at ¶ 15; Valverde Decl. at ¶ 3. Class Counsel also sought the input of counsel for *amici* in drafting the proposed Notice. Reisman Decl. at ¶ 16; Valverde Decl. at ¶ 4. *Amici Curiae* will not be raising objections to the revised Settlement Agreement. Valverde Decl. at ¶ 5.

**C. Summary of Key Terms of the Proposed Settlement Agreement**

**1. *Relief to Rule 23(b)(2) Class Members***

The Settlement Agreement proposes to amend the 23(b)(2) Class definition to be “[a]ll persons who, pursuant to the IDEA, have filed or will file during the period of time that the Court may retain jurisdiction, a due process petition with NJDOE, and whose cases are pending in the New Jersey Office of Administrative Law (NJOAL).” Settlement Agreement at ¶ 3.

The Settlement Agreement requires NJDOE to comply with 34 C.F.R. § 300.515 (expressly tracking the regulatory language) by ensuring that, not later than 45 days after the expiration of the 30 day period under 34 C.F.R. § 300.510(b), or the adjusted time periods described in 34 C.F.R. § 300.510(c), and accounting for specific extensions of time requested by a party and granted by an Administrative Law Judge, the following must occur: (a) a final decision is reached; and (b) a copy of the decision is mailed to the parties. Settlement Agreement at ¶ 10. The Settlement Agreement requires NJDOE to calculate the 45-day timeline exclusively using calendar days, in accordance with 34 C.F.R. § 300.515(a) and (c) excluding specific extensions of time requested by a party and granted by an ALJ. Settlement Agreement at ¶ 9; Reisman Decl. at ¶ 24.

The parties also agreed that NJDOE must use a negotiated adjournment request form (attached to the Settlement Agreement as Exhibit A) to track specific extensions of time requested by the parties and granted by the ALJ. *Settlement Agreement* at ¶ 22; *see also id.*, Ex. A. This form contains explicit instructions for calculating the new final decision due date, requiring extensions to be limited to the number of calendar days requested. *Settlement Agreement* at Ex. A.

The Settlement Agreement further provides that, within 18 months from final approval of the Settlement Agreement, NJDOE shall come into **95% compliance** with 34 C.F.R. § 300.515, with an explicit definition of the meaning of “95%

compliance.” Reisman Decl. at ¶ 25; Settlement Agreement at ¶ 7. The compliance rate will be determined by a Compliance Monitor, appointed by the Court and compensated by NJDOE, based on specific information that the Settlement Agreement requires NJDOE to provide to the Monitor.

If NJDOE fails to achieve 95% compliance, Class Counsel shall provide NJDOE with a notice containing (i) the act(s) of non-compliance, (ii) a reference to the specific provision(s) of the Settlement Agreement that the Class alleges that Defendants have violated, and (iii) a statement of the remedial action sought. Defendants shall have 30 days to respond to Class Counsel, and the parties shall then meet and confer for 30 days to attempt to resolve the issues. Settlement Agreement at ¶ 35. If the parties cannot resolve the issues consensually, the Class may seek any remedy available to it. Settlement Agreement at ¶ 35.

## **2. *Relief to Rule 23(b)(3) Issues Class Members***

The Settlement Agreement proposes to amend the 23(b)(3) Issues Class definition to be “[a]ll persons who pursuant to IDEA, filed due process petitions with NJDOE on or after May 23, 2016, who, after their due process petition was transmitted to the NJOAL, did not receive a decision within the timeline as defined in 34 C.F.R. § 300.515(a), 34 C.F.R. § 300.515(c) and the violation occurred prior to approval of this Agreement.” Settlement Agreement at ¶ 4.

The Rule 23(b)(3) Issues Class sought declaratory relief designed to enable class members to argue that the statute of limitations had been tolled as to any claims against NJDOE. For members of the Issues Class, the Settlement Agreement tolls the statute of limitations as to claims against NJDOE.

