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; DR. LILY LAUX, Commissioner of Education, in her official capacity, Defendants.	Civil Action No. 19-cv-12807-ESK-MJS Edward S. Kiel, U.S.D.J. Matthew J. Skahill, U.S.M.J.

REPLY IN SUPPORT OF
JOINT MOTION TO AMEND CONSENT ORDER
AND SETTLEMENT AGREEMENT AND
REQUEST APPOINTMENT OF A SPECIAL MASTER AND
OPPOSITION TO CROSS-MOTION FOR RELIEF (ECF No. 643)

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PRELIMINARY STATEMENT

On April 20, 2026, Rue Law Group (RLG) filed a Memorandum of Law in Opposition to the Joint Motion to Amend Consent Order and Cross-Motion for Relief (*Opp.*) [ECF No. 643],[1] purportedly on behalf of seven class representatives but unsupported by a single client certification, instead relying solely on argument and mischaracterizations.[2] The opposition does not engage meaningfully or accurately with the factual record, the substance of the proposed Amended Consent Order (ACO), or the proposed orders submitted with the instant Joint Motion, and thus the opposition fails to offer even a single concrete basis for this Court to reject the relief sought on this motion, which is (i) essentially the relief Plaintiffs requested in the underlying pleadings in this action (which the opposition ignores), (ii) consistent with Rule 23, and (iii) responsive to the State's non-compliance. The opposition therefore should be rejected in full.

[1] Pursuant to L.R. 7.1(h), the Class files this combined reply brief in support of the joint motion to amend and in opposition to the cross-motion of the RLG plaintiffs.

[2] One week after the deadline for submitting opposition papers, and on the eve of our filing deadline, RLG filed four statements from individuals other than the objectors/cross-movants. As relevant here, those statements assert that New Jersey Department of Education (NJDOE) 45-Day Timeline violations continue. That is already established, generally. But none of these statements explains why the appointment of the Special Master would not be a reasonable and appropriate enforcement mechanism to bring the State into compliance and achieve the goal of elimination of harm to children with disabilities from 45-Day Timeline violations.

Notably, Mr. Rue of RLG (then John Rue & Associates (JRA)) signed the operative Second Amended Class Action Complaint in the instant action [ECF No. 78], which specifically sought, *inter alia*, the appointment of a federal monitor to oversee and enforce special education dispute resolution reforms. [ECF No. 78 at p.80 (Prayer for Relief), (E); *see also id.* at ¶ 325.] The ACO achieves that relief, in the form of a Special Master; RLG's opposition, therefore, is entirely without merit.

The opposition's principal contention is that the ACO is an "extension of failure" and a deferral of enforcement. *Opp.* at 1. But it is nothing of the sort. To the contrary, the ACO, with its appointment of a Special Master, ***is*** an enforcement mechanism, replacing advisory monitoring with a highly-qualified Rule 53 Special Master whose Compliance Plan—once entered by the Court—will be directly enforceable through this Court's remedial and contempt powers. *See*, *e.g.*, FRCP 53(c)(2) ("The master . . . may recommend a contempt sanction against a party . . . ."). Indeed, the documents submitted with this motion clearly confirm that the ACO is a robust enforcement mechanism, with coercive powers.

For example, and with emphasis added:

- Paragraph 15(e) of the ACO [ECF No. 637-2, Exhibit 1 (Page 9 of 93 PageID: 18696)] states: "The general role of the Special Master is to . . . **(e) otherwise seek remedial Orders from the Court designed to achieve the required 95% Compliance**."
- Paragraph 16(b) of the ACO states: "The Special Master shall, without limitation . . . **seek remedial Orders from the Court**

if NJDOE is not making progress required by the Compliance Plan."

- Paragraph 28 of the ACO states: "If deemed necessary to remedy continued non-compliance, **the Special Master shall make recommendations for remedial or coercive Orders requiring corrective action**."

- Paragraph 3 of the [Proposed] Order Appointing Special Master [ECF No. 637-4] states: "The Parties have agreed, in lieu of contested contempt proceedings, to the entry of an Amended Consent Order that, among other things, **replaces the advisory Compliance Monitor with a Special Master vested with enforcement authority**."

