IN THE 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, v. NEW JERSEY DEPARTMENT OF EDUCATION; KEVIN DEHMER, Interim Commissioner of Education, in his official capacity, Defendants.	Civil Action No. 19-cv-12807

MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT AND AWARD OF ATTORNEYS' FEES AND COSTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. Introduction

As this Court has recognized, "this case involves both some of the most vulnerable in our society and how they are treated by their government." *C.P. v. New Jersey Dep't of Educ.*, No. 19-cv-12807, 2022 U.S. Dist. LEXIS 158147, at *3 (D.N.J. Sept. 1, 2022) (*C.P. II*).[1] To provide much needed and long awaited relief to those most vulnerable citizens – children with disabilities entitled to an appropriate education – Class Counsel[2] seek approval of a Consent Order and Settlement Agreement (SA or Agreement)[3] resolving the claims in this litigation and providing for retention of jurisdiction to monitor the efficacy of the settlement.

Congress enacted the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA), to ensure that children with disabilities receive a free appropriate public education (FAPE). To that end, Congress included various procedural safeguards, including the ability to adjudicate disputes about the provision of FAPE, to protect the rights of the children and their parents. To secure

[1] Pursuant to Fed. R. Civ. P. 25(d), in the caption, the current Interim Commissioner of Education has been substituted as a party for the former Acting Commissioner of Educaton.
[2] By Opinion and Order dated October 27, 2023, the Court approved the current Class Counsel team. ECF Nos. 530, 531; *Declaration of Catherine Reisman in Support of Motion for Final Approval of Settlement Agreement and Attorneys' Fees* (*Reisman Decl.*) ¶¶ 4, 40.
[3] The Agreement is attached to the *Reisman Decl.* as Exhibit 1.

that adjudication, parents must file a "due process petition" or "due process complaint" requesting an administrative hearing.

IDEA requires that the State Educational Agency, here the New Jersey Department of Education (NJDOE), observe strict timelines in adjudicating due process complaints. *See* 20 U.S.C. § 1415(f)(1)(B)(ii) ("If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence"). After a thirty-day resolution period to facilitate settlement without adjudication, federal regulations require that hearing officers decide the matter within forty-five days, unless either party requests specific adjournments. 34 C.F.R. § 300.515(a); *N.J.A.C.* 6A:14-2.7(j). "No other delays are contemplated. Therefore, if no specific adjournments are requested by the parties, a final decision must be rendered within 45 days after the end of the 30-day resolution period." *C.P. II*, 2022 U.S. Dist. LEXIS 158147, at *9. The Court has referred to this requirement as the "45 Day Rule." *Id.* The United States Department of Education (USDOE) determined in 2019 that NJDOE does not have a process to ensure compliance with the 45 Day Rule. *Id.* at *14.

The Court certified two classes in this case. For the 23(b)(2) Class,[4] Plaintiffs sought prospective injunctive relief, asserting that Defendants have acted or refused to act on grounds that are generally applicable to the class, so that final injunctive relief is appropriate respecting the class as a whole. *Reisman Decl.* ¶ 11. For the 23(b)(3) Issues Class,[5] in relevant part, Plaintiffs sought declaratory relief on the following two issues:

- How long has NJDOE been systemically violating the 45 Day Rule; and
- Whether NJDOE engaged in misrepresentations that amounted to wrongful concealment, thus satisfying the first prong of the fraudulent concealment doctrine for purposes of tolling the statute of limitations.

ECF No. 241-1 at 9-10; *Reisman Decl.* ¶¶ 12, 63. The relief requested was akin to a declaratory judgment whereby the court can certify particular issues for class treatment, even if those issues do not resolve a defendant's liability. *See, e.g., Russell v. Educ. Comm. for Foreign Med. Graduates*, 15 F.4th 259 (3d Cir. 2021); *In re Fieldturf Artificial Turf Mktg.*, No 17-2779, 2023 WL 4551435 (D.N.J. July 13, 2023). The purpose of this declaratory relief was to assist the 23(b)(3) class

[4] The Agreement defines the 23(b)(2) Class as follows:
> All 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). SA ¶ 5.

[5] The Agreement defines the 23(b)(3) Class as follows:
> All persons who pursuant to IDEA, filed due process petitions to the NJOAL, did not receive a decision within the timeline as defined in 34 C.F.R. §300.515(a), (c) and the violation occurred prior to approval of this Agreement. SA ¶ 4.

members to argue that the statute of limitations on potential claims against NJDOE related to 45 Day Rule violations should be tolled.[6]

For the 23(b)(2) Class, the Agreement provides all of what the Second Amended Complaint (SAC) sought – a prospective injunction to reform the due process hearing system. *Reisman Decl.* ¶ 11. For the 23(b)(3) class, the Agreement provides significant relief. Rather than adjudicating factual issues that might merely help individual class members to avoid the bar of the statute of limitations, the Agreement actually extends the limitations period for all of the class members. *Reisman Decl.* ¶ 64. Each member of the 23(b)(3) Issues Class now has two years from the date of final approval of the Agreement to assert individual claims against NJDOE for violating the 45 Day Rule. SA ¶ 13; *Reisman Decl.* ¶ 65.

After nearly five years of litigation and hard work by the Court and the parties, this historic settlement is "designed to insure that our most vulnerable children remain the priority we all should agree they are, not only in these times, but at all times." *C.P. v. New Jersey Dep't of Educ.*, No. 19-cv-12807, 2020 U.S. Dist. LEXIS 90150, at *40 (D.N.J. May 22, 2020). Accordingly, Class Counsel respectfully submit this unopposed motion seeking (i) final approval of the settlement of this action; (ii) approval of attorneys' fees and costs; (iii) approval of

[6] Counsel did not seek certification of a liability class under Rule 23(b)(3) because of concerns about meeting the predominance requirement. *Reisman Decl.* ¶ 62.

incentive awards to the Named Plaintiffs; and (iv) continuing jurisdiction of this Court for monitoring and enforcement of the terms of the Consent Order.

II. Background of the Case

A. Plaintiffs' Counsel Filed the Case Seeking Redress for 45 Day Rule Violations

J.A., et al. v. Monroe Twp. Bd. of Educ., et al., Civil No. 1:18-cv-09580 (*JA Class Action*), filed on May 23, 2018, was the first putative class action alleging flaws in NJDOE's system of timely resolving special education due process cases. This Court granted in part and denied in part certain motions to dismiss in the *JA Class Action* on April 22, 2019. *See J.A. v. Monroe Twp. Bd. of Educ.*, No. 1:18-cv-09580, 2019 U.S. Dist. LEXIS 67507 (D.N.J. April 22, 2019). Pursuant to the Court's rulings, the *J.A.* Plaintiffs filed an Amended Class Action Complaint.

