

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 his their 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 T.M.; and on behalf of ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

NEW JERSEY DEPARTMENT OF EDUCATION; KEVIN DEHMER, Acting Commissioner of Education,

Defendants.

Case No. 1:19-cv-12807 (NLH/KMW)

Judge Edward S. Keil

Magistrate Judge Matthew S. Skahill

MEMORANDUM OF LAW IN OPPOSITION TO JOINT MOTION TO AMEND CONSENT ORDER ON BEHALF OF C.P., D.O., S.B.C., A.S., M.S., Y.H.S., AND L.G.

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*“If not now, when?”*<sup>1</sup>

**PRELIMINARY STATEMENT**

This motion asks the Court to approve an extension of failure. Not a correction of the system. Not enforcement of an existing judgment. An extension of the same conditions that gave rise to this case.

The Consent Order was a judgment, entered to correct a system that denied children timely access to legally required services. In exchange for that judgment, the Class accepted a limited deferral of enforcement. The premise was simple. The State would use that time to come into compliance. That premise has failed. The record reflects continued delay, continued noncompliance, and continued denial of timely services.

The proposed amendment does not respond to that failure. It extends it. For another eighteen months, the Court’s primary enforcement mechanism remains unavailable. That is the central feature of the amendment. It is not presented that way. It is not described that way in the motion papers. It is not disclosed that way in the purported “notice” to the class. The extension of the no-enforcement period appears instead through incorporation by reference, without explanation of its present effect. *See* Proposed Amended Consent Order at ¶ XI.

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<sup>1</sup> Attributed to Hillel the Elder.

In exchange for the class agreeing to more delay, the amendment offers more process. Monitoring. Reporting. Coordination. Oversight. These measures may describe the system's failure. They do not correct it. A Special Master without coercive authority may observe noncompliance. She cannot remedy it. Data may be collected. Without enforcement, it does not change outcomes. The structure is adjusted. The result remains the same.

This case was not brought to assist the State with institutional design. It was brought to remedy harm. That harm is ongoing. Families with active cases continue to wait well beyond governing timelines. Children go without services while proceedings stall. Time is not neutral in this context. It is loss. It is regression. And, when everyone knows the system is broken, it is leverage, creating hydraulic pressure on parents, producing coerced settlements, waived rights, and abandonment of claims. These are not hypothetical risks. They are the current conditions.

The amendment does not address those conditions. It provides no trigger for intervention. No pathway to accelerated relief. No consequence for continued noncompliance. It asks families already experiencing delay to remain within the same system for a longer period of time. Approval would therefore do more than defer relief. It would permit the continuation of harm without remedy.

The deficiencies run deeper than the basic terms of the amendment. They are structural. The class has internal conflicts. Some members may benefit from prospective speculative improvements. Others cannot wait. Families with active cases require relief now. Members of the B3 class have already suffered harm. They require a meaningful opportunity to pursue it. The amendment treats these groups as if their interests align. They do not.

The structure reflects that misalignment. Decision-making is centralized. Class representatives are excluded from meaningful participation. Access to information is controlled through a single channel. The experiences of families navigating the system are not reliably incorporated into the framework that governs them. What remains is a structure that depends on trust rather than accountability.

Overlaying that structure is a compensation model that continues regardless of outcome. Like an annuity, fees accrue indefinitely as the process continues, while relief remains contingent. Incentives follow structure, not intent. Where compensation is tied to process rather than results, the interests of counsel and class diverge.

Rule 23 does not permit approval of such a framework. A class-wide modification must be fair, adequate, and reasonable. It must align the interests of counsel with those of the class. It must provide a mechanism by which rights are enforced. This amendment does not do so.

The Court is presented with a choice. Extend a structure that has not produced compliance. Or require one that can. The law does not require the former. The record does not support it.

If the amendment is not denied, then the structure must be corrected at its foundation. The conflicts within the class must be recognized. Subclasses must be created. One for members with active or imminent cases. One for members of the B3 class. Each must have independent counsel. Each must have representation aligned with its interests. Without that correction, the outcome is predictable. Delay continues. Process expands. Real relief remains speculative.

The motion should be denied. If it is not, the structure must be remade. The time is now.

**I. The Amendment Extends Non-Enforcement Without Meaningful Consideration**

**A. The Proposed Amendment is Not “Fair and Reasonable.”**

Like any jointly proposed order, the Proposed Amended Consent Order reflects compromise. But Movants do not forthrightly present the most substantial concession that Class Counsel proposes to make on behalf of the Class: an additional eighteen-month extension of non-enforcement of a binding court order. The magnitude of this concession dwarfs the proposed consideration from NJDOE.

The Third Circuit has articulated specific factors to assess the fairness of a merits settlement, which also address whether a settlement of contempt provides

sufficient consideration to absent class members. These factors include: (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 trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 258 (3d Cir. 2009) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)).

In the posture of this case -- where the parties seek approval of a settlement to avoid enforcement of a prior order -- many of the *Girsh* factors are of limited applicability. But all confirm the same conclusion. Unlike a case proceeding toward trial, the complexity, expense, and likely duration of a motion for contempt are minimal. The reaction of the class cannot be meaningfully assessed, because Class Counsel has not adequately communicated the terms or consequences of the proposed amendment to absent class members. No meaningful discovery has been conducted to assess NJDOE's compliance, and information that has been shared voluntarily has been withheld from class representatives in the face of their express requests. The risks of establishing liability and damages are negligible, given that

NJDOE consented to judgment and cannot plausibly claim compliance more than three years later. And there is no serious question that the class remains viable or that NJDOE could withstand a more stringent enforcement regime.