- Paragraph 9(e) of the [Proposed] Order Appointing Special Master, states: "The Special Master's general duties are to: . . . **(e) seek remedial Orders from the Court as necessary to achieve 95% Compliance.**"

- Paragraph 11 of the [Proposed] Order Appointing Special Master, states: "The Special Master shall, without limitation . . . **seek remedial Orders from the Court if NJDOE is not making progress required by the Compliance Plan. The foregoing examples are illustrative and not an express limit on the actions the Special Master may take to achieve 95% Compliance.**"

- Paragraph 5 of the [Proposed] Order Granting Motion To Amend Consent Order And Settlement Agreement And Requesting Appointment Of A Special Master [ECF No. 637-5], states: "the non-coercive Compliance Monitor mechanism established in the Original Consent Order has proven insufficient to achieve the 95% compliance benchmark set forth therein, **warranting the appointment of a Special Master with authority to enforce compliance**."

The "deferral of enforcement" argument simply ignores the express language of the documents (and FRCP 53) that demonstrate that the ACO provides for the affirmative enforcement authority that the opposition asserts is absent or deferred.

Further, despite what the opposition appears to suggest, litigating a motion for contempt in and of itself is not enforcement; it is but a means to an end. And, here, had Class Counsel proceeded with time-consuming and costly contempt proceedings against NJDOE, Class Counsel would have sought exactly this remedy—that is, appointment of a Special Master, as requested in the underlying complaint.

For the foregoing reasons, and those that follow, the Court should grant this joint motion, approve the ACO, appoint the Special Master, and deny the Cross-Motion.

ARGUMENT

I. The ACO Provides the Enforcement Mechanism the Opposition Purports to Seek for the B2 Class

The opposition asserts that the "central feature of the amendment" is that, for "another eighteen months, the Court's primary enforcement mechanism remains unavailable." *Opp.* at 1 (citing ACO, Section XI, ¶ 32). Not so.[3]

[3] That contention is entirely inconsistent with the appointment of a Special Master with coercive powers, and thus the contention makes no sense in the context of this motion.

RLG presumably misunderstood paragraph 32 of the ACO, which merely acknowledges that, during the *initial* eighteen-month period, the Class could not file a motion for contempt. To be clear, at no time has Class Counsel or the State

There is a substantial structural difference between the Original Consent Order and the Amended Consent Order. The former established an *advisory* Compliance Monitor, who could observe and recommend, but could not compel. The latter, by contrast, establishes a Rule 53 Special Master whose Compliance Plan, including benchmarks, presumptive deadlines, and 95% target date, would be entered by this Court as an order. Compare Original Consent Order ¶¶ 15–19 with Amended Consent Order ¶¶ 15(b), 16(a). *See also* FRCP 53(c)(2) ("The master . . . may recommend a contempt sanction against a party . . . ."). NJDOE's noncompliance with that order would be directly enforceable. That is the most substantively significant point of the amendment, and it is a point the opposition does not address. The ACO thus does not delay or eliminate enforcement, it expedites it. *See*, *e.g.*, Declaration Of Judith A. Gran (*Gran Decl.*), ¶ 31 ("In my opinion, the proposed amended consent decree provides a remedy 'that promises realistically to work *now,*' because it provides for the development of a compliance

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intended for that language to extend the eighteen-month moratorium. Supplemental Declaration of Catherine Merino Reisman (*Supp. Reisman Decl.*) ¶ 4. Indeed, the only reason the initial eighteen-month moratorium is even relevant to this motion is because the putative objectors previously asserted, incorrectly, that Class Counsel could have proceeded with contempt proceedings in July of 2025. ECF No. 615 at 2.

Nonetheless, to remove any conceivable doubt about the parties' intentions, the parties have agreed to amend paragraph 32 of the ACO to read: "The provisions in Section XI are no longer applicable and this Revised Amended Consent Order will be enforceable in accordance with the rules of court." *Supp. Reisman Decl.*, Ex. 1, ¶ 32. The only change in the Revised ACO is this change to Section XI, ¶ 32.

plan by the Special Master, which will be enforceable as an order of the Court. In other words, "the amended consent decree takes us at the beginning of the compliance period to the same place at which the parties arrived in other cases for systemic reform only after lengthy contempt proceedings . . . .") (citation omitted).