Rule 23(b)(3) Issues class members will have two (2) years from final approval of the Settlement Agreement to assert a claim for individual relief under the IDEA for a violation arising out of, or related to, the timeline set forth in 34 C.F.R. § 300.515(a) and (c). Settlement Agreement at ¶ 13. The Settlement Agreement explicitly preserves (and does not release) the claims of the Rule 23(b)(3) class members under IDEA arising out of, or related to, a violation of the timeline as defined in 34 C.F.R. § 300.515(a) and (c). Settlement Agreement at ¶ 48.

#### **D. Class Notice**

The parties have agreed on a comprehensive Class Notice, a copy of which is attached as Exhibit 2 to the Reisman Decl. The parties believe the Class Notice adequately explains the terms of the proposed Settlement Agreement to all class members, and advises them of their rights. The parties propose that, within 28 days after entry of the Order Preliminarily Approving Settlement and Providing for Notice (the “**Preliminary Approval Order**”), Class Counsel will post copies of the Class Notice and the Settlement Agreement and its exhibits on the website [www.NJ45DayClassAction.com](http://www.NJ45DayClassAction.com). Within that same 28-day period, the parties

propose that NJDOE shall cause a copy of the Class Notice to be mailed to all class members who can be identified with reasonable effort. NJDOE shall also serve the Class Notice by email on any attorneys who represent or represented class members. Settlement Agreement at ¶ 47.

The Class Notice explains the key terms of the Settlement Agreement, the considerations that led Class Counsel to conclude that the Settlement Agreement is fair and adequate, the manner in which an award of attorneys' fees and expense reimbursement will be determined, the incentive awards sought for the class representatives, the procedure for members of both Classes to object, the procedure for the 23(b)(3) Issues Class to opt out, and the date and place of the Settlement Fairness Hearing.

The Notice Program will fairly apprise class members of the terms of the Settlement Agreement and their options with respect thereto, and fully satisfies the requirements of due process.

**1. *Objection, Opt-Out and Exclusionary Provisions***

The parties propose that any Class Member who wishes to object to the fairness of the Settlement Agreement must file an objection with the Court, and mail copies thereof to the Class Counsel and Defendants' Counsel to be postmarked no later than 49 days after preliminary approval. Any Class Member who does not file a timely objection to the Settlement Agreement shall be foreclosed, unless otherwise



permitted by the Court, from making any objection to the Settlement Agreement's fairness, reasonableness, or adequacy; to the Settlement Agreement; to the award of attorney's fees and expenses; or to the incentive awards for class representatives. The parties may propound discovery on an objecting class member, in compliance with the Federal Rules of Civil Procedure. *See, e.g., Granillo v. FCA US LLC*, No. 16-cv-153, 2018 WL 4676057, at \*7 (D.N.J. Sept. 28, 2018) (Wolfson, J.). Any 23(b)(3) Issues Class Member who wishes to be excluded may submit a written request for exclusion to Class Counsel, postmarked no later than 49 days after preliminary approval.<sup>2</sup>

## **2. Release Provisions**

The Settlement Agreement sets forth a release of all past and present liabilities, claims, demands, rights and causes of action, guarantees, claims for damages or other relief, costs, and compensation of any kind or nature whatsoever, that were raised in the SAC. Settlement Agreement at ¶ 48(a). The SAC did not request any individualized relief, so the Settlement Agreement does not release any such claims. Settlement Agreement at ¶ 48(b). Prospective claims, of course, cannot be released. Thus, the Settlement Agreement does not address those claims.

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<sup>2</sup> Because the 23(b)(2) Class seeks only injunctive relief, there is no provision to opt-out of that subclass.

The SAC raised claims related to NJDOE's and NJOAL's attempt to adopt certain "Procedural Guidelines" in 2020. The Class asserted that the Procedural Guidelines violated the due process rights of persons who filed Due Process Petitions. During the case, the Class filed a motion for a preliminary injunction (blocking the implementation of the Procedural Guidelines), which the Court indicated it would decide during or after the trial on the merits. Meanwhile, NJDOE withdrew the 2020 Procedural Guidelines.