What remains, then, are factors eight and nine: whether the proposed amendment is reasonable in light of the risks of immediate enforcement, and in comparison to the best possible outcome. Those factors weigh decisively against approval.

There is little meaningful risk associated with pursuing enforcement. NJDOE consented to judgment and cannot plausibly contend that it has complied with the Consent Order. The factual predicate for noncompliance is established by the record, the Monitor's reports, and the State's own performance. This is not a case in which liability must be established through contested proof. It has already been established. The only question is compliance, and the record reflects ongoing failure.

Nor would enforcement introduce meaningful delay relative to the proposed amendment. A contempt proceeding would place the question of compliance before the Court now and permit the imposition of coercive remedies upon a finding of noncompliance. The amendment, by contrast, guarantees an additional eighteen months during which no enforcement may occur, regardless of continued violations. The choice is therefore not between uncertain litigation and prompt

relief. It is between immediate access to enforcement and a defined period of continued non-enforcement. Under these circumstances, the risk of pursuing contempt is minimal, while the cost of foregoing it is certain.

The contention that the proposed amendment avoids delay cannot be reconciled with its central feature: a defined eighteen-month period during which no enforcement may occur. That is not the avoidance of delay. It is the imposition of delay. A motion for contempt would place the question of compliance before the Court immediately and permit relief upon a finding of noncompliance. The amendment, by contrast, guarantees that no such relief will be available for a fixed period, regardless of continued violations. The choice is therefore not between delay and efficiency, but between potential enforcement now and certain non-enforcement for eighteen months. In that respect, the amendment does not mitigate delay. It institutionalizes it.

By contrast, the potential benefit of enforcement is substantial. A contempt proceeding would permit the Court to impose remedies that carry actual consequences for noncompliance, including coercive measures designed to ensure timely adjudication of due process cases. Such measures could include granting a Special Master meaningful authority to address ongoing delay, intervene where individual cases stagnate, and order systemic corrective action where compliance is not achieved. Immediate enforcement would also create the conditions under

which meaningful relief for B3 class members could be operationalized, including mechanisms to address claims arising from past delay.

The proposed amendment offers none of these features. It extends the period of non-enforcement -- the central concession by the Class -- in exchange for administrative measures that do not alter the underlying incentives or consequences facing the State.

Measured against the minimal risks of enforcement and the substantial benefits available through the Court's contempt powers, the proposed amendment provides inadequate consideration to the class, and cannot be deemed "fair and reasonable."

**B. The Amendment Obscures Its Most Significant Concession by the Classes.**

Three years after execution of the original Consent Order, two years after its approval, and after the expiration of the original eighteen-month moratorium on contempt, Class Counsel now proposes to continue that limitation on enforcement for an additional eighteen months. Proposed Amended Consent Order ¶ XI (incorporating the prior eighteen-month enforcement limitation by reference).

That is not a minor or technical provision. The ability to seek enforcement through contempt is the central mechanism by which the Consent Order provides relief. *Hawkins v. HHS*, 665 F.3d 25, 30 (1st Cir. 2012) ("[I]t is well settled in the law that a motion for contempt is the proper way to seek enforcement of a consent

decree.”). Extending the period during which that mechanism remains unavailable is a material modification of the parties’ agreement. Modification of a consent decree that alters its material terms requires careful justification. *In re Commonwealth v. UPMC*, 2019 Pa. Commw. LEXIS 305 (2019).

Yet that extension of the non-enforcement period is not squarely presented. Class Counsel’s motion papers do not identify the continued or renewed period of non-enforcement as a central feature of the amendment. The supposed “notice” belatedly provided to the class on a largely dormant website likewise makes no mention of extending the non-enforcement period. Instead, the limitation on contempt is carried forward through incorporation by reference, without explanation of its present effect. Most notably, the extension is not framed as a concession at all.

The omission matters. The Court cannot fairly evaluate a proposed modification where its principal concession is not clearly disclosed. Nor can absent class members assess the proposal where its most consequential term is not identified or justified.

As explained below, this substantial concession is offered in exchange for measures that do not provide enforceable relief. The result is an amendment that trades away the core enforcement mechanism of the Consent Order while failing to clearly present that trade to either the Court or the class.

**C. The Amendment Preserves Delay Rather Than Delivering Relief**

The Court must independently conclude that the terms of the amendment are fair, and cannot “substitute the parties' assurances or conclusory statements for [our own] independent analysis of the settlement terms.” *In re Vanguard Chester Funds Litig.*, 783 F. Supp. 3d 815, 824 (E.D. Pa. 2025). Consideration of the terms of the proposed amended consent order can only result in the conclusion that the amended consent order is a giveaway to the State.

There is nothing inherently improper about the proposed amendment. Measures such as enhanced monitoring, reporting, and the use of a Special Master could, if coupled with meaningful enforcement authority, form part of an appropriate remedial framework. Indeed, a strengthened version of these provisions could be imposed by the Court in connection with a finding of contempt, without NJDOE's consent.

