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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

E.R.K., by his legal guardian
R.K.; R.T.D., through his
parents R.D. and M.D.; HAWAII
DISABILITY RIGHTS CENTER,
in a representative capacity on
behalf of its clients and all
others similarly situated,

Plaintiffs,

Case No. 10-00436 SOM-KSC

**PLAINTIFFS' STATUS
REPORT; CERTIFICATE OF
SERVICE**

DATE: June 2, 2015

TIME: 9:30 a.m.

JUDGE: Kevin S. C. Chang

vs.

DEPARTMENT OF EDUCATION,
State of Hawai'i,

Defendant.

**PLAINTIFFS' STATUS REPORT
RE: COMPENSATORY EDUCATION**

Plaintiffs submit the following report regarding the status of pilot group assessments and the status of the DOE's provision of services to the Class as a whole. Plaintiffs request guidance from the Court regarding several issues for which the parties have been unable to reach agreement.

I. Pilot Group Assessments

Assessments of the Pilot Group are underway. On May 13, 2015, Plaintiffs advised the DOE that, in accordance with the requirements for provision of compensatory education, the DOE must be prepared to make the following determinations in connections with the Pilot Group's assessments:

1. The current capabilities of each class member;
2. The class member's capabilities when he or she left school;
3. What is necessary to restore the class member to that level of functioning and to prepare him/her for

additional education and related services; and

4. What services are needed (and for how long) in order to advance the student's level of achievement to what it would have been if the student had received a proper FAPE up to age 22 without interruption (with special focus on the IDEA-required transitional services).

Further, Plaintiffs explained that an adequate offer of compensatory services must consist of a recommended program of services, from DOE and private providers as necessary, to bring the class member to the level he or she would reasonably have been expected to achieve today if the full complement of SPED had been properly provided to age 22.

The DOE did not respond to Plaintiffs' letter. Having received multiple similar inquiries from parents regarding the function of the assessments, class counsel compiled a list of questions reflecting the information being requested by parents. However, the DOE assessors refused to answer **any** questions—even basic ones regarding the scope and purpose of the assessments—and have repeatedly referred parents to Michelle Comeau, one of Plaintiffs' counsel, for answers to questions that only the DOE can answer.¹

¹ Plaintiffs also received reports from parents that the DOE was using assessors who had not been identified on the on the list previously provided by the DOE in February 2015. Plaintiffs followed up with the DOE and received a new list on Friday,

Additionally, certain Class Members/legal guardians have requested to have parents attend and observe the assessments of their children, and others have requested that class counsel be present. However, with the exception of one assessment of which Plaintiffs are aware, the DOE has unilaterally refused to permit observation, *even by parents*. Plaintiffs are unaware of any legal authority permitting a school district to close assessments in this manner, and it is counterproductive, as the purpose of proceeding in this fashion with respect to the Pilot Group is to provide a process that can be reviewed and improved before it is applied to the remainder of the Class. Plaintiffs ask the Court to clarify that the Class Members are entitled to request parents/guardians and class counsel be present during assessments.²

May 29, 2015, with a significant number of new assessors. Plaintiffs cannot determine from this list if all of the assessors are DOE staff, nor whether or not any are qualified to assess young adults.

² Class counsel has also been made aware of scheduling requests from the DOE that are excessively demanding. For example, E.R.K., the named plaintiff, was scheduled for several assessments that spanned seven working days over two weeks. Class counsel and the Class Members/families must have the ability to have an open dialogue