The Opposition's Cross-Motion asks the Court to order relief that the ACO already provides. The table below compares the specific "demands" in the opposition to the paragraphs of the ACO:

Opposition's Requested Relief	Provision in the ACO
"Development and implementation of enforceable procedures and policies, rather than recommendations that depend entirely on voluntary adoption." Opp. at 37.	Compliance Plan includes "benchmarks to measure progress toward achieving 95% Compliance," "presumptive deadlines by which specific actions and responsibilities will be completed," and "a target date for achieving 95% Compliance" (¶ 16(a)); plan is submitted to and "adopted as an Order" by the Court (¶ 15(b)); Special Master may seek coercive relief to enforce it (¶¶ 16(b), 28).
Independent data access and verification — concern that "access to information is centralized" and "neither class representatives nor the Court have a complete view." Opp. at 38.	Special Master "shall have full access to any and all information and data from NJDOE" (¶ 17(a)); authority to "undertake any necessary investigation" if NJDOE's production is inadequate (¶ 17(b)); full access to NJOAL's electronic case management system and authority to "conduct random audits" once operational (¶¶ 17(c)–(d)).

Opposition's Requested Relief	Provision in the ACO
Resources and staff adequate to make Special Master oversight effective.	Special Master may "employ [additional] professionals or support staff or expert consultants... at NJDOE's expense" (¶ 14(d)); NJDOE compensates the Special Master at her hourly rate, and objections to fees cannot be a basis to refuse to comply with her recommendations (¶ 14(b)); NJDOE funds a full-time NJOAL employee whose work includes maintaining case data and producing it to the Special Master (¶ 39(d)).
Pro se litigant protections and support. *See* Opp. at 14–15.	*Pro se* litigation guide drafted by Class Counsel and NJDOE, disseminated to all *pro se* parties at the time of filing, and posted on NJDOE's website (¶ 39(b)); pre-hearing conferences "automatically audio-recorded for all cases in which parents or guardians are *pro se*," with free copies on request (¶ 39(c)); Special Master's random case reviews "particularly those in which parents or guardians are pro se" (¶ 39(e)); Special Master shall "examine the impact" of all interventions on "*pro se* parents" (¶ 16(c)).
Regular reporting and transparency.	Monthly data production by NJDOE to Special Master on all three compliance metrics (¶ 23); written report to the Court every four months, with required content including benchmarks progress, data, causes of non-compliance, and remedial

Opposition's Requested Relief	Provision in the ACO
	actions (¶ 26); reports filed on docket and posted in redacted form on NJDOE website (¶ 30).

The ACO thus accomplishes what the putative objectors specifically seek.

The opposition offers peculiar commentary about the *pro se* Litigation Guide that is both factually inaccurate and otherwise based entirely on counsel's conjecture. *Opp.* at 14. The opposition contends that the guide will be authored by Class Counsel, but that is not true. The ACO provides that "**NJDOE and** Class Counsel will draft an informative litigation guide." ACO, ¶ 39(b) (emphasis added). Nor is it correct that a document prepared unilaterally by Class Counsel would have the same effect. The ACO provides that "NJDOE will ensure dissemination to all *pro se* parties at the time of filing. NJDOE will also maintain the guide on its website in an easily accessible location." Both provisions put the lie to the argument that the guide does not constitute a concession by the State. *Opp*. at 14.

Further, the opposition contends that the guide does not provide relief. *Id*. As part of their role in this case, Class Counsel have communicated with various *pro se* litigants and advocacy groups, and are aware of various difficulties they confront as unrepresented parties. Dissemination to all *pro se* litigants of a guide that "may assist navigation" of the system (*id.*) is significant relief.

Relatedly, the opposition treats the State's agreement to audio-record (i) ***all*** pre-hearing conferences involving *pro se* litigants, and (2) pre-hearing conferences requested by represented parties as if that agreement is nothing at all. But the State is not otherwise required to record such proceedings, and, as the opposition recognizes, a recording "creates a record of what occurs during those conferences." *Opp*. at 15. It is exactly with that record, that parties, especially *pro se* litigants, who face "pressure to settle, confusion regarding procedural posture, or the informal disposition of issues" may be able to demonstrate to the Special Master that they have been aggrieved in violation of the 45-Day Timeline, and the Special Master has authority to deal with such situations. So, once again, the opposition complains about the absence of something that is very much present.