The problem is not the form of the proposal. It is the proposed exchange. These measures are offered only in conjunction with a further extension of non-enforcement, and without any corresponding increase in enforceable rights or consequences for the State's continued noncompliance. As a result, the amendment does not reflect a balanced compromise. It reflects the surrender of the class's only meaningful leverage (the right to enforce the consent order) in return for measures that, standing alone, do not compel relief.

More than three years have passed since the Consent Order was executed. The central premise of that Order was straightforward: enforcement would be deferred for a defined period in order to allow the State to bring its due process system into compliance. That premise has not been realized.

At the outset, an eighteen-month moratorium on enforcement was part of a negotiated exchange for the State's consent to judgment. At that time, the State asserted jurisdictional and other defenses that presented a meaningful risk to the Class absent a settlement. But that landscape has changed. The Court's jurisdiction is now firmly established, and the record now reflects sustained noncompliance with the terms of the Consent Order. The State offers no commensurate basis for extending non-enforcement for an additional eighteen months.

The record instead reflects continued systemic delay. Families remain without timely adjudications. Children remain without timely services. The reprehensible conditions the Consent Order was designed to correct persist.

Against that backdrop, the proposed amendment does not move the parties toward enforcement. It does not establish any point at which continued delay results in enforceable consequences, nor does it create any mechanism by which prolonged noncompliance is converted into relief.

Instead, it continues the structure under which enforcement remains unavailable while adding additional layers of process -- monitoring, reporting, and collaborative oversight -- that do not themselves compel compliance.

That distinction is critical. A system can be observed indefinitely without being corrected. The amendment expands observation while continuing to defer consequences. The practical effect is to preserve the existing dynamic: ongoing delay without enforcement. The structure has been modified. The result has not.

**D. The “Additional Relief” Is Administrative, Not Remedial**

The amendment characterizes several new components as “additional relief.” That characterization does not withstand scrutiny. The measures identified are administrative in nature. They do not provide a mechanism by which class members can obtain timely, enforceable outcomes.

A true remedy would alter consequences. It provides a means by which a violation is corrected or enforced. The measures proposed here do not do that. They observe, organize, or explain the system as it exists. They do not require it to function as required. They enforce no consequences for continued failure.

**1. “Special Master”**

The proposed Special Master is presented as a central feature of the amendment. It is the “headline” in Class Counsel’s communications regarding this proposal. In substance, however, the role is collaborative and supervisory. It is not

an adequate substitute for either this Court's supervision or the coercive authority associated with enforcement through contempt.

The proposal does not confer authority on the Special Master to adjudicate individual grievances. It does not establish any mechanism by which a family experiencing delay can obtain a binding determination or case-specific relief. Nor does it provide authority to impose consequences for continued systemic noncompliance.

Absent such coercive authority, the Special Master does not function as an enforcement mechanism. It functions as an additional layer of oversight. It may facilitate communication and track issues, but it does not create a pathway to relief for the families the Consent Order was designed to protect.

## **2. Additional monitoring and reporting**

The amendment emphasizes expanded monitoring and reporting. Those measures do not constitute relief.

Monitoring already exists under the Consent Order. The persistence of systemic delay despite that monitoring demonstrates the limits of observation without enforcement. Additional data collection does not compel compliance. Reports may document delay in greater detail, but they do not shorten it. They do not resolve cases or deliver services to children awaiting decisions.

Reporting delay is not a remedy for delay. It is a description of the problem. Without a mechanism that converts that information into enforceable consequences, the underlying condition remains unchanged.

### **3. A Litigation Guide for *pro se* Families**

The proposed litigation guide is informational and non-binding. It does not alter timelines. It does not create rights. It does not provide a mechanism for enforcing existing obligations. It does not change what occurs when the system fails to act. At most, it explains a process that remains noncompliant. That may assist navigation. It does not supply relief.

Moreover, the Proposed Amendment assigns responsibility for drafting the guide to Class Counsel, with no provision for review or approval by the Court. The guide is therefore advisory in both form and authorship. Moreover, the amendment does not explain why such a document could not be prepared unilaterally by Class Counsel, independent of any agreement with the State. Nor does it explain how a document to be authored by Class Counsel constitutes a concession by the State at all.

### **4. State-funded support staff**

The amendment also contemplates state-funded support staff. These personnel would operate within the State's system. They are not independent advocates for class members. They do not possess authority to compel action or

secure outcomes. Their role is supportive, not remedial. As a result, these new roles do not alter the fundamental dynamic facing families whose cases are delayed. They may assist within the existing process, but they do not provide a mechanism for obtaining timely, enforceable relief when that process fails.

## **5. Recording Pre-Hearing Conferences**

The proposed inclusion of recording pre-hearing conferences does not provide substantive relief to class members. To the contrary, the absence of recording to date underscores a more basic problem: without a record, there is no accountability for what occurs in those proceedings. Recording may therefore be a necessary baseline for transparency. But that only highlights the point.

Establishing a basic condition for accountability is not a remedial measure, and it does not constitute a meaningful concession capable of justifying an extension of the non-enforcement period.