In the Settlement Agreement, that Motion for Preliminary Injunction is withdrawn "without prejudice," meaning that the Class's application for injunctive relief can be renewed if, in the future, NJDOE and/or NJOAL attempt to adopt or implement policies, general practices, or procedures that violate the rights of class members. Nothing in the Settlement Agreement prevents any Class Member, or parent of a student with a disability, or interested party from separately challenging any attempt to implement new guidelines or NJDOE's and/or NJOAL's implementation, or attempted reimplementation, of the 2020 proposed guidelines. Settlement Agreement at ¶ 48(e).

For members of the Rule 23(b)(3) Issues Class, nothing in the Settlement Agreement will prevent any member of the Rule 23(b)(3) Issues Class from bringing a future action in an individual capacity under the IDEA arising out of, or related to, a past, present, or future violation of the 45-calendar day timeline for forms of relief

not requested in the SAC in this action. Defendants, however, reserve any and all defenses and arguments related to those claims. Settlement Agreement at ¶ 48(c).

**3. *Award of Attorney's Fees, Expenses, and Incentive Awards***

The parties agreed that each Class is a prevailing party for the purposes of an award of attorneys' fees pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*, and the Civil Rights Act, 42 U.S.C. § 1983, *et seq.*, and is entitled to an award of reasonable and necessary fees and expenses. Settlement Agreement at ¶ 37; Reisman Decl. at ¶ 26. Importantly, the parties did not discuss settlement of the attorney's fees and expenses amount until *after* they agreed on the resolution of the merits issues. Reisman Decl. at ¶ 11; *see* 4 Newberg and Rubenstein on Class Actions § 13:50 (6th ed.) ("Fees should not be negotiated between class counsel and defendant's counsel until after a settlement of the class's claims has been agreed upon"); *see also Manual for Complex Litigation, Fourth* § 21.7.

Indeed, as part of the Settlement Agreement, the parties agreed upon a procedure to negotiate the amount of fees with the assistance of Judge Schneider, following the parties' agreement on the merits of the dispute. Settlement Agreement at ¶ 39. As a result of the negotiation mediated by Judge Schneider, Defendants will not oppose an application for an award of attorneys' fees and expenses of \$4,750,000.00 for all work performed through resolution of the Settlement Fairness Hearing scheduled as a result of the Motion for Preliminary Approval of the

Settlement. Defendants, moreover, will not pay the fees and expenses amount from funds received by them pursuant to the Individuals with Disabilities Education Act. Settlement Agreement at ¶ 40; Reisman Decl. at ¶ 27. At the time they file the motion for final approval of the Settlement Agreement, the classes will file a motion, pursuant to Federal Rule of Civil Procedure 23(h), for approval of the amount of fees agreed to by the Parties in the Settlement Agreement. The papers filed in connection with that motion will detail the extensive efforts of Class Counsel in litigating and ultimately settling this case. Reisman Decl. at ¶ 28.

The parties further agreed that Class Counsel is entitled to reasonable fees and expenses for legal services performed related to post-judgment monitoring. Settlement Agreement at ¶ 38. This provision ensures that Class Counsel will be able to serve the public interest to monitor NJDOE's efforts to achieve 95% compliance with IDEA's timelines. Class Counsel must support any request for such fees as to each monitoring period with appropriate billing records. If the Parties cannot agree on the amount of fees for monitoring, they may seek the assistance of a mediator or submit the dispute regarding fees to the Court. Settlement Agreement at ¶ 44; Reisman Decl. at ¶ 29. Class Counsel must support any request for post-judgment fees with appropriate billing records. If the parties cannot agree on the amount of fees for monitoring, they may seek the assistance of a mediator or submit the dispute regarding fees to the Court. Settlement Agreement at ¶ 44; Reisman Decl. at ¶ 29.