Further, the opposition appears to be complaining that Class Counsel and the State did not agree to every specific remedy for every potential issue that might arise in a due process proceeding. But that is for the Special Master to assess, after her impartial review of the deficiencies of the system and her consideration of the appropriate ways to remedy them, including the types of isolated issues that might arise (and could not possibly be pre-negotiated by the parties).

By contrast, the Original Consent Order provided only for an advisory monitoring period, during which the State would determine for itself how it would try to fix its system. The Compliance Monitor's role was to collect data to determine

whether the State was making appropriate progress. The Compliance Monitor could make suggestions (which she repeatedly reported that the State followed), but could not compel any conduct. The Monitoring Reports make clear that the State was not able to fix the system in the time provided, despite trying to implement the Compliance Monitor's suggestions. Simply stated, the Compliance Monitor reported that the State's starting point was worse than she had anticipated, which exacerbated the State's difficulty getting into compliance. *See also* Gran Decl., ¶ 7 ("the root causes of non-compliance on the part of a complex state system rarely become fully apparent until the implementation phase of an order or decree.").

The opposition does not bother to address the underlying structural issues here. As the Monitoring Reports make plain, the issue here has not been the State simply disregarding its obligations under the Original Consent Order. Rather, the problem has included extreme structural issues that NJDOE could not remedy, even when it put its best foot forward. This does not excuse NJDOE's failure to come into compliance, but it provides specific context for *why* it failed to come into compliance, and Class Counsel assessed that context to be directly relevant to the types of relief the Court might grant on initial contempt practice.

For example, NJDOE and OAL began to implement a computerized case management system that the Compliance Monitor believed would go a long way toward resolving many of the issues leading to violations of the 45-Day Timeline.

The Compliance Monitor reported, however, that the vendor confronted unanticipated problems when migrating the underlying data to the software program, indefinitely postponing its implementation. *Supp. Reisman Decl.* ¶¶ 6, 7. While obviously a problem and a misstep, Class Counsel reasonably assessed that the Court would not "throw the book" at the State over a problem caused by a data-migration issue, as opposed to intentional disregard of its obligations.

Unlike the Original Consent Order, the ACO provides the Special Master with the authority to investigate the best path forward for rolling out the software program, and to compel the State to do so in the manner she chooses. That *is* enforcement, and it is far more practical than the parties or the Court simply making up a deadline date that may or may not be achievable, which then would be followed by more contempt litigation.[4]

Quite simply, it became clear during the monitoring period that many of the problems complying with the 45-Day Timeline exist beyond mere intransigence or

[4] The opposition asserts, without any support whatsoever, that "[u]nlike a case proceeding toward trial, the complexity, expense, and likely duration of a motion for contempt are minimal." RLG, of course, does not have the experience to make such an assessment, and seasoned class action practitioners recognize its sheer fallacy. Rather than lengthen this brief on this fairly obvious proposition, Class Counsel respectfully refer the Court to the Gran Declaration. Ms. Gran has exactly the type of systemic-relief, class action experience that RLG lacks. In her declaration, Ms. Gran describes an assortment of systemic-relief cases, and recognizes "two realities about contempt as a tool to coerce compliance. First, it is neither quick nor simple, and second, it does not automatically achieve the desired result." *Gran Decl.*, ¶ 26.

a particular ALJ's failure to follow the rules (although that may still happen), and that there remain serious structural impediments that need to be remedied. The Compliance Monitor did not have the authority to require any changes; the Special Master will. That is an invaluable enforcement mechanism here.

RLG's cross-motion also seeks relief that already is provided by the ACO. The opposition argues:

> 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. (*Opp*. at 37.)