At most, this provision creates a record of what occurs during those conferences. It does not alter outcomes, ensure that hearings are scheduled within required timelines, or provide any mechanism for correcting improper conduct in real time. For example, if an ALJ refuses to record or engages in other arbitrary conduct while being recorded, the amendment provides no recourse. Thus, this provision produces a record, but no remedy. To the extent pre-hearing conferences involve pressure to settle, confusion regarding procedural posture, or the informal

disposition of issues, recording those interactions does not prevent those dynamics. It only preserves a record of them.

Nor does the proposal establish any process by which recorded material will be reviewed, relied upon, or used to enforce compliance. Without a mechanism that connects recording to consequences, the existence of a record does not translate into accountability.

In that respect, recording pre-hearing conferences reflects the broader structure of the amendment. It increases documentation but does not introduce consequences for continued misfeasance. As with additional monitoring and reporting, it expands observation without providing a path to relief. Yet in exchange, the amendment extends the period during which enforcement remains unavailable for an additional eighteen months. That exchange is not proportionate to the limited benefit being offered.

#### **E. The Amendment Leaves the Core Problem Untouched**

The deficiency in the current system is not a lack of information. It is a lack of consequences. The State is aware of the delays, as is the Court. The delays have been measured, reported, and monitored. What has been missing is a mechanism that converts continued noncompliance into enforceable outcomes. The Proposed Amended Consent Order does not supply that mechanism. It adds observation

without consequence, process without enforcement, and structure without compulsion. It offers, at most, a clearer view of problems that remain unaddressed.

As a result, the central problem remains intact. Delay continues without penalty. And so long as that dynamic persists, delay will continue.

## **II. The Amendment Fails to Address Ongoing Harm to Class Members**

### **A. Present Harm Continues While Enforcement Is Deferred**

The harm at issue in this case is not historical. It is ongoing. Families with active due process cases continue to experience delay now, while the amendment is under consideration. Children entitled to timely decisions and services are instead waiting -- often well beyond governing timelines -- for relief that does not come.

Those delays are not abstract. They affect educational placement, services, and supports in real time. For a child with unmet needs, each additional month without resolution is not neutral. It is lost time that cannot be recovered.

The proposed amendment does not address that reality. It does not create any mechanism by which families currently experiencing delay can obtain accelerated or enforceable relief. It does not provide a trigger for intervention when timelines are exceeded. It does not impose consequences that would alter the State's response to ongoing noncompliance. Instead, it leaves those families within the same system, under the same conditions, for a longer period of time while additional monitoring and process are developed.

The Court is not being asked to approve a modification in the abstract. It is being asked to extend a structure under which class members are currently experiencing ongoing injury, without providing any mechanism to alleviate that injury in the foreseeable future. A modification that defers enforcement while harm is ongoing must, at minimum, provide a means of protecting those currently affected. The amendment does not do so.

Approval would therefore do more than postpone meaningful relief, which would remain speculative and at least a year and a half into the future. It would permit the continuation of harm without remedy. If the current structure persists, the same conditions that produced the present noncompliance will remain in place, and the same request for additional time will follow in another two years. The absent members of the classes cannot wait.

**B. Case Study: B3 Harm -- Delay Used to Pressure Waiver and Settlement**

In a recently filed matter, parents of a young child with disabilities initiated a due process proceeding seeking educational relief, including services, placement changes, and reimbursement of costs. *See generally D.F. et al. v. Elizabeth Bd. of Edu. et al.* (D.N.J. 3:26-cv-03788 (filed April 10, 2026)), attached to Rue Certification at Exh. A. Following transmittal to the Office of Administrative Law, the matter was not adjudicated within the 45-day timeline required by federal and state law. Instead, the case remained pending for many months, with adjournments

and scheduling delays extending the proceedings well beyond the required timeframe.

During that period of delay, the defendant school district declined to resolve the matter unless the parents agreed to waive their claim for attorneys' fees, to which they were otherwise entitled. As the proceedings continued without resolution, the parents faced ongoing delay in obtaining services for their child, increased litigation costs, and uncertainty regarding when a final decision would issue. The Administrative Law Judge advised, in substance, that settlement would be necessary to obtain timely relief and that waiver of attorneys' fees would be required to resolve the matter, further indicating that a final decision would likely not be issued for many months.

Under those circumstances, the parents agreed to waive more than \$14,000 in attorneys' fees in order to secure a resolution. The matter was ultimately resolved through settlement after extended delay, with the educational relief obtained substantially overlapping with the relief originally sought in the due process petition. The family has since filed suit seeking damages arising from the delay and the resulting waiver of attorneys' fees, and has asserted class claims on

behalf of similarly situated families.<sup>2</sup> This family is but one of thousand absent members of the C.P. B3 Class.

**C. Case Study: B2 Harm -- Loss of the Process Itself**

Another recently filed matter illustrates a distinct and more severe form of harm affecting B2 class members -- the loss of access to the adjudicatory process itself. *See generally A.V. o/b/o A.V. v. Princeton Public School Board* (DNJ No. 3:26-cv-03789), attached to Rue Certification at Exhibit B.. A pro se parent initiated a due process proceeding in accordance with the governing framework, but the case did not move forward within the required timeline. Instead, it stalled.

After that period of delay, the matter was addressed not through a hearing or adjudication, but during a brief status conference conducted by telephone. During that call -- lasting only minutes -- the parent was pressured into withdrawing the case. The consequences were immediate. The parent sought to rescind the withdrawal the same day, and again the following day, but those efforts were rejected, and the parent was informed by the OAL that the only option was to begin the process again from the start. This family is but one of hundreds (if not thousands) of absent members of the B2 Class.