Plaintiffs filed the initial Complaint in this matter on May 22, 2019 and an amendment as of right on August 26, 2019. Plaintiffs subsequently moved for class certification and for two preliminary injunctions. ECF Nos. 30, 31, 69.[7] The Court heard argument on these motions on February 18, 2020 and delayed ruling thereon, but orally granted Plaintiffs leave to file the SAC. *Reisman Decl.* ¶ 6. Plaintiffs

[7] The first preliminary injunction motion sought an Order enjoining NJDOE from continued violation of the 45 Day Rule in special education disputes, appointing a federal monitor, and providing related relief. ECF No. 31-9. The second preliminary injunction motion sought to temporarily restrain the implementation of proposed procedural guidelines for special education due process hearings. ECF No. 69.

filed the SAC, the currently operative pleading, on February 27, 2020. ECF Nos. 1, 21, 78; *Reisman Decl.* ¶ 5.

Defendants moved to dismiss the SAC, ECF No. 90, but the Court denied the motion, except as to one plaintiff family. ECF No. 98; *Reisman Decl.* ¶ 7. Plaintiffs renewed their Motion to Certify the Class on June 7, 2020, which Defendants opposed. ECF Nos. 108, 117. On November 24, 2020, the Court announced its intent 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.*; *Reisman Decl.* ¶ 8.

B. Counsel Developed a Robust Factual Record Through Hard-Fought Discovery

Thereafter, the parties engaged in extensive discovery. The deadline for pretrial factual discovery was September 3, 2021. ECF No. 179. The Court granted Plaintiffs' request for supplemental discovery on March 16, 2022. ECF No. 350; *Reisman Decl.* ¶ 9.

Plaintiffs' Counsel served numerous document requests and received and reviewed thousands of pages produced by Defendants; prepared, served, and responded to interrogatories; and took and defended numerous depositions. *Reisman Decl.* ¶¶ 15-17. Plaintiffs' Counsel litigated numerous discovery disputes, seeking to ensure access to full information. *See, e.g.,* ECF Nos. 156, 157, 173,

188, 191, 193, 201, 232, 233; *Reisman Decl.* ¶ 18. The extensive briefing submitted in connection with cross-motions for summary judgment established counsel's familiarity with the underlying facts in the case. *See* ECF Nos. 243, 244, 247, 248, 315, 316, 317, 320; *Reisman Decl.* ¶ 19.

In November 2021, Plaintiffs renewed their motion for class certification, seeking certification of a 23(b)(2) injunction class and a 23(b)(3) issues class. ECF Nos. 240, 241; *Reisman Decl.* ¶ 10. At the same time, the parties cross-moved for summary judgment. ECF Nos. 234, 247. After certifying the classes on August 19, 2022, ECF No. 384, the Court denied the cross-motions for summary judgment on September 1, 2022. ECF No. 391. The Court then advised the parties to begin preparation for trial. ECF No. 393. *Reisman Decl.* ¶ 13.

On February 8, 2023, Judge Skahill approved the parties' 168-page Joint Final Pre-Trial Order (PTO), reflecting the development of a full evidentiary record through discovery. ECF No. 326; *Reisman Decl.* ¶ 20. The PTO attached 261 factual stipulations, listed 107 facts that Plaintiffs' Counsel intended to prove at trial based upon the record in the case, named 31 Plaintiffs' trial witnesses and summarized their testimony, and identified 310 Joint Exhibits, 163 Plaintiffs' Exhibits, and 73 Defendants' Exhibits for trial in this matter. *Reisman Decl.* ¶¶ 20-24; ECF Nos. 326, 326-1.

On August 30, 2022, Plaintiffs' Counsel submitted a 75-page Proposed Findings of Fact and Conclusions of Law, which included 361 proposed factual findings with citations to record evidence. ECF No. 389; *Reisman Decl.* ¶ 25. On the same date, Defendants submitted a 70-page Proposed Findings of Fact and Conclusions of Law, which included 373 proposed factual findings with citations to record evidence. ECF No. 390; *Reisman Decl.* ¶ 26.

Thus, when making the decision to settle, counsel were well-informed regarding the merits of the case. Indeed, counsel were prepared for trial.

C. Beginning in April 2022, the Parties Engaged in Arm's Length Settlement Negotiations Facilitated by a Current Magistrate Judge and a Former Magistrate Judge, Reached a Merits Settlement While at the Same Time Preparing for Trial, and Determined the Fees After the Merits Settlement Was Finalized

In April 2022 the Court urged the parties to participate in mediation to resolve the matter prior to trial. ECF No. 352; *Reisman Decl.* ¶ 27. 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 Nos. 356, 379, 383. *Reisman Decl.* ¶ 28. After the Court certified both classes on August 19, 2022 and denied cross motions for summary judgment on September 1, 2022, the parties continued private settlement discussions mediated by the Honorable Joel Schneider, U.S.M.J. (retired). *Reisman Decl.* ¶¶29-31.

During the settlement negotiations, the trial team continued to do significant work toward trial preparation. The Court, to keep the litigation moving, set several trial dates while the parties were simultaneously pursuing mediation. *Reisman Decl.* ¶ 32; *see* Trial Notice dated May 17, 2022 (no ECF No.); ECF Nos. 393, 396, 400. The parties sought to adjourn the trial several times in the fall of 2022 to facilitate settlement discussions. ECF Nos. 418, 433, 442. Because counsel could not know for certain that the case would settle, trial counsel Thomas O'Leary and Gregory Little carried on with trial preparation while settlement negotiations were ongoing. *Reisman Decl.* ¶ 31.

At the same time, in the fall of 2022, the parties participated in interlocutory proceedings before the United States Court of Appeals for the Third Circuit. Defendants filed a petition for leave to appeal of the class certification order pursuant to Fed. R. Civ. P. 23(f) on September 2, 2022. On September 26, 2022, the Court of Appeals granted the petition as to two issues. ECF No. 416.[8] On December 27, 2022, the parties informed the Court that Plaintiffs conceded on the

[8] Specifically, the court agreed to consider (1) Whether the District Court erred by including in the certified classes those plaintiffs who settled or abandoned their claims before the 45-day period elapsed; and (2) Whether the District Court erred in certifying for class-wide resolution the issue of whether New Jersey's entire controversy doctrine per se bars later individual damages actions. ECF No. 416 at 2.

two issues pending before the Court of Appeals and jointly requested a thirty day trial adjournment to pursue settlement. ECF No. 441. *Reisman Decl.* ¶ 32.

The many sessions of arm's length negotiations before Judge Schneider proved fruitful and the parties reached a resolution on the merits. *Reisman Decl.* ¶ 33. Notably, the parties did not negotiate the fees amount at the same time as the merits. *Reisman Decl.* ¶ 35. On February 17, 2023, counsel notified the Court of the settlement on the merits and that the parties still had to agree on the fees. The Court set a schedule for negotiation of the fees. *Reisman Decl.* ¶ 33; ECF Nos. 447, 448. Plaintiffs' Counsel provided Defendants with a fee demand with accompanying proofs, which NJDOE reviewed at length. The parties jointly requested several extensions to finalize the fee negotiation. *Reisman Decl.* ¶ 33. As a result of the fee negotiation assisted by Judge Schneider, Defendants will not oppose an application for an award of attorneys' fees and expenses for an amount not to exceed $4,750,000 for all work performed through resolution of the Fairness Hearing. *Reisman Decl.* ¶ 36; SA ¶ 40.