While it is not exactly clear what RLG means by "case-level remedies"—for example, it surely cannot be the case that the Special Master can jump in and decide cases as if she were an ALJ, or direct an ALJ to issue a ruling that he or she is not prepared to issue—the ACO provides the Special Master with the authority to create and compel corrective action plans. *See*, *e.g.*, ACO, ¶ 17(c) ("random audits of cases" under the NJOAL case management system"); ¶ 18 (requiring Special Master or delegee to "respond to inquiries regarding issues of non-compliance related to the 45-Day Timeline from Rule 23(b)(2) Class members" and to "address with NJDOE and Class Counsel issues of non-compliance... raised by Rule 23(b)(2) Class members"); ¶ 19 ("individual, confidential interviews" to verify and supplement

data"); ¶ 39(e) (Special Master required to "conduct random reviews of cases, **particularly those in which parents or guardians are *pro se***," to assess compliance and "identify and address systemic barriers affecting the case's timely progression").

II. The B3 Critique is Misdirected and Unsupported in the Record

The opposition argues that Class Counsel have "functionally abandoned" the B3 class. *Opp.* at 28-29. That argument is without merit.

First, the Amended Consent Order does not modify the B3 rights in any way whatsoever. Paragraph 13 of the Original Consent Order, in language that was negotiated by JRA when it was still representing the B3 class,[5] provided B3 class members two years from April 11, 2024, to file individual claims for IDEA relief. That provision is "fully preserved and incorporated [in the ACO] without modification." ACO at 2 (Whereas clause); *see also id*. ¶ 13. The ACO expressly states that "[t]he Amended Consent Order does not in any way impact the rights of the members of the Rule 23(b)(3) Issues Class." ECF 637-1 at 2, n.2. The B3 class's rights are completely unchanged. As such, the amendment cannot in any way be read to create a conflict between the B2 and B3 classes. There is none.

[5] *See* ECF No. 462-2 at PageID: 15341 ¶ 7.

Second, to the extent the opposition contends that B3 members are entitled to a longer tolling window, additional outreach, or a claims-administration mechanism beyond what the 2024 settlement provided, they are precluded from asserting that claim at this time. Leaving aside that JRA negotiated the contours of the B3 class remedy as a member of the Class Counsel team, JRA also represented the putative objectors to the ACO at the Motion for Preliminary Approval of the Original Consent Order. ECF No. 553 at 3:21-25. When asked if she had anything to add before the Court granted preliminary approval of the settlement with the terms that the putative objectors now seek to attack, Ms. Rue did not object. *Id.* at 19:18-20. Two separate law firms represented the putative objectors at the April 11, 2024, final approval hearing. ECF No. 574 at 6:20-24. The Court invited any objectors to be heard, and counsel once again did not step forward. *Id.* at 52:6-53:7.

But even if these putative objectors could launch such a collateral attack at this time, a party seeking to modify a consent decree bears the burden of showing a "significant change either in factual conditions or in law" under *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992). The opposition does not attempt to make that showing. The Court approved the 2024 Consent Order after notice, a period for objection, and a fairness hearing. If the putative objectors had a problem with the B3 relief, which actually was proposed by their current counsel, RLG, they had to raise it at the time of final approval of the Original Consent Order.

Finally, the B3 "issues" class received the following relief: "Any member of the Rule 23(b)(3) Issues Class shall have two (2) years from the date of entry of this Order to file a claim in this court for individual relief under the IDEA for a violation arising out of or related to the timeline in 34 C.F.R. § 300.515(a), (c)." The pursuit of such claims was not part of Class Counsel's mandate, particularly because of the class member-specific fact patterns relating to such *individual* claims. Nothing prevented the B3 Class members from pursuing their individual claims; indeed, nothing prevented RLG (or JRA) from assisting such people in pursuing their individual claims if it sought to do so. And, to the extent that class members more recently have had due process petitions that have exceeded the 45-Day Timeline, they may pursue their individual claims at this time without the need for additional tolling.

III. The Record Refutes the Fee Structure Attack

Putative objectors devote Section IV of the opposition to the contention that the ACO's fee provisions—which functionally mirror the fee provisions drafted by JRA in the Original Consent Order—somehow "create a conflict between class counsel and the class" by being "untethered to results" and structured like an "annuity." *Opp*. at 31–33. Three features of the record refute that argument.