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<sup>2</sup> They have also asserted a class action of similarly situated people, further tolling the statute of limitations for the entire B3 class pursuant to *American Pipe*.

This sequence is critical. The failure here is not simply that the parent was required to wait, but that delay created conditions under which the process itself was terminated without adjudication. In that setting, delay becomes more than inefficiency. It becomes leverage. A stalled system creates pressure points -- particularly for unrepresented parents -- where withdrawal or abandonment becomes the path of least resistance. Certainly, a burdensome federal appeal is not an option available to most *pro se* litigants.

Once that occurs, the harm is not merely postponed relief. It is the loss of the statutory right to have the dispute heard and decided within the existing proceeding. Nothing in the proposed amendment addresses that risk. It provides no safeguard against coercive outcomes during delayed proceedings, no mechanism for reinstating claims improperly withdrawn under pressure, and no intervention trigger when a case stalls beyond required timelines.

This example demonstrates that B2 harm is not limited to waiting. In a system that permits delay without consequence, it can result in the loss of the process itself.

These examples are not isolated. They reflect systemic conditions that persist across the due process system and affect families statewide.

### **III. The Proposed Structure Lacks Accountability and Adequate Representation**

#### **A. Internal Conflicts Within the B2 Class Are Dispositive.**

“Not all intra-class conflicts will defeat the adequacy requirement.” *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012). The relevant inquiry is which conflicts “should matter,” and which divisions “render the class representation so defective in structure as to rise to the level of a constitutional dereliction, or violation of Rule 23(a)(4).” *Id.* A conflict is fundamental where it “touches the specific issues in controversy,” including where it concerns “the allocation of remedies amongst class members with competing interests.” *Id.*

In *Dewey*, the Third Circuit rejected a class settlement where similarly situated class members were divided into groups with materially different access to recovery. Pre-expiration claimants had access to insurance proceeds, while post-expiration claimants did not. That disparity created divergent incentives and rendered unified representation inadequate. The court made clear that such conflicts are structural and may require subclassing to ensure that class members with aligned interests are adequately represented. *Id.*

The same structural defect is present here. As certified, the Rule 23(b)(2) class includes “[a]ll persons who, pursuant to the IDEA, have filed or will file during the period of time that the Court retains jurisdiction, a due process petition with NJDOE, and whose cases are pending in the New Jersey Office of

Administrative Law.” Consent Order ¶ II. That definition sweeps together three materially distinct groups: (1) those with cases pending now (“Current”); (2) those who will file during the proposed eighteen-month extension of non-enforcement (“Near Future”); and (3) those who will file only after that period has elapsed (“Future”).

These groups do not share aligned interests with respect to the proposed amendment. The Current group faces ongoing delay and receives no meaningful benefit from prospective administrative adjustments that will not affect their cases. The Near Future group may receive some limited benefit, depending on whether those adjustments are implemented before their matters are resolved. The Future group stands to benefit most, but only if the proposed measures result in sustained compliance -- a speculative outcome that depends on conditions that have not yet been achieved.

This is not a marginal or hypothetical divergence. It goes directly to the central issue in controversy: whether to defer enforcement of an existing order in exchange for prospective reforms. For members of the Current group, delay is harm. For members of the Future group, delay may be a tradeoff for potential improvement. Those positions are not reconcilable within a single, undifferentiated class structure. This is not a mere difference in timing or degree of benefit; it is a conflict over whether present enforcement should be surrendered in exchange for

speculative future reform, and over whether retrospective damages interests will be subordinated to prospective process interests.

Under *Dewey*, such a conflict is fundamental. It concerns the allocation of relief and the timing of enforcement, and it produces materially different incentives among class members. It therefore renders the proposed amendment inadequate as a class-wide resolution and raises serious concerns as to the adequacy of representation under Rule 23(a)(4).

**B. The Current Structure Excludes Meaningful Participation by Class Representatives**

Class representatives are not symbolic actors. They are appointed to safeguard the interests of absent class members and to provide an internal check on the conduct and decisions of class counsel. That function requires meaningful participation -- access to information, involvement in decision-making, and a defined mechanism through which concerns can be raised and addressed. The proposed framework provides none of those protections.

As structured, dissenting class representatives have no defined operational role. They are not integrated into decision-making, provided no formal mechanism to present issues or challenge positions, and afforded no meaningful ability to influence implementation. Their participation, if any, is discretionary rather than structural.

That exclusion is not theoretical. Since approval of the Consent Order, class counsel has refused to engage in meaningful communication with dissenting class representatives, who comprise the great majority of all class representatives in this case. That refusal confirms the absence of any functional role for them within the structure. Decision-making remains centralized in the same attorneys who negotiated and now support the amendment, with no internal mechanism to test those decisions against the interests of the broader class. The consequence is borne not by the representatives, but by absent class members whose interests depend on the existence of such a check.

The concentration of authority is reinforced by control over information. Class counsel functions as the principal conduit for communications from absent class members, determining what issues are surfaced, how they are characterized, and which patterns are treated as systemic. Class representatives have not been provided meaningful access to that information, nor any ability to independently assess trends or the scope of ongoing harm. Where a single set of actors controls both decision-making and the flow of information, the resulting record is necessarily filtered and untested.