D. In June 2023, Plaintiffs' Counsel Presented the Initial Consent Order and Agreement for the Court's Approval and the Court Directed the Parties to Address Concerns Raised by *Amici Curiae*

The negotiations facilitated by Judge Skahill and Judge Schneider resulted 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.* ¶ 37. On

June 23, 2023, counsel for *amici curiae* raised limited concerns with the original Consent Order and Agreement. ECF No. 464; *Reisman Decl.* ¶ 38. On July 11, 2023, the Court instructed the Parties to revise the original Consent Order and Settlement Agreement to address those concerns. ECF No. 474 (Tr. 7.11.2023 at 12-13); *Reisman Decl.* ¶ 39.

After appointment of interim Class Counsel on August 31, 2023, the parties entered into negotiations to revise the original Consent Order and Agreement to address *amici*'s concerns. During the fall of 2023, Class Counsel, working closely with counsel for *amici* as well as Defendants' counsel, revised the Agreement and drafted the notice to be sent to class members. *Reisman Decl.* ¶¶ 41, 42. *Amici curiae* have not raised objections to the revised Agreement. *Reisman Decl.* ¶ 43; *see also Declaration of Jennifer N. Rosen Valverde*, ECF No. 546-3 ¶ 3.

E. After Concluding That the Settlement is in the Best Interest of the Classes, Class Counsel Presented the Agreement to the Court for Preliminary Approval in December 2023

Class Counsel sought preliminary approval of the current Agreement on December 11, 2023. ECF No. 546; *Reisman Decl.* ¶ 44. As this Court recognized at the hearing on the Motion for Preliminary Approval, the Agreement resulted from the significant labor of two Magistrate Judges. Judge Skahill provided initial assistance with settlement negotiations, and Judge Schneider, who facilitated multiple in-person mediation conferences and participated in numerous Zoom and

telephone conferences, was instrumental in helping the parties to reach an accord. *Reisman Decl.* ¶ 45; *see also* Exhibit 2 to *Reisman Decl.,* Tr. (12.18.2023) at 6:14-21.

Class Counsel are well informed of the merits of this case. Beyond their collective experience in the special education dispute resolution system in New Jersey, Class Counsel have participated in extensive discovery, drafted and briefed two motions for preliminary injunctions, drafted a motion for summary judgment, responded to Defendants' motion for summary judgment, drafted the Joint Final Pre-Trial Order, drafted proposed findings of fact and conclusions of law, prepared for trial, and appeared countless times before this Court. *See* Section II.A., *supra*; *Reisman Decl.* ¶ 46. Class Counsel were always confident in the merits of the case, but, all seasoned attorneys, were also well aware that there is risk inherent in taking any case to trial. Class Counsel thus had to consider not only the risk (however minimal) of losing at trial, but also the delays that would accompany the inevitable appeals and other post-trial proceedings even if the Classes prevailed at trial. Weighing these factors, Class Counsel reasonably concluded that the Agreement will lead to relief far more quickly than proceeding to trial. *Reisman Decl.* ¶ 47. Indeed, having achieved NJDOE's agreement, by settlement, to comply with the 45 Day Rule, Class Counsel have made the reasonable assessment that the Agreement will lead to compliance far sooner than prevailing at trial and awaiting

the conclusion of any inevitable appeal. Further, the foregoing analysis does not even take into account how difficult it would have been for the Court to impose a non-consensual remedy on NJDOE to provide the requested relief. *Reisman Decl.* ¶ 47.

III. Summary of the Settlement

A. Relief for 23(b)(2) Class Members

Rule 23(b)(2) authorizes class-wide relief if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Agreement provides everything sought in the SAC, significant prospective injunctive relief for families who currently, or in the future, must use New Jersey's special education due process hearing system to pursue IDEA claims.

The Agreement requires NJDOE to comply with 34 C.F.R. 300.515 (expressly tracking the regulatory language) by ensuring that, not later than forty-five days after the expiration of the thirty 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. SA ¶ 10. NJDOE also agrees to

immediately cease using any method to calculate the forty-five days other than calendar days. SA ¶ 9; *Reisman Decl.* ¶¶ 48, 49.

The Agreement requires that documents provided to parents when NJDOE transmits the case to the New Jersey Office of Administrative Law (OAL) for hearing must state the initial forty-five day deadline for disposition. SA ¶ 26(a); *Reisman Decl.* ¶ 50. For the duration of the Court's jurisdiction over this matter, the Agreement also ensures that 23(b)(2) class members are aware of the Settlement, by requiring the transmittal documents to include a Class Action Notice, in a centered black box, with one point larger font than the rest of the text, providing contact information for the Monitor and Class Counsel. SA ¶ 12; *Reisman Decl.* ¶ 51.

To ensure that NJDOE has accurate data regarding compliance with the timeline, the Agreement requires use of a negotiated Adjournment Form to track specific extensions of time requested by the parties and granted by an ALJ. SA ¶ 22 & Ex. A; *Reisman Decl.* ¶ 52. The Adjournment Form is crucial for monitoring of the timelines and will provide transparency to 23(b)(2) class members while their cases are pending. The form provides instructions as to how to calculate the new final decision due date, specifying that the date is extended only by the number of calendar days of the specific extension request. SA Ex. A at p. 2; *Reisman Decl.* ¶ 53.

To comply with the Agreement, NJDOE must attain 95% compliance with the 45 Day Rule within eighteen months from final approval of the Agreement. SA ¶¶ 8, 35. The Agreement explicitly defines the meaning of "95% compliance." SA ¶ 7. If NJDOE fails to reach 95% compliance after eighteen months, Class Counsel may seek further relief from the Court. SA ¶ 35. *Reisman Decl.* ¶ 54.

The Agreement provides that the Court will appoint a neutral Compliance Monitor with specific duties, powers, and, crucially, access to information. SA ¶¶ 14-19. The Monitor (upon whom the parties have agreed) will provide NJDOE with the support, guidance, experience, and expertise needed to comply with the terms of the Agreement. SA ¶ 15. The Monitor will operate independently of the parties, with full access to the data from NJDOE necessary to fulfill her role. She has extensive duties related to supporting compliance, including the ability to conduct individual, confidential interviews as she deems appropriate. SA ¶¶ 16, 17, 18, 19; *Reisman Decl.* ¶¶ 55-58.

At the end of each monitoring period, the Monitor shall submit a report detailing the status of compliance with the 45 Day Rule. SA ¶ 23. The Agreement specifies the required contents of the report and requires the Monitor to use the data to calculate compliance rates. SA ¶¶ 23-33; *Reisman Decl.* ¶ 59. NJDOE must post a copy of the monitoring reports on its website within five days of their issuance. SA ¶ 33; *Reisman Decl.* ¶ 60.

To ensure that Class Counsel will be able to monitor Defendants' efforts to achieve compliance, the Agreement also provides for reasonable fees and expenses for legal services performed related to post-judgment monitoring. SA ¶ 38. Class Counsel must support any request for such 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. SA ¶ 44; *Reisman Decl.* ¶ 61.

B. Relief to Rule 23(b)(3) Issues Class Members

Rule 23(b)(3) allows certification of a class when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." This Court certified a 23(b)(3) Issues Class, contemplating "relief granted in the form of the Court answering certain legal and factual questions that Plaintiffs contend affect the entire putative class." ECF No. 384 at 6. With respect to the issues certified, the Court found that the class met the predominance, superiority, and ascertainability requirements under Rule 23(b)(3). ECF No. 384 at 34-42.