First, the "annuity" framing turns reality on its head. Class Counsel negotiated the ACO under the threat of filing contempt proceedings. ECF 637-1 at 6–7. By

reaching an agreement, Class Counsel foreclosed proceeding in a way that would have resulted in substantially larger fees. Contested contempt proceedings, evidentiary hearings, expert preparation, post-hearing submissions, and appellate review, would have generated materially more attorney time—by many factors—than the negotiated modification. The path Class Counsel selected thus *reduced*, instead of expanded, Class Counsel's potential to earn attorney's fees. Class Counsel selected that route to deliver systemic relief to the B2 Class "without the delay, expense, and uncertainty" of contested contempt litigation. ECF 637-1 at 2. Accordingly, the incentive asymmetry that putative objectors describe cuts in the opposite direction from the one they advance: a fee-maximizing strategy would have been to litigate, not to settle. Class Counsel chose settlement. That is Rule 23(g)(4) fidelity, not a conflict.

Second, every fee application under the Consent Order remains subject to this Court's continuing oversight. Each petition is reviewable under the lodestar standard on contemporaneous time records, subject to NJDOE's meet-and-confer and, if necessary, the Court's own review on objection. Any concern that fees might be paid absent results can be addressed in that process, without setting aside the systemic relief the ACO delivers.

Third, putative objectors' counsel negotiated the fee provisions that he now attacks.[6] The ACO does not alter that architecture in any material respect. It merely changes the cadence of fee applications from "tied to each Monitor report" to "quarterly," which is a ministerial, administrative change that was made at NJDOE's request. ECF 637-1 at 9. Putative objectors cannot credibly attack as structurally deficient a fee provision their own counsel drafted and argued for when representing this Class.

IV. The Opposition's Intra-Class Conflict Theory Fails as a Matter of Law

Putative cross-movants rely on *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012), to offer some sort of supposed class conflict argument. But *Dewey* is a Rule 23(b)(3)/23(e) settlement-approval case involving the allocation of a finite pool of funds between two groups of Volkswagen and Audi owners. There, the plaintiffs had cars with sunroofs that had already leaked or might leak in the future. Based upon claim rates from the past, the settlement agreement sorted various car models into the "reimbursement group" and the "residual group." The reimbursement group had priority access to the settlement fund, and the residual

[6] In the Motion for Preliminary Approval filed by JRA on June 9, 2023, counsel argued that the provision for enforcement fees "is an extremely important aspect of the 'benefit of the bargain' of the Agreement for the Classes . . . This provision ensures that Class Counsel will be able to retain attorneys to represent the interests of the Class during the vital implementation period, after final approval of the settlement." ECF No. 462-1 at PageID:15322. That has not changed.

group would only receive payments after all the members of the reimbursement group were paid. *Id.* at 187.

The ACO is nothing like the settlement in *Dewey*. It does not allocate a finite fund, and does not condition any class member's recovery on another's forbearance. Rather, the ACO is an enhancement of a prospective injunctive consent decree that now provides stricter oversight and enforcement mechanisms to ensure the State meets its obligations in administering IDEA due-process proceedings. Every B2 member, whether called Current, Near Future, and Future alike, benefits from the same systemic reforms through the same Compliance Plan, 95% Compliance standard, reporting cadence, and Special Master. No member receives payment; no member is excluded. *Dewey's* limited-fund logic has no purchase here.[7]

Additionally, the *Dewey* court indicated that, on remand, the settlement could satisfy Rule 23(a)(4) by doing away with the distinction between the reimbursement group and the residual group, "and allow all members of the class to submit reimbursements with no difference in priority." 681 F.3d at 189. Unlike the *Dewey* settlement, the ACO already treats all class members the same.

[7] *Dewey* draws its authority from *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), both involving the allocation of a limited settlement inventory between presently-injured and future asbestos claimants. Courts have not extended those holdings to defeat certification, or to require subclasses, in a case involving a 23(b)(2) class whose remedy is indivisible injunctive relief.

If putative cross-movants were correct that the Current/Near Future/Future dichotomy required subclasses, then no 23(b)(2) class for injunctive relief could ever be certified. Rule 23(b)(2) classes necessarily include members whose issues are pending now and members who will enter the class later. But the unitary relief, timely adjudication of due process hearings, benefits them all. This is not a zero-sum situation as was the case in *Dewey*.