That dynamic affects the Court as well. If the Court's understanding of ongoing conditions depends on a single informational channel, without independent verification, it risks being incomplete. The absence of broader

documented patterns cannot be taken at face value where access to underlying information is restricted.

The result is a structure that depends on trust rather than accountability. Rule 23 does not permit that substitution. A class-wide mechanism affecting thousands of absent members must include a meaningful internal check to ensure that their interests are protected in practice. The proposed amendment does not do so.

**C. Class Counsel’s Express Refusal to Coordinate with Court-Appointed Class Representatives Reflects a Structural Defect.**

Class counsel expressly refuses to coordinate with the Court-appointed class representatives. [ECF #624 at 6 (“Class Counsel **has not and will not** coordinate enforcement strategy with [the class representatives].”) (emphasis added)].<sup>3</sup> This is not a matter of litigation posture or professional disagreement. It is evidence of a structural failure. In a functioning class framework, collaboration between class counsel and court-appointed representatives is the mechanism through which accountability operates, and by which both Class Counsel and the Class

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<sup>3</sup> To the extent Class Counsel attempts to characterize its refusal as limited to coordination with RLG rather than the class representatives, that framing is immaterial. RLG serves as counsel to a supermajority of the Court-appointed class representatives (seven of ten), who act through counsel in discharging their obligations to the class. A refusal to coordinate with their counsel is, in practical effect, a refusal to engage with the representatives themselves.

Class Counsel’s unaltered heading states that it “has not and will not coordinate enforcement strategy with **RLG through putative movants**.” (emphasis on the original language). That characterization is inaccurate. These individuals are court-appointed class representatives acting by and through counsel in this action, not outsiders seeking entry into the case.

Representatives discharge their fiduciary obligations to absent class members. The Class Representatives are obliged to provide oversight, raise concerns, and ensure that decisions reflect the interests of absent class members rather than the preferences of a single set of actors. They cannot meaningfully satisfy those duties if Class Counsel refuses to engage with them.

That mechanism does not exist here. Since approval of the Consent Order, class counsel has declined to engage in meaningful communication with dissenting representatives. That refusal is not incidental. It confirms that there is no defined pathway through which representatives can participate in, influence, or test the decisions being made on behalf of the class. Their role exists in form, but not in function.

This absence of collaboration aligns with the broader structure described above -- centralized decision-making, restricted access to information, and the lack of any defined mechanism for representative input. These features do not reflect ordinary friction. They reflect a system that operates without meaningful internal accountability.

The proposed amendment leaves that system unchanged. It introduces no requirement of collaboration with the class representatives, no process for resolving internal disagreements, and no structure through which class representatives can perform their oversight function. In that setting, the refusal to

collaborate is not an isolated choice. It is confirmation of how the structure is designed to operate.

**D. The B3 Class Has Been Functionally Abandoned**

Class counsel asserts that the proposed amendment does not affect the rights of B3 class members. That premise is incorrect.

The B3 class is affirmatively harmed by the structure of the amendment. Its interests are in conflict with those of other class members, yet no mechanism exists to represent them. As a result, the B3 class is left without meaningful advocacy for the only claims it was certified to preserve.

The B3 class was certified to preserve the ability to pursue individualized damages claims arising from systemic delay. That right has meaning only if it is made accessible in practice. The record reflects that no meaningful outreach, infrastructure, or support has been provided to enable class members to identify, evaluate, or pursue those claims. As a result, the relief preserved for the B3 class has remained largely theoretical.

The proposed amendment does nothing to correct that failure. It does not extend tolling, does not provide a mechanism for pursuing claims, and does not account for the fact that the window for many such claims is now closing. In that context, the extension of non-enforcement does not leave B3 members unaffected.

It perpetuates a structure under which their only meaningful avenue of relief remains unimplemented and, for many, effectively lost.

The contention that B3 members are unharmed therefore cannot be sustained. The amendment preserves the form of their rights while allowing their practical exercise to lapse.

That failure has immediate consequences. The tolling period has expired, and the window intended to preserve these claims is closing. Because the necessary infrastructure was never put in place, many class members have been left without a realistic opportunity to act before that window expires.

In that sense, the B3 class has not merely been underserved. It has been functionally abandoned. The proposed amendment does not address that failure. It provides no retroactive outreach, no mechanism to protect or extend the ability of B3 members to pursue their claims, and no recognition that the only concrete relief afforded to that class has, for many, gone unused through no fault of their own.

A structure that preserves a right in theory but fails to make it accessible in practice does not satisfy the obligations of class representation. The amendment leaves that deficiency untouched.

**E. The Amendment Confirms Resource-Based Inadequacy**

The structure advanced by the amendment reflects a fundamental shift away from advocacy and toward administration. Rather than strengthening the capacity

to represent and advocate for class members, it trades away the advocacy that should be performed by class counsel for institutional substitutes -- expanded monitoring, additional reporting, state-funded personnel, and non-binding informational tools -- that operate within the system rather than against its failures.

Those mechanisms have a role within a functioning system, but they do not perform the function of advocacy. Monitoring can identify problems. Reporting can describe them. Administrative personnel can operate within the system that produces them. Informational materials may assist in navigating that system. None of these measures compels a result, secures relief for an individual class member, or substitutes for the role of counsel in pressing claims, enforcing rights, and obtaining outcomes.