Plaintiffs sought declaratory relief for the 23(b)(3) Class designed to allow class members to argue that the statute of limitations was tolled for individual claims under IDEA against NJDOE. *Reisman Decl.* ¶ 63. The relief in the

Agreement, however, actually extends the statute of limitations (as opposed to merely helping class members argue for tolling). *Reisman Decl.* ¶ 64.

Because of the individualized nature of the inquiry needed to demonstrate standing and available recovery for each class member, *see Huber v. Simon's Agency, Inc.*, 84 F.4th 132 (3d Cir. 2023), the action did not seek reimbursement or compensatory education relief for members of the Rule 23(b)(3) Issues Class. All Rule 23(b)(3) Issues Class members will have two years from the date of final approval of the Agreement to assert a claim for relief for a violation arising out of, or related to, the timeline set forth in 34 C.F.R. 300.515(a), (c). SA ¶ 13; *Reisman Decl.* ¶ 65. For class members who can prove that they have been injured, the removal of the statute of limitations defense for NJDOE provides significant relief. *Reisman Decl.* ¶ 66.

C. Release Provisions

The Agreement sets forth a comprehensive release between the parties related only to the claims asserted in the Second Amended Complaint, and excepting any individualized relief. SA ¶¶ 48(a), (b); *Reisman Decl.* ¶ 67. The Agreement specifically notes that it does not bar any member of the Rule 23(b)(3) Issues Class from bringing a future action, in an individual capacity, under IDEA arising out of a past, present, or future violation of the 45 Day Rule. SA ¶ 48(c); *Reisman Decl.* ¶ 68. The Agreement withdraws, without prejudice, the Second

Motion for Preliminary Injunction related to the attempted implementation of procedural guidelines and recognizes that nothing in the Agreement prevents any class member or interested party from challenging implementation of new guidelines or attempted reimplementation of the 2020 proposed procedural guidelines. SA¶ 48(e); *Reisman Decl.* ¶ 69.

D. Incentive Awards to Named Plaintiffs

The parties agreed that NJDOE shall make a $5,000 incentive payment to the family of each Named Plaintiff within thirty days of the approval of the Agreement, subject to any State held liens or child support claims. SA ¶ 36. Class Counsel sought the incentive payments because the Named Plaintiffs in this case have each absorbed substantial burdens by their participation in the prosecution of this matter, including, without limitation, responding to requests for production and interrogatories, being deposed, and participating in numerous witness preparation sessions for trial. *Reisman Decl.* ¶ 70.

IV. Notice Has Been Provided and Only .07% of the Class Objected

Pursuant to ¶ 8 of the Court's December 18, 2023 Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement, Directing Issuance of Settlement Notice, and Scheduling Hearing on Final Approval, ECF No. 549,Class Counsel worked to ensure that the Class Notice approved by the Court in the Order was disseminated to the Classes. The Notice

sent to class members and counsel who represented class members in the OAL is attached to the *Reisman Decl.* as Exhibit 3. *Reisman Decl.* ¶ 71. Class Counsel also created and are maintaining an informational website, www.nj45dayclassaction.com, in both English and Spanish. *Reisman Decl.* ¶ 72. Class Counsel posted the Notice to the class action website, as required by the Order, before January 15, 2024. The materials remain posted on the website for public view. *Reisman Decl.* ¶ 73. The website also has a "Frequently Asked Questions" page, https://nj45dayclassaction.com/frequently-asked-questions-faq/, which provides class members with more information about the Settlement. *Reisman Decl.* ¶ 74.

The Class Action Fairness Act (CAFA) requires that a class action defendant provide notification of a proposed settlement to the Attorney General of the United States and to the Attorney General of any state in which a class member resides. 28 U.S.C. § 1715. All relevant jurisdictions had received the CAFA notice by January 11, 2024. *Reisman Decl.* ¶ 75.

On February 2, 2024, the Court signed a Consent Order adjusting the deadline for mailing the Notice. Counsel for Defendants reported that the Notice was mailed to 5,483 class members on February 8, 2024, in advance of the February 13, 2024 deadline (as amended by the Consent Order dated February 2, 2024, ECF No. 559). Defendants sent email notice to attorneys who represented

class members in the OAL on February 15, 2024. Class counsel created a dedicated email address, info@nj45dayclassaction.com, for inquiries related to the Class Notice. Class counsel monitor the email address and have promptly responded to all inquiries. Since February 8, 2024, Class counsel have received and responded to forty-five email inquiries. Members of the Class Counsel team have spoken on the telephone with fifteen class members, answering questions and explaining the terms of the settlement. *Reisman Decl.* ¶ 80. Class counsel have received four written objections and nineteen opt-outs of the Rule 23(b)(3) relief. *Reisman Decl.* ¶¶ 76-81 & Exs. 4a-4d.

V. The Court Should Order Final Approval of the Settlement

Before granting approval of a settlement for a class action, a court must find that the settlement at issue is "fair, reasonable, and adequate." *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 488 (3d Cir. 2017); *see also* Fed. R. Civ. P. 23(e)(2). The decision to approve an agreement is "left to the sound discretion of the district court." *Halley*, 861 F.3d at 488 (quoting *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions (Prudential)*, 148 F.3d 283, 299 (3d Cir. 1998)). The Agreement meets the factors used by courts in this Circuit to determine whether a settlement is fair, reasonable, and adequate, which factors overlap with those in Fed. R. Civ. P. 23(e)(2). *See Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975); *see also Prudential*, 148 F.3d at 317. Courts routinely find Agreements are reasonable even

if some of the factors do not weigh in favor of settlement. *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 243 (3d Cir. 2001) (finding that "the balance" of the *Girsh* factors "clearly weighed in favor of approval"). In other words, courts "must not hold counsel to an impossible standard, as settlement is virtually always a compromise…" *Hawker v. Consovoy*, 198 F.R.D. 619, 627 (D.N.J. 2001) (internal quotation omitted). A settlement will therefore be deemed reasonable so long as a majority of the *Girsh* factors weigh in favor of settlement.

A. The Initial Presumption of Fairness Applies to the Agreement

Courts in the Third Circuit "apply an initial presumption of fairness in reviewing a class settlement when: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re NFL Players Concussion Inj. Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) (cleaned up); *see also In re Suboxone*, MDL No. 2445, 2024 U.S. Dist. LEXIS 33018, at *10 (E.D. Pa. Feb. 27, 2024). Because all four factors have been met, the initial presumption of fairness applies to the Agreement.

As this Court found, the parties participated in extensive and ultimately fruitful settlement negotiations over several months, thanks in great part to the efforts of both Judge Skahill and Judge Schneider. *See Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146, 2013 WL 1192479, at *10 (D.N.J. Mar. 22, 2013) (all-

day mediation sessions in front of a mediator are evidence of arm's length negotiations); *see also* Fed .R. Civ. P. 23(e)(2)(B) (arm's length negotiations as factor for approving settlement).