Finally, the parties agreed that NJDOE shall make a \$5,000.00 incentive payment to the family of each named plaintiff within thirty (30) days of the receipt of completed child support certifications and New Jersey W-9 forms. Settlement Agreement at ¶ 36. The named plaintiffs in this case have absorbed substantial burdens by their participation, including responding to full paper discovery, sitting for depositions, and preparing for trial. *See, e.g., In re Schering-Plough Corp. Enhance Sec. Litig.*, No 08-397, 07-2177, 2013 WL 5505744, at \*37 (D.N.J. Oct. 1, 2013) (“Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved”); *Easterday v. USPack Logistics LLC*, No. 15-cv-07559, 2023 U.S. Dist. LEXIS 116655, at \*14 (D.N.J. July 6, 2023) (approving modest service award for class representative).

### **III. PRELIMINARY APPROVAL IS APPROPRIATE**

#### **A. The Law Favors Settlement**

The law encourages and favors settlement of civil actions in federal courts. This is true particularly in class actions and other complex cases, where settlement conserves substantial resources by avoiding lengthy trials and appeals. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004); 4 Newberg and Rubenstein on Class Actions § 13:44 (6th ed.).

Where, as here, the parties propose to resolve class action litigation through a class-wide settlement, they must request and obtain the Court's approval. *See* Fed. R. Civ. P. 23(e). "Review of a proposed class action settlement is a two-step process: (1) preliminary approval and (2) a subsequent fairness hearing." *Easterday*, 2023 U.S. Dist. LEXIS 116655, at \*12-13 (citing *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005) and *Manual for Complex Litigation, Fourth* § 21.632). Courts conduct a preliminary assessment of the settlement before directing notice be given to settlement class members. *In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 581-582, 585 (3d Cir. 2014) (citing *Manual for Complex Litigation, Fourth* §§ 21.632-634).

"A court's preliminary approval is not binding and is granted unless the proposed settlement is obviously deficient." *Kress v. Fulton Bank, N.A.*, No. 19-cv-18985, 2021 U.S. Dist. LEXIS 259351, at \*23 (D.N.J. Sept. 17, 2021); *Bernhard v. TD Bank, N.A.*, No. 08-cv-4392, 2009 WL 3233541, at \*14 (D.N.J. Oct. 5, 2009). "At the preliminary fairness evaluation stage, the court must determine whether the proposed settlement falls 'within the range of fairness, reasonableness and adequacy' required by Rule 23(e)." *Easterday*, 2023 U.S. Dist. LEXIS 116655, at \*13 (quoting *In re Amino Acid Lysine Antitrust Litig.*, No. 95 C 7679, MDL No. 1083, 1996 U.S. Dist. LEXIS 5308, at \*11 (N.D. Ill. Apr. 22, 1996)). "A proposed settlement falls within the range of possible approval if there is a conceivable basis

for presuming that the standard applied for final approval – fairness, adequacy, and reasonableness – will be satisfied.” *Easterday*, 2023 U.S. Dist. LEXIS 116655, at \*13-14 (citing *In re Nat’l Football League Players’ Concussion Injury Litig.*, 301 F.R.D. 191, 198 (E.D. Pa. 2014)). Courts generally grant preliminary approval where the proposed settlement “appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, [and] does not improperly grant preferential treatment to class representatives or segments of the class.” *Easterday*, 2023 U.S. Dist. LEXIS 116655, at \*14 (quoting *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)).

**B. The Settlement Agreement Is Presumptively Fair**

“A settlement is presumed fair when it results from ‘arm’s-length negotiations between experienced, capable counsel after meaningful discovery.” *Easterday*, 2023 U.S. Dist. LEXIS 116655, at \*14 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). Further, there is a presumption that the results of a settlement negotiation process “adequately vindicate the interests of the absentees” where the Court determines that “negotiations were conducted at arm’s length by experienced counsel after adequate discovery.” *Gen. Motors*, 55 F.3d at 796.