That distinction goes to the core obligation of class representation. Class counsel is not appointed merely to participate in administering a process. It is appointed to advocate on behalf of absent class members, particularly where those members lack the resources or ability to advocate for themselves. The structure proposed here assumes that improvement will follow from observation and coordination, but it provides no mechanism for compelling that improvement when it does not occur.

Viewed in that light, the amendment does not merely fail to enhance representation. It confirms a form of resource-based inadequacy: a framework in

which the tools of administration are substituted for the work of advocacy. That substitution aligns with the broader features described above -- centralized decision-making, restricted access to information, and the absence of meaningful participation by class representatives -- and reflects a system that manages a process rather than enforces rights.

Rule 23 does not permit that substitution. A class structure affecting thousands of absent members must provide meaningful representation through advocacy, not merely administration. The proposed amendment does not do so.

#### **IV. The Fee Structure Creates Annuity-Like Incentives Untethered to Results**

##### **A. Class Counsel Compensation Is Untethered to Results**

The amendment contemplates continued compensation for class counsel on a recurring basis, effectively functioning as an annuity tied to the ongoing administration of a process, rather than the improvement of outcomes for class members. Class counsel has represented that it has expended hundreds of hours to date, and the proposed structure would permit successive six-figure fee applications as the framework continues to operate. In that respect, compensation is structured to continue over time through repeatable, defined mechanisms associated with maintaining the process itself.

At the same time, the amendment does not create any meaningful new enforceable rights for class members. It establishes no mechanism for obtaining

individual relief, imposes no measurable compliance benchmarks, and does not condition compensation on the achievement of concrete outcomes. Relief remains contingent on future system performance that the amendment does not compel, while the mechanisms that generate compensation are immediate, defined, and ongoing.

That asymmetry is not incidental. It is structural. Compensation is designed to continue regardless of whether the underlying problem -- systemic delay -- is resolved, creating a framework in which payment may persist even in the absence of meaningful results. The amendment thus separates fees from outcomes, authorizing ongoing compensation for administering a process that has neither produced adequate results nor provides any enforceable mechanism to achieve them going forward.

**B. The Fee Terms Create a Conflict Between Class Counsel and the Class**

Where compensation is recurring but outcomes are not enforced, the incentives created by the structure must be examined. The proposed framework permits continued compensation through successive fee applications while leaving relief contingent on future system performance. In that setting, the process itself risks becoming the focal point. Collaboration, monitoring, and administrative coordination sustain the structure that generates fees, even in the absence of measurable progress toward resolving the underlying violations.

That incentive structure is not aligned with the interests of the class. Class members benefit from timely adjudication, enforceable rights, and concrete relief. A framework that does not require those outcomes but permits ongoing compensation in their absence, creates a divergence between the interests of counsel and those of the class. This is not a question of intent but of structure. Incentives operate regardless of motive, and where compensation is untethered from results, the structure itself creates a risk that process is maintained while relief is deferred. In short, the structure incentivizes extending the remediation process irrespective of whether it delivers meaningful benefit to absent class members. The result is a structure in which compensation is certain, but relief is not.

**C. Rule 23 Does Not Permit Approval of a Structure That Rewards Process Without Relief**

Rule 23 requires that any class-wide arrangement be fair, adequate, and reasonable, and that it align the interests of class counsel with those of the class. *See* Fed. R. Civ. P. 23(e)(2). A structure that permits continued compensation while leaving relief contingent and unenforced does neither.

Such a framework allows process to continue indefinitely without requiring results, creating a system in which compensation is assured but relief is not. That is incompatible with the core requirements of Rule 23.

**V. Cross-Motion for Relief**

**A. The Court Should Require Real Accountability**

If the Court is inclined to modify the Consent Order rather than deny the proposed amendment outright, any revision must introduce meaningful accountability. The central deficiency identified above is not a lack of process, data, or oversight -- but the absence of consequences. A system that permits delay without enforcement will continue to produce delay, regardless of how extensively it is monitored or reported.

Accordingly, relief cannot consist solely of collaborative planning, administrative coordination, or enhanced observation. Those mechanisms may facilitate compliance, but they do not ensure it. Any amendment must include components with practical effect when noncompliance persists -- mechanisms that convert continued delay into enforceable outcomes rather than additional process.

That requirement follows directly from the history of this case. Where an initial period of deferred enforcement has not produced compliance, a further extension cannot be justified without the introduction of measures that carry consequences. Absent such measures, modification would not represent a meaningful change in approach, but would simply extend the framework under which noncompliance has persisted. The Court should therefore require that any amendment create enforceable elements sufficient to alter incentives and produce

results, rather than relying exclusively on coordination and oversight. Without consequences, the system will continue to produce delay.

**B. The Court Should Subdivide the Class and Appoint Separate Counsel**

The deficiencies identified above are not merely operational. They reflect a structural conflict among distinct groups within the class that cannot be resolved through coordination, monitoring, or procedural refinement alone.

Members of the class stand in materially different positions. B2 members with active or imminent due process claims require immediate, enforceable relief. B2 members whose interests are primarily prospective may benefit from forward-looking administrative reforms, but only if such reforms are more than speculative. B3 members, by contrast, have already suffered injury and require a meaningful opportunity to pursue individualized damages claims. A single, unified structure cannot adequately serve these divergent interests.