Further, the "Court should consider the state of the proceedings and the amount of discovery completed in order to evaluate the degree of case development that Class Counsel have accomplished prior to settlement." *Henderson*, 2013 U.S. Dist. LEXIS 46291, at *28; *Cendant*, 264 F.3d at 235. Here, Class counsel completed extensive discovery; drafted and opposed competing motions for summary judgment; drafted motions for class certification; finalized the PTO; and prepared for trial before settling the case. There was, in sum, no further case development to be done.

And, as this Court has reviewed and discussed at length, Class Counsel consists of very experienced firms in the area of special education litigation. ECF No. 530. The Court, in appointing Class Counsel, found:

> The Court . . . is independently satisfied with counsel's knowledge and experience, prior and ongoing efforts, and the resources that have and will continue to be collectively dedicated to the representation of the classes. *See* Fed. R. Civ. P. 23(g)(1)(A). This conclusion, based on Plaintiffs' motion brief and the certifications of counsel, is further supported by the Court's firsthand experience with proposed counsel throughout this litigation.

ECF No. 530 at 15. Therefore, Fed. R. Civ. P. 23(e)(2)(A) is satisfied.

Finally, Defendants mailed out 5,483 notices and Class Counsel received four objections (one of which was not even from a class member with standing). Thus, approximately .07% - that is, seven-hundredths of one percent - objected to the settlement.

B. The Relevant *Girsh* Factors Support Approval of the Agreement

When exercising its discretion to determine whether a settlement is fair, reasonable, and adequate, courts in this Circuit also consider the following nine non-exhaustive factors originally set forth in *Girsh*:

> (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the 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.

Halley, 861 F.3d at 488 (citing *Girsh*, 521 F.2d at 157).[9]

[9] Courts may also consider additional *Prudential* factors, when appropriate, such as "[1] the maturity of the underlying substantive issues. . .; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable." *Halley*, 861 F.3d at 488–89.

Analysis of the first six *Girsh* factors weighs strongly in favor of approving the Agreement. The remaining three factors are not applicable herein because they relate to actions for damages, whereas the Agreement provides only injunctive relief.

1. The Settlement Provides Substantial Benefits to the Class While Avoiding Unnecessary Litigation and Undue Delay (Girsh Factors 1, 4 and 5)

The first *Girsh* factor "captures the probable costs, in both time and money, of continued litigation." *Cendant*, 264 F.3d at 233 (internal quotation omitted). Skipping ahead, the risks of establishing liability (fourth factor) and the risks of establishing damages (fifth factor) together "survey the possible risks of litigation in order to balance the likelihood of success and the potential . . . award if the case were taken to trial against the benefits of an immediate settlement." *Prudential*, 148 F.3d at 319 (internal quotation omitted).

Class Counsel and Defendants have weighed the benefits of this Agreement against the risks of proceeding to trial, the costs of continued litigation, and the delay in achieving improvements to the special education dispute resolution system in New Jersey. SA ¶¶17-18; *Reisman Decl.* Ex. 2, Tr. (12.18.2023) at 11-16. The Agreement satisfies the first, fourth and fifth *Girsh* factors because it provides all of the comprehensive relief sought in the SAC while eliminating the need to

engage in costly and burdensome continued litigation that would delay systemic improvement and entail outcome-related risks.

The settlement will substantially improve the resolution of disputes regarding education for students with disabilities throughout New Jersey by mandating compliance with 34 C.F.R. 300.515. *Reisman Decl.*, Ex. 2, Tr. (12.18.2023) at 7:18-8:23. The Court-appointed Monitor will ensure 95% compliance with the 45-day timeline within eighteen months, which will be a substantial improvement over the average time of 212 days for Defendants to issue a final decision over the last two decades. *Reisman Decl.*, Ex. 2, Tr. (12.18.2023) at 7:18-8:23. By entering into an agreement now, the 23(b)(2) Class need not wait for the litigation, including any appeals and potential remands, to conclude before they can begin receiving relief.

In addition, the individual Named Plaintiffs will receive $5,000 each in incentive awards. *Reisman Decl.*, Ex. 2, Tr. (12.18.2023) at 11:7-9 and 15:19-20. These awards are reasonable and appropriate to compensate the individual Named Plaintiffs for their role in litigating the case on behalf of the Class. *Id.; see, e.g., Monteleone v. Nutro Co.*, No. 14-CV-801, 2016 WL 3566964, at *7 (D.N.J. June 30, 2016). Accordingly, the incentive awards do not affect the equitable nature of the relief to the overall Class. *See* Fed.R.Civ.P. 23(e)(2)(D).

Notably, the breadth of the relief obtained here is unprecedented and could serve as a model for other jurisdictions across the country. Although Defendants deny liability, both sides acknowledge the time and risks associated with and inherent in any litigation, and that the Agreement will provide substantial benefits to the Classes while avoiding those delays and risks. In so doing, the parties also avoided the significant costs of continued litigation, especially for continued preparation for trial, conduct of the trial, and any possible subsequent appeals and remand. Accordingly, the relief provided for the Class is adequate and satisfies *Girsh* factors 1, 4, and 5. *See* Fed.R.Civ.P. 23(e)(2)(C).[10]

2. The Agreement Was Received Positively by the Class (Girsh Factor 2)

NJDOE mailed out 5,483 notices. Class Counsel, however, have received only four objections to the Agreement and only three of those are from class members. *See Reisman Decl.*, Exs. 4a, 4b, 4c, 4d. Thus, only 0.07% of those who received the notices objected. This factor thus decisively favors approval.

"As a general rule, only class members have standing to object to a proposed class settlement." *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 459 (E.D. Pa. 1990).

[10] Rule 23(e)(2)(C)(iii) considers the terms of the attorneys' fee award, which is addressed in depth in Section VI, *infra*. Plaintiffs and Defendants concur that the negotiated attorneys' fee of $4.75 million in the Agreement is fair and reasonable. This factor therefore further weighs in favor of approving the settlement. The final sub-point (iv) is not applicable to this case, as there are no agreements required to be identified under Rule 23(e)(3). Fed.R.Civ.P. 23(e)(2)(C)(iv).

Here, the fourth objection comes from an attorney who practices special education law (*see Reisman Decl*., Ex. 4a) who is not a class member and does not purport to have been retained to submit an objection on a class member's behalf. As a result, the attorney lacks standing to object to the settlement. Nonetheless, we will address each of the objections sent to Class Counsel.[11]

The objections simply do not provide any basis for the Court to reject the Agreement. Counsel negotiated at arm's length and with the assistance of Magistrate Judge Skahill and former Magistrate Judge Schneider, and the settlement achieves the relief sought in this action for both Classes. Indeed, none of the objectors specifically objects to the requirement that the State comply with the 45 Day Rule (which is the substantive relief that the 23(b)(2) Class sought in the instant action); none objects to extending the statute of limitations two years (when the purpose of the 23(b)(3) issues class questions was to facilitate extension of the statute of limitations); and none objects to the attorneys' fee amount, which Defendants have agreed to pay and which does not in any way take money out of any class member's pockets. The failure to state objections to the three material issues is dispositive.

[11] To avoid any potential procedural issue, Class Counsel respectfully request that the Court, at least in the alternative to the argument that the attorney "objector" lacks standing, address the merits of the attorney's purported "objection."