V. The Court Should Again Reject the Renewed Complaints About Class Counsel

A. The Opposition Cannot Sustain a Rule 23(a)(4) Challenge on this Record

A party challenging adequacy of representation under Rule 23(a)(4) bears the burden of proof and must come forward with record evidence sufficient to establish the conflict alleged. *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 393 (3d Cir. 2015); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 800 (3d Cir. 1995). The inquiry is evidentiary. Statements of counsel in a brief are not evidence (*Versarge v. Twp. of Clinton*, 984 F.2d 1359, 1370 (3d Cir. 1993)), and putative cross-movants provide no admissible record support for their arguments. At a minimum, the Court should disregard any of the opposition's factual assertions that are unsupported by record evidence, which is all of them. *See* Fed. R. Evid. 602.

The opposition's only concrete examples of purported B2 and B3 harm are two federal actions filed by RLG nine days before the opposition. *Opp.* at 18-20 (citing *D.F. v. Elizabeth Bd. of Educ.*, No. 3:26-cv-03788 (sic) (D.N.J. filed Apr. 10, 2026), and *A.V. v. Princeton Pub. Sch. Bd.*, No. 3:26-cv-03789 (D.N.J. filed Apr. 10, 2026)). *Opp.* at 18, 20. But pleadings in separate actions are not evidence, are not part of the record in this case, and do not supply the record support that Rule 23(a)(4) requires. The gap cannot be filled by unsworn, narrative summaries of complaints that counsel for putative objectors/cross-movants filed elsewhere.

Because of the tolling provision in the Original Consent Order, the plaintiff in *D.F., et al, v, Elizabeth Board of Education, et al.*, No. 2:26-cv-03788, had until April 11, 2026 to file a claim for individual relief. The filing of that Complaint is proof that the B3 tolling provision, originally negotiated by JRA, benefitted a B3 class member whose claim would otherwise have been time-barred.[8]

The *A.V.* litigation involves a *pro se* parent whose "case did not move forward with the required timeline." *Opp*. at 20. Upon approval of the ACO, a litigant like that one would be able to present her issues—backed up by an audio-recording that would not otherwise be required but for the requirement in the ACO—directly to the Special Master to address, if appropriate. That is enforcement, even if the ACO itself

[8] If the *D.F.* Complaint was not filed in a timely manner, *see* ECF No. 3, Civil Action No. 2:26-cv-03788-BRM-AME (attached as Ex. 2 to *Supp. Reisman Decl.*), that is not due to any action or inaction of Class Counsel.

does not decree exactly how the Special Master should handle such a situation. That is part of the Special Master's role in creating the Compliance Plan that she will have the power to enforce.

Finally, the practical consequences of granting the cross-motion's request for relief only compounds the delay in relief to the class. Under the relief putative cross-movants seek, the Court would direct the parties to meet and confer on subclass boundaries, brief subclass structure, solicit and select new separate counsel for each newly-created subclass, re-notice the class, and potentially conduct a new fairness hearing, while in the interim permitting "targeted discovery, including responses to the pending Requests for Admission and such additional discovery as may be appropriate." *Opp*. at 40. That process is not a matter of weeks but of many months, or more, and for no legitimate purpose whatsoever. It merely creates delay.

During every one of those months, the Compliance Plan would not be developed, the Special Master would not be in place, and the continued non-compliance documented in the Fourth Compliance Monitor Report would persist. *See* ECF 637-1 at 7, 22. As the moving papers observe, and this Court has previously recognized, "once lost [time] can never be recovered." ECF 637-1 at 22 (quoting ECF No. 574 at 14). The cross-motion's practical effect is to defer the very enforcement mechanism the ACO delivers.