“In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class

settlement reached in arms-length negotiations between experienced, capable counsel.” *Clark v. Ecolab Inc.*, No. 07 Civ. 8623, 2010 WL 1948198, at \*4 (S.D.N.Y. May 11, 2010) (internal quotations omitted). Courts also give weight to the parties’ judgment that the settlement is fair and reasonable. *See Rudel Corp. v. Heartland Payment Sys., Inc.*, No. 16-cv-2229, 2018 U.S. Dist. LEXIS 10636, at \*5 (D.N.J. Jan. 22, 2018) (“A court may give considerable weight to counsel’s assessment of the settlement as fair and reasonable”) (internal citation and quotations omitted); *Palacio v. E\*TRADE Fin. Corp.*, No. 10 Civ. 4030, 2012 WL 2384419 at \*2 (S.D.N.Y. June 22, 2012); *Diaz v. E. Locating Serv. Inc.*, No. 10-cv-4082-JCF, 2010 WL 5507912, at \*3 (S.D.N.Y. Nov. 29, 2010).

The arm’s-length nature of the settlement negotiations here undoubtedly supports the conclusion that the Settlement Agreement is fair and was achieved free of collusion. Indeed, the parties reached settlement in this action only after this Court urged settlement discussions, and after the parties participated in extensive settlement negotiations first with the assistance of Magistrate Judge Skahill and later, in private mediation, with the assistance of retired Magistrate Judge Schneider. *See Shapiro v. Alliance MMA, Inc.*, No. 17-cv-2583, 2018 WL 3158812, at \*2 (D.N.J. June 28, 2018) (“The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm’s-length and without collusion between the parties.”) (internal citations omitted); *see also* 4



Newberg and Rubenstein on Class Actions § 13:14 (6th ed.) (“Courts have also found collusion less likely when settlement negotiations are conducted by a third-party mediator”). Class Counsel, moreover, agreed to the settlement only after conducting extensive discovery. Indeed, the parties reached final agreement on the merits days before the trial was scheduled to commence.

**C. The Settlement Agreement’s Benefit Falls Within the Range of Possible Approval**

The Court’s preliminary approval evaluation is guided by the same considerations that apply later to final approval. *See, e.g., Singleton v. First Student Mgmt. LLC*, No. 13-cv-1744, 2014 WL 3865853, at \*5 (D.N.J. Aug. 6, 2014) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)).

Courts in the Third Circuit considering final approval of a class action settlement must evaluate a settlement under the *Girsh* factors: “(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.” *Singleton v. First Student Mgmt. LLC*, No. 13-cv-1744, 2014 WL 3865853, at \*5

(D.N.J. Aug. 6, 2014) (citing *Girsh*, 521 F.2d at 157. Here, the Settlement Agreement clearly satisfies the relevant *Girsh* factors.

**1. *Girsh Factors 1, 4 and 6: Complexity, expense, and likely duration of the litigation; risks of establishing liability and of maintaining a class action through trial***

This Court has recognized that the permanent injunction that the Class seeks is a “significant exercise of this Court’s considerable powers [that] should not be undertaken lightly.” *C.P. v. New Jersey Dep’t of Educ.*, No. 19-cv-12807, 2022 U.S. Dist. LEXIS 158147, at \*35 (D.N.J. Sept. 1, 2022). Class Counsel recognizes as much, and thus has considered the prospect that, even if it prevailed at trial, the requested relief against the State presents significant legal issues that could delay relief to the Class for years while the case wends its way through appellate review. Indeed, *Blackman v. D.C.*, 277 F. Supp. 2d 71, 80 (D.D.C. 2003), relied upon by this Court in prior decisions, is particularly instructive because the appeals and post-trial proceedings in that case resulted in years of delay in getting relief to the class.