Instead, the objections from the three class members concern their personal situations, not the specific relief set out in the Agreement. The three class members object that the Agreement does not provide specific retrospective relief based on past violations. *See Reisman Decl.* ¶¶ 4b, 4c, 4d. Counsel state no opinion regarding the merits or severity of the objectors' personal experiences, except to reiterate that the Agreement will provide all three objectors who are class members (and, indeed, all class members) with two years to bring claims for individual relief, *even if those claims would otherwise be barred*, based on their experiences with the dispute resolution system.

Likewise, to the extent that the second class member objector is concerned that NJDOE will "find a workaround" to its obligations, such a concern exists in any scenario where a party is required to take action. More importantly, however, the Agreement accounts for such concern by requiring (1) the involvement of an impartial Monitor; (2) the full and complete sharing of relevant data with the Monitor, Class Counsel and the public; (3) compliance benchmarks; (4) legal fees to Class Counsel for monitoring compliance to ensure that the Class's interests continue to be protected; (5) the Court's continued jurisdiction over the issues; and (6) 95% compliance with the 45 Day Rule within eighteen months, absent which Plaintiffs shall have the right to seek further remedies, including permanent oversight. In any event, the mere possibility that NJDOE may choose not to

comply with the 45 Day Rule even after the Court approves the Agreement certainly is not a basis to disapprove of NJDOE's agreement to comply at this time.

The final submitted "objection" – by an attorney without standing – is entirely without merit. *See Reisman Decl.* Ex. 4a. It is, at best, backseat driving by an attorney who could have, but did not, bring a claim to remedy the broken dispute resolution system. Objecting counsel merely makes pronouncements about what he believes the settlement should have included, all without any regard for the nature of the claims actually filed, without any consideration of the practical difficulties the NJDOE will face in changing the system to obtain compliance with the 45 Day Rule,[12] and without any appreciation for the reality that negotiated resolutions require compromise.

Objecting counsel first asserts that "[t]he class members receive nothing under this settlement." *Id*. That statement, of course, is entirely untrue. Aside from NJDOE's agreement to remedy the deficient system with certain agreed procedures and protections (including the appointment of a neutral Monitor) to meet 95% compliance within 18 months, the Class Members obtained an additional two years to pursue individualized claims against NJDOE.

[12] Objecting counsel also pronounces that NJDOE "should comply within 30 days." But this Court has already recognized that this would not be possible. ECF No. 75 at 69-71. No one benefits by demanding NJDOE do something that it literally cannot do.

Objecting counsel next complains that there should have been a fund to pay Class Members a dollar amount per day of delay. *Id*. But Plaintiffs never sought such relief in this class action because, in Class Counsel's reasonable opinion, such relief is not the proper subject of a class action because of the predominance and superiority requirements. "No doubt, predominance concerns can arise when unnamed class members must submit individualized evidence to satisfy standing and recover damages." *Huber*, 84 F.4th at 156.

In sum, objecting counsel would have preferred a remedy that Plaintiffs did not seek in this case. But failing to achieve a result that the case did not seek simply cannot be a basis for rejecting a settlement of the claims that Plaintiffs did file.

Objecting counsel next objects because the Agreement does not provide hypothetical examples of the timing of a case. But that is no objection to the substance of the Agreement. Indeed, the Agreement provides for a stipulated form to be used by NJDOE to calculate the required deadline in each case. It also requires the initial transmittal notice to OAL to inform parents of the initial 45 day deadline in every case. Thus, the Agreement requires NJDOE to calculate exactly what objecting counsel wants to see in hypotheticals and inform Class members of the actual deadlines and adjusted deadlines in their cases.

Objecting counsel next contends that NJDOE should be required to provide sufficient judicial resources to OAL. This objection states what might be an understandable "want," but Plaintiffs did not have the power to compel NJDOE to agree to hire anyone; in fact, it is not even clear that this Court would have such power either, even after trial, because Administrative Law Judges in New Jersey are appointed by the governor and confirmed by the State Senate. Instead, the parties reached an agreement that would require NJDOE to implement procedures that will ensure that NJDOE properly calculates the forty-five days, *which it was not doing previously*, as it relied on a made-up concept of "federal" days instead of calendar days. Now, however, NJDOE is required to do the math correctly; if OAL is not staffed sufficiently to reach 95% compliance with the 45 Day Rule then NJDOE will be found to be in contempt of Court, and this Court will be in a position to impose additional requirements on NJDOE to ensure compliance with the law. And, after NJDOE implements new measures with the involvement of the Monitor, if needed, the Court would be able to fashion a remedy with the wisdom obtained by the Monitor during her oversight.

Objecting counsel's next three numbered objections—specifically, that the Agreement does not require (a) parties to a due process petition to state the number of hearing days required at the outset (#4); (b) hearings to be scheduled on consecutive days (#5); and oral, as opposed to written, summations (#6)—do not

provide a basis to reject a settlement that requires NJDOE to comply with the 45 Day Rule. Rather, these objections merely concern objecting counsel's opinion of other methodologies that might improve the likelihood of NJDOE complying with its obligations under the Agreement. Whatever the merits of objecting counsel's ideas, and they may in fact be practical, they are not obligations that NJDOE is required by law to undertake, and thus they simply are not required elements of the Agreement. Of course, it may be that NJDOE might choose to use such ideas in the future to help ensure compliance, particularly if recommended by the Monitor.

In the end, rejecting this settlement on the basis that Objecting Counsel thinks he has "better" ideas effectively would afford NJDOE years more to avoid making any efforts to improve the system, which certainly does not provide any benefit to either Class.

3. The Agreement Should be Approved Given the Quality of the Negotiations and the Discovery Completed (Girsh Factor 3)

As previously has been discussed at length, in the Motion for Preliminary Approval, ECF No. 546, and by this Court during the December 18, 2023 hearing, the extensive formal discovery and the arm's length negotiations facilitated by one current and one former Magistrate Judge amply support final approval of the Agreement. Indeed, this case was essentially ready for trial before settlement negotiations took place because trial had been rescheduled many times. ECF Nos. 214, 224, 229, 298, 300, 329, 343, 433. Thus, the third *Girsh* factor plainly is met.

4. The Risk of Maintaining a Class Through Trial is Neutral (Girsh Factor 6)

Finally, the sixth *Girsh* factor—the risk of maintaining a class through trial— is neutral, at worst. The Court has approved the definitions of both the 23(b)(2) Class and the 23(b)(3) Class. Defendants have identified all persons that are potential class members prior to the Agreement and those who would be class members post-approval of the Settlement will be easily tracked due, in part, to Defendants' commitment to track such information and the Monitor's evaluation of the data. The Named Plaintiffs thus are and will remain adequate class representatives.

5. The Remaining Girsh Factors Are Irrelevant

As this Court correctly found, "The other factors, Girsh factors, are not relevant in this case as there is no damage reward, individualized – the preservation of individual claims. Damage cases will proceed independent of this. And the Court need not consider those factors at this stage or even really at the final stage." *Reisman Decl.*, Ex. 2 Tr. (12.18.2023) at 14:9-13. The remedy herein is strictly equitable and thus there is no need to analyze the *Girsh* factors relating to damages at law.