B. The "Refusal to Coordinate" Narrative Raises No Basis For Appointment of Separate Counsel for Subclasses

The opposition argues, "In a functioning class framework, collaboration between class counsel and court-appointed representatives is the mechanism through which accountability operates." *Opp.* at 26. That is true only as far as it goes; after appointment, Class Counsel is accountable to the Class *as a whole* and to the Court. "The attorneys themselves have an obligation to all of the class members, and 'when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs.'" *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (quoting *Pettway v. American Cast Iron Pipe Co.*, 576 F.3d 1157, 1176 (5th Cir. 1978)). Class Counsel's determination to negotiate and enforce the rights of Rule 23(b)(2) Class members based on their own independent judgment, rather than in some ongoing strategic partnership with withdrawn former class counsel, is wholly consistent with, if not required by, Class Counsel's independent fiduciary duty to the class as a whole under Rule 23(g)(4). *See In re Cendant Corp. Litig.*, 264 F.3d 201, 234–35 (3d Cir. 2001) (class counsel owes independent fiduciary duty to class). The fact that "Class Counsel has not and will not coordinate

enforcement strategy with RLG through" RLG's individual clients, *Opp.* at 26 n.3, is understandable given RLG's historical role in the litigation.[9]

C. The Strategic Disagreement of a Withdrawn Firm that No Longer Represents the Class About the Terms of the Amendment Does Not Render Class Counsel Inadequate

Stripped of its rhetoric, the opposition/cross-motion appears to be nothing more than a stated preference for a different remedy than the one Class Counsel negotiated, although the papers do not clearly identify the contours of the preferred remedy. But a strategic disagreement does not, in and of itself, establish inadequacy of representation. *Drennan v. PNC Bank, NA*, 622 F.3d 275, 305 (3d Cir. 2010) (citing *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) and *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) ("Representation is not inadequate simply because an attorney denied appointment as class counsel has

[9] On August 22, 2023, this Court entered an Order directing JRA to show cause why it should not be disqualified from continuing to represent both the B2 and B3 Classes, citing the Court's concern that JRA was "heavily invested in protecting its own interests, to the detriment of those of the class[es]." ECF No. 504 at 4 (quoting *Valenti v. Dfinity USA Research LLC*, No. 21-cv-06118, 2023 WL 3331310, at *4–5 (N.D. Cal. May 8, 2023)); ECF No. 509 (Transcript of Aug. 22, 2023 hearing). Rather than confront the Order to Show Cause about the Court's stated concern, JRA stipulated to withdraw as class counsel. ECF No. 515 ¶ 1. This Court rejected JRA's prior attempt to remove the current Class Counsel team. ECF No. 609 at 7 ("In the end, this motion does not set forth any viable complaint about the job that Class Counsel is doing to advance the Class's interests during the monitoring phase of the case and does not articulate any misconduct by Class Counsel, previous or ongoing, providing any basis to revisit the earlier Order appointing Class Counsel").

different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy.") (citation modified).

A motion for contempt is a vehicle to get relief – it is not an end in itself. The opposition offers no explanation as to why it would be in the best interest of the Class to engage in a lengthy contempt proceeding rather than accept the State's agreement to fund a Special Master right now, which is the relief specifically sought in the Complaint.

CONCLUSION

The Revised ACO is the enforcement mechanism that the Rule 23(b)(2) class secured through Class Counsel's invocation of the Original Consent Order's enforcement provision. The Revised ACO provides the B2 Class with the Special Master requested in the Second Amended Complaint, who will have (i) coercive authority, (ii) enforceable benchmarks, (iii) a direct channel for class members to report non-compliance, (iv) case-level intervention authority, and (v) *pro se* protections, and it does so without the delay, expense, and uncertainty of contested contempt litigation. The Revised ACO brings us now to the same place at which the parties arrived in other cases for systemic reform after lengthy contempt proceedings: an implementation plan that assigns specific responsibilities, personnel, resources, and tasks to be accomplished. *Gran Decl.* ¶ 31.

It is in the best interest of the Rule 23(b)(2) Class to approve the Revised ACO and allow enforcement to move into the next phase. Class Counsel[10] respectfully request that the Court approve the Revised Amended Consent Order filed with this Reply and Response to Cross-Motion.[11]

Dated: April 27, 2026

Respectfully submitted,

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[10] Defendants' Counsel will file separately joining in the portions of this brief relevant to their support of the Joint Motion to Approve the Consent Order.

[11] As stated above, the only change in the Revised ACO is ¶ 32, which, to avoid any confusion as to the Parties' intent, now states: "The provisions in Section XI are no longer applicable and this Revised Amended Consent Order will be enforceable in accordance with the rules of court."

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