Class Counsel are well informed of the merits of this case, based on their participation in the extensive discovery in this matter and drafting of the motion for summary judgment, as well as their collective experience in the special education dispute resolution system in New Jersey. Reisman Decl. at ¶ 17. Class Counsel, although confident in the merits of the case, are aware that there is risk inherent in taking any case to trial. Class Counsel also had to take into account the delays

accompanying inevitable appeals and other post-trial proceedings. Weighing these factors, Class Counsel reasonably concluded that the Settlement Agreement will lead to much needed and long awaited relief far more quickly than proceeding to trial. Reisman Decl. at ¶ 18.

A settlement that requires NJDOE to demonstrate compliance with the 45-Day Rule (on pain of contempt) within 18 months is a better option for the Class than proceeding to trial, with all the risks attendant to the trial and subsequent appeals, which would not likely be resolved until after the 18 month period set out in the Settlement Agreement expires, and without the risk of any appeal. Reisman Decl. at ¶ 19. Further, given the systemic relief required, a remedy crafted through settlement with participation of all parties is preferable to court-imposed relief. Reisman Decl. at ¶ 19. And, here, the Settlement Agreement largely provides the primary relief that the Class sought in bringing the case. Reisman Decl. at ¶ 18.

Significantly, the Parties have already had preliminary discussions with, and agreed upon, a proposed Compliance Monitor. Should the Court preliminarily approve the Settlement Agreement, the Parties will be able to jointly present their Compliance Monitor candidate to the Court for appointment at the same time as they seek final approval, which will allow the remediation process to begin immediately upon final approval. Reisman Decl. at ¶ 23.

**2. *Girsh Factor 3: Stage of proceedings and amount of discovery completed***

Given the stage of the proceedings, Class Counsel clearly understood the strengths and weaknesses of the Classes' claims. The case has gone through extensive discovery and the Parties have submitted and the Court has ruled upon cross-motions for summary judgment. Class Counsel were in the final stages of preparing for trial when the settlement was finalized. The decision to settle was well-informed. The Settlement Agreement, moreover, largely provides the primary relief that the Class sought in bringing this case in the first place.

**3. *Girsh Factors 5, 7, 8 and 9: Damages are not at issue in this case***

The remaining *Girsh* factors—five, seven, eight and nine—are not at issue in this case, as they apply to cases seeking monetary relief.

**4. *Conclusion***

An analysis of the relevant *Girsh* factors shows that the Settlement Agreement falls well “within the range of possible approval.” For all these reasons, and especially because it was the product of a thorough, arm’s-length negotiation process shepherded by two Magistrate Judges (one current, and one retired), the Settlement Agreement is reasonable, presumptively fair, and overwhelmingly satisfies the *Girsh* factors. *See also Shapiro*, 2018 WL 3158812, at \*2. The Classes therefore respectfully request that the Court grant preliminary approval of the Settlement Agreement, approve the proposed Notice Program and schedule a Settlement

Fairness Hearing. *See Manual for Complex Litigation, Fourth* §40.42 (model preliminary approval order).

#### **IV. THE COURT SHOULD APPROVE THE PROPOSED FORM AND METHOD OF CLASS NOTICE**

When a class action settlement is proposed, class notice is sent pursuant to Fed. R. Civ. P. 23(c)(2) and 23(e). Under Rule 23(c)(2), the Court “must direct to class members the best notice that is practicable under the circumstances.” *Korrow v. Aaron’s Inc.*, No. 10-cv-6317, 2015 WL 7720491, at \*9 (D.N.J. Nov. 30, 2015) (approving distribution of notice to class members by direct mail, e-mail, publication, and via litigation-specific website). The December 2018 amendment to Rule 23(c)(2) clarifies that providing “the best notice that is practicable under the circumstances” to individual class members may include “electronic means, or other appropriate means.” *Leary v. McGowen Enters., Inc.*, No. 17-cv-2070, 2018 WL 4961593, at \*3 (E.D. Pa. Oct. 15, 2018) (claims administrator sent notice via email to class members with known e-mail addresses and via mailed postcard for the other class members); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-cv-8144, 2009 WL 5178546, at \*23-24 (S.D.N.Y. Dec. 23, 2009).