When considered together, the balance of the *Girsh* factors support approval of the settlement under Rule 23(e). Because the settlement is fundamentally "fair,

adequate, and reasonable," the Court should approve the Agreement through entry of the Proposed Order.

VI. Plaintiffs' Counsel's Fees and Costs Are Reasonable, Have Been Negotiated with Defendants with the Assistance of a Former Magistrate Judge, and Should Be Approved

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). As this Court has noted, "Importantly, for purpose of the Court's preliminary *Girsh* analysis, as contemplated by the Manual for Complex Litigation and then the approving case law, the attorneys' fees were negotiated separate and apart from the relief for the two classes and only after that agreement was reached." *Reisman Decl.*, Ex. 2, Tr. (12.18.2023) at 11:19-23.

A negotiated, agreed-upon attorneys' fee is the "ideal" way to request a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Nonetheless, "a thorough judicial review of fee applications is required in all class action settlements." *Prudential*, 148 F.3d at 333 (cleaned up). As set forth below, the Classes, as the prevailing parties, are entitled to attorneys' fees and costs and the amount agreed upon represents a reasonable fee. Accordingly, the Court should approve the negotiated amount of $4,750,000 in fees and costs through entry of the Proposed Order.

A. Plaintiffs are Entitled to Attorneys' Fees and Costs Under Federal Law and Pursuant to the Agreement

Numerous civil rights statutes, including IDEA and Section 1983, rely on private litigants to enforce compliance with the law and thereby vindicate the rights Congress has granted. *See Hensley*, 461 U.S. at 429; *see also City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). Fee-shifting provisions are a key component of these statutes, assuring these private litigants access to the court system, particularly those who are most disenfranchised by poverty and discrimination.

Plaintiffs' Counsel are entitled to an award of attorneys' fees and costs because under fee-shifting statutes, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley*, 461 U.S. at 429 (internal quotations omitted). "In order to be a 'prevailing party,' a party must be 'successful' in the sense that it has been awarded some relief by a court." *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852 (3d Cir. 2006) (*quoting Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)); *see also Hensley*, 461 U.S. at 433, 435.The relief awarded must constitute a "change in the legal relationship of the parties" that is "judicially sanctioned." *Buckhannon*, 532 U.S. at 605; *P.N.*, 442 F.3d at 853; *see also Raab v. City of Ocean City*, 833 F.3d 286, 292–94 (3d Cir. 2016).

First, the Agreement recognizes that Plaintiffs are prevailing parties for the purposes of attorneys' fees and costs. Second, all 23(b)(2) class members will benefit from the equitable relief requiring NJDOE to fix the special education dispute resolution system while the Court will retain jurisdiction for enforcement by incorporating the Settlement into an Order. Third, for the 23(b)(3) class members, as discussed, *supra*, the Agreement achieved an actual agreement to extend the statute of limitations for individual claims against NJDOE, rather than a declaration that would have allowed the class members to argue for tolling in separate cases.

B. The Parties' Negotiated Attorneys' Fees and Costs of $4,750,000 is a Significant Reduction from the Lodestar and Should be Approved

The Third Circuit typically applies the lodestar method to determine fees in statutory fee-shifting cases, "'to reward counsel for undertaking socially beneficial litigation' . . . where the nature of the recovery does not allow the determination of the settlement's value for application of the percentage-of-recovery method." *See In re Rite Aid Corp. Securities Litigation*, 396 F. 3d 294, 300 (3d Cir. 2005) (quoting *Prudential*, 148 F.3d at 333); *see also In re GMC Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) ("Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases");

Skeen v. BMW of N. Am., LLC, No. 13-CV-1531, 2016 WL 4033969, at *18 (D.N.J. July 26, 2016). Under the lodestar method, the court calculates "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley,* 461 U.S. at 433; *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 703 n.5 (3d Cir. 2005). "There is a strong presumption that the lodestar is the reasonable fee." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (cleaned up).

1. The Lodestar is Based on Reasonable Rates and Hours

Reasonable hourly rates are "based on prevailing market rates in the relevant community." *Interfaith Cmty. Org.*, 426 F.3d at 703 (citation omitted). The Third Circuit held this is even true for "law firms that typically charge clients below-market fees, or no fees at all." *Id.*; *see also Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989); *Maldonado v. Houstoun*, 256 F.3d 181, 188 (3d Cir. 2001).

In this case, the hourly rates used for almost all of Plaintiffs' Counsel are directly keyed to rates approved in district courts within our Circuit. *See Reisman Decl.* ¶¶ 97-101; *K.N. v. Gloucester City Bd. of Educ.,* No. 17-7976, 2022 U.S. Dist. LEXIS 36492 (D.N.J. March 1, 2022); *Cent. Bucks Sch. Dist. v. Q.M.*, No. 22-1128, 2022 U.S. Dist. LEXIS 215318 (E.D. Pa. 2022); *E.H. v. Wissahickon Sch. Dist.*, No. 2:19-cv-05445, 2020 U.S. Dist. LEXIS 199469, at *11 (E.D. Pa. Oct. 27, 2020); *R.B.A. v. Jersey City Bd. of Educ.*, No. 15-cv-8269, 2023 U.S. Dist. LEXIS

72797 (D.N.J. April 26, 2023); *Ida D. v. Rivera*, No. 17-5272, 2019 U.S. Dist. LEXIS 106715 (E.D. Pa. June 26, 2019). They are also almost all well below the Community Legal Services (CLS) rates, which the Third Circuit has found "to be a fair reflection of the prevailing market rates." *K.N.* 2022 U.S. Dist. LEXIS 36492, at *6.

The reasonableness of this range of hourly rates is reinforced by the approval of similar rates in other complex class actions in this District. *See Khona v. Subaru of Am., Inc.*, No. 19-CV-9323, 2021 WL 4894929, at *1 (D.N.J. Oct. 20, 2021) (approving Class Counsel rates ranging from $225 for a paralegal to $850 for a partner); *In re Mercedes-Benz Tele Aid Contract Litig.*, No. 07-CV-2720, 2011 WL 4020862, at *7 (D.N.J. Sept. 9, 2011) (approving a range of $500-$855 for partners and $265-$475 for associates in a complex class action lawsuit); *see also Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169, 181 (3d Cir. 2009).

The hours billed by Class Counsel are similarly reasonable. The lodestar reflects 11,986.9 hours of work from the beginning of the case in April 2019 through reaching agreement on substantive matters and filing the motion for final approval in March 2024. *Reisman Decl.* ¶ 114. This is appropriate for a case spanning nearly five years and involving complex issues at the intersection of disability rights, special education law, federal court litigation, and government enforcement, including interlocutory proceedings in the Court of Appeals as well

as extensive litigation in this Court. The Agreement came about after considerable investigation, the filing of a complaint and two amended complaints, extended motion practice and discovery, and significant negotiation. Solo or small firm attorneys with substantial experience in special education law handled the bulk of the work, with hours written off if potentially duplicative or inefficient. Accordingly, the number of hours spent on this matter is reasonable. Based on the foregoing, the lodestar of $6,747,078.74 is reasonable.