That divergence creates a conflict of interest that bears directly on the adequacy of representation. A structure that advances prospective administrative improvements at the expense of immediate relief or retrospective recovery cannot be said to represent the class as a whole. Nor can that conflict be cured by internal consultation or discretionary participation, particularly where the existing framework excludes meaningful involvement by dissenting class representatives

and concentrates both decision-making authority and access to information in a single set of actors.

The appropriate remedy is structural. The Court should subdivide the B2 class to reflect these distinct interests and appoint separate counsel to represent each subclass, as well as the B3 class. Only through separate representation can the interests of B2 members seeking immediate relief and B3 members pursuing retrospective claims be adequately protected. Without such separation, the existing conflicts will persist, and the proposed amendment will continue to operate unevenly across the class.

**C. If Appointed, a Special Master Must Have Coercive Authority**

As proposed, the Special Master function is primarily collaborative and supervisory. Without additional authority, it risks becoming another layer of observation within a system that already suffers from a lack of consequences. To avoid that result, any Special Master structure must be designed to affect outcomes, not merely monitor them.

The proposed reliance on a Special Master does not represent a meaningful shift in approach. It is, in substance, a repackaging of the same monitoring framework that has already failed to produce compliance. The existing structure included a Monitor, reporting requirements, and ongoing oversight. Those mechanisms identified persistent noncompliance, but did not correct it.

Replacing one observer with another does not alter that dynamic. Without authority to impose consequences, compel action, or deliver case-level relief, the Special Master performs the same essential function: observation without enforcement. The problem in this case has not been a lack of visibility into system failure. It has been the absence of consequences when that failure is identified. A structure that substitutes a new supervisory title for the exercise of enforcement authority does not remedy that defect. It repeats it.

At a minimum, that requires authority to address concrete instances of noncompliance. Class members must have a mechanism to bring individual complaints of ongoing delay before the Special Master, and the Special Master must have the capacity to translate those complaints into case-level remedies. Without that authority, the role cannot convert identified problems into corrective action.

The structure must also extend beyond advisory functions. It should provide for the development and implementation of enforceable procedures and policies, rather than recommendations that depend entirely on voluntary adoption. A system that relies on guidance alone does not alter the incentives that have produced the existing conditions.

Finally, the framework must include a defined process by which class representatives may present systemic and individual issues for consideration. That

process must be structured and mandatory, not discretionary, and must ensure that concerns raised on behalf of absent class members are addressed within the system itself.

These elements are not enhancements. They are necessary conditions for accountability. Absent such authority, the inclusion of a Special Master would not materially change the dynamics identified above. It would add process without introducing consequence.

**D. Approval Is Not Possible on the Present Record**

The current framework provides no reliable mechanism for independently verifying how the system is functioning in practice. As described above, access to information is centralized, and neither class representatives nor the Court have a complete view of the volume, nature, or disposition of complaints from absent class members. Communications between class counsel and class members, including through the website, are non-public. In that setting, the record is necessarily incomplete.

The deficiency is compounded by the absence of meaningful notice. The class has not been adequately informed of the proposed changes, beyond an incomplete description posted on a previously dormant website. Rule 23 does not permit approval of a class-wide modification on such a record.

To the extent the State may contend that it would not have agreed to a structure incorporating meaningful enforcement, that position does not justify the proposed amendment. Class counsel's obligation is not to secure agreement at any cost, but to protect the interests of the class. Where meaningful relief cannot be obtained through negotiation, Rule 23 contemplates that enforcement mechanisms remain available.

Class counsel emphasizes the volume of its efforts -- monitoring activity, communications with class members, and ongoing engagement with the State. Even accepting those representations as true, they do not resolve the relevant inquiry under Rule 23.

The adequacy of representation is not measured by effort, but by results. The question is not whether class counsel has been active, but whether the structure it has negotiated secures meaningful relief for absent class members. Activity within a system that continues to produce delay does not satisfy that standard.

Rule 23 does not permit approval of a class-wide modification based on diligence alone. Where the result of those efforts is a framework that extends non-enforcement and fails to deliver enforceable relief, the level of effort expended does not cure the underlying deficiency.

In that setting, the absence of agreement does not justify further delay. It underscores the need for enforcement. The remedy for noncompliance is not

continued negotiation, but the invocation of the Court's authority to impose relief sufficient to address ongoing violations. Rule 23 does not permit the interests of absent class members to be subordinated to the limits of what the opposing party is willing to accept.

### **CONCLUSION**

At a minimum, the Court should not approve the proposed amendment on the present record and class structure. If the Court determines that the deficiencies identified above reflect a structural conflict within the class, it should direct the parties to meet and confer regarding subdivision of the B2 class and the appointment of separate counsel, including for the B3 class, before any further amendment to the Consent Order. That process should include a mechanism for identifying and applying for any newly created roles, and permit separate submissions if necessary.

If the Court is not prepared to make that determination, it should permit targeted discovery, including responses to the pending Requests for Admission and such additional discovery as may be appropriate.

Approval of the proposed amendment without either structural correction or development of the record would not satisfy Rule 23.

For the reasons set forth above, the motion should be denied.

Signed: John Rue

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