Beyond an adequate delivery, the notice must “fairly, accurately and neutrally describe the claims and parties in the litigation as well as the terms of the proposed settlement and the identity of persons entitled to participate in it” and be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency

of the action and afford them an opportunity to present their objections.” *Shapiro*, 2018 WL 3158812, at \*7. “Due process requires notification (1) of ‘the nature of the pending litigation’; (2) of ‘the settlement’s general terms’; (3) ‘that complete information is available from the court files’; and (4) ‘that any class member may appear and be heard at the Fairness Hearing.’” *Shapiro*, 2018 WL 3158812, at \*7 (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527 (D.N.J. 1997)).

There are “no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. Notice is adequate if it may be understood by the average class member.” *Id.* at 114 (internal quotations and citations omitted). Here, the Class Notice will be sent to class members by First Class Mail and their counsel by email. Class Counsel will also post the Class Notice, as well as the full Settlement Agreement, on a dedicated website, [NJ45DayClassAction.com](http://NJ45DayClassAction.com).

The Class Notice describes in plain English the terms of the Settlement Agreement; the considerations that led Class Counsel to conclude that it was fair and adequate; the quantum of attorneys’ fees and expense reimbursement to be paid to Class Counsel and incentive awards for the named plaintiffs; the procedures to object

to or be excluded from the Settlement Agreement; and the date and place of the Settlement Fairness Hearing. With the Court's approval, Defendants will mail the Class Notice to class members, and email the Notice to counsel for class members within twenty-eight (28) days after entry of the Preliminary Approval Order.

## V. PROPOSED SCHEDULE

The Class proposes the following schedule of events, subject to the Court's preferences and calendar, leading to the Settlement Fairness Hearing, as per the proposed Preliminary Approval Order submitted herewith.

<b>Event</b>	<b>Paragraph in the Proposed Order</b>	<b>Timing</b>
Preliminary Approval		Date of Preliminary Approval Order
Defendants Serve Appropriate Federal and State Officials Pursuant to Class Action Fairness Act, 28 U.S.C. § 1715	¶ 8	Within 10 calendar days after Preliminary Approval
Notice Mailed to Class and Emailed to Attorneys Representing or Who Have Represented Class Members Class Counsel Posts Notice and Agreement to website	¶ 8	Within 28 calendar days after Preliminary Approval
Opt-Outs of 23(b)(3) Class	¶ 13	Within 49 calendar days after Preliminary Approval

<b>Event</b>	<b>Paragraph in the Proposed Order</b>	<b>Timing</b>
Objections to Settlement	¶ 14	Within 49 calendar days after Preliminary Approval
Motion for Final Approval, Attorneys' Fees and Costs, and Incentive Awards	¶ 20	Within 63 calendar days after Preliminary Approval
Opposition to Motion for Final Approval, Attorneys' Fees and Costs, and Incentive Awards	¶ 20	Within 77 calendar days after Preliminary Approval
Reply in support of Motion for Final Approval	¶ 20	Within 90 calendar days after Preliminary Approval
Settlement Fairness Hearing	¶ 10	100 calendar days after Preliminary Approval

## **VI. CONCLUSION**

For the foregoing reasons, and in light of the fact that Defendants do not oppose this motion, Plaintiffs respectfully request that the Court enter an Order as soon as practicable: (i) preliminarily approving the Consent Order and Settlement Agreement; (ii) directing that notice be given to the class members in the form set forth in Exhibit 2 to the Reisman Declaration by mail to class members and email to attorneys for class members and posting on Class Counsel's website, [www.NJ45DayClassAction.com](http://www.NJ45DayClassAction.com); and (iii) setting a date for a Settlement Fairness



Hearing approximately 100 days from the date of the Preliminary Approval Order, with interim deadlines as set forth in the proposed Preliminary Approval Order.

Respectfully submitted,

Dated: December 11, 2023

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