2. Class Counsel Seeks a Negotiated Amount Representing a Significant Reduction of the Lodestar

The fee amount of $4,750,000, negotiated with the involvement of Judge Schneider, is less than 70.4%[13] of the compensable time. In agreeing to this significant discount, counsel prioritized reaching a settlement in the best interest of the Classes and weighed the importance of reaching a final agreement versus further litigation, highlighting the reasonableness of the fees. The discount also accounts for any inefficiencies or billing errors, such that Defendants stipulate that this $4,750,000 represents a reasonable amount for fees. *See Reisman Decl.*, Ex. 5. Accordingly, the Court should enter the Proposed Order approving the $4,750,000

[13] Six of the nine counsel firms did not track their time after February 2023, although they spent significant time subsequent to that date. *Reisman Decl.* ¶ 113. Because the lodestar of $6,747,078.74 underestimates the compensable time, the the fee settlement amount is less than 70.4% of the actual compensable time.

in attorneys' fees and costs to be paid to Class Counsel, as set forth in the Agreement.

C. The Relief to Class Members Highlights the Reasonableness of the Negotiated Attorneys' Fees and Costs

Because the Agreement provides substantial equitable relief to Class Members, though no damages fund or award (which one might otherwise argue would be reduced by the fees), legal support exists for the negotiated fees and costs award of $4,750,000. The Third Circuit considers the following factors:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of Class Counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

In re Diet Drugs, 582 F.3d 524, 541 (3d Cir. 2009) (citation omitted); *Prudential*, 148 F.3d at 336– 40). These factors are not exhaustive and should not be applied in a formulaic way. *Rite Aid*, 396 F.3d at 301–02. Here, the factors weigh strongly in favor of approving the negotiated amount of $4,750,000.

1. Factors One, Seven, and Nine Are Irrelevant As They Relate to Monetary Funds and Factor One Favors Approval As It Relates to Number of Beneficiaries

The Agreement does not create a class fund and none was sought. *Reisman Decl.* ¶ 83. As a result, factors one, seven, and nine are irrelevant in this analysis. For factors one and seven, there is no fund to measure and no award to be compared to other cases. With respect to factor nine, this was not a case for damages, so there is no contingency fee against which to compare the attorneys' fee request.

However, by compelling Defendants to bring its special education due process dispute resolution system into compliance with federal regulations, specifically the 45 Day Rule and the Adjournment Rule, after decades of non-compliance, the Agreement establishes a method by which families will obtain quick and timely resolution of their administrative cases, as required by federal law. The Agreement will benefit the more than 5,000 class members who received notice. And, of course, the to-be-properly functioning system will benefit families beyond the conclusion of the instant case. Accordingly, the number of beneficiaries weighs in favor of approval.

2. Factor Two Favors Approval As Substantial Objections to the Settlement Terms and/or Fees Do Not Exist

Rule 23(h)(1) requires notice of a motion for attorneys' fees and costs directed to class members in a reasonable manner, which can be done at the same time as the class action settlement. *Halley*, 861 F.3d at 500. The notice distributed to class members satisfies this requirement. There were no specific objections to

the attorneys' fees. Nor would any be well taken in any event because (1) the fees do not detract from any monetary fund available for damages (because this case did not seek damages or a fund); (2) the parties only negotiated the fee amount *after* agreeing on the merits; (3) the parties negotiated the fees with the assistance of Judge Schneider; and (4) Defendants will not use IDEA funds to pay the attorneys' fees. And only .07% of the Classes raised any concern with the settlement, which concerns were simply not valid.

3. The Remaining Factors Also Weigh in Favor of Approval

With respect to factor eight, USDOE has investigated NJDOE's 45 Day Rule non-compliance and issued a Corrective Action Plan (CAP). The CAP, however, did not correct the violations because NJDOE simply indicated that it would comply in due time, without outlining or implementing concrete steps/ The relief in this case will benefit the Class sooner and more completely, with more oversight and opportunity for enforcement, by requiring NJDOE to implement appropriate measures to remedy the system with the supervision of a Monitor. Further, the attorneys' fees here do not correspond to a percentage of recovery from a common fund, so it is not possible to compare the amount to awards in other cases. Comparing the overall sum to other lodestar-calculated awards would not provide any relevant information due to the number of variables inherent in such a calculation. Instead, the practical comparison to other cases is the hourly

rates requested, which, as outlined above, are within the range of rates approved in this District.

The skill and efficiency of the attorneys has already been recognized by the Court during the December 18, 2023 hearing. Class Counsel have significant experience in special education cases and federal litigation. Factors three and eight plainly weigh in favor of approval.

Factors four and six consider the complexity and duration of the litigation, and the amount of time devoted by Class Counsel. As explained above, this case was litigated for nearly five years and involves complex and uncertain issues. The parties reached the Agreement as part of an arm's length negotiation and the remedy will serve as a model for other jurisdictions. The complexity of this action is reflected in the fact that Class Counsel spent almost 12,000 hours on this case prior to executing the Agreement and the docket contains 563 entries.

As to factor five, courts "recognize the risk of non-payment as a major factor in considering an award of attorney fees." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 122 (D.N.J. 2012) (citations omitted). Plaintiffs' Counsel did not charge their clients, and thus there was a risk that they might not have been compensated for their efforts at all. *Reisman Decl.* ¶ 87.

The final factor, whether there are any innovative terms of the settlement, weighs in favor of approving the settlement. The Agreement brought about broad

changes in the policies and practices of the NJDOE that will result in class members obtaining timely results in their special education disputes. *See Kelly v. Bus. Info. Grp., Inc.*, No. 15-CV-6668, 2019 WL 414915, at *19 (E.D. Pa. Feb. 1, 2019) (settlement had innovative terms where it brought about a change in the defendant's practices to address important aspects of the class's complaint). Moreover, class members with retrospective claims that otherwise would be barred will be able to seek compensation with the extended statute of limitations relief. Accordingly, the final factor weighs in favor of approval.

Because all relevant factors weigh in favor of approving the attorneys' fees, this analysis supports the lodestar calculation of attorneys' fees. However, since Class Counsel only seeks the negotiated amount of $4,750,000, the Court should enter the Proposed Order and award Class Counsel $4,750,000 in attorneys' fees and costs.

D. The Documented Costs Are Reasonable

"Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. at 125 (citations omitted). Over the litigation, counsel incurred costs relating to deposition and transcripts; travel to attend hearings at the Courthouse in Camden, New Jersey; photocopying and postage costs; legal research; and other necessary

and attendant litigation costs. The costs were reasonably and necessarily incurred over the course of four years to achieve the result obtained for the Class and "are the type of expenses routinely charged to hourly paying clients and, therefore, should be reimbursed." *James v. Global Tel*Link Corp.*, No. 2:13-CV-04989, 2020 WL 6197511, at *11 (D.N.J. Oct. 22, 2020).

VII. Conclusion

In light of the foregoing, the Court should grant Plaintiffs' unopposed Motion for Final Approval of the Agreement, approve $4,750,000 in attorneys' fees and costs, and enter an Order dismissing this case but retaining jurisdiction over the matter for purposes of enforcement of the Agreement as outlined therein.

Dated: March 11, 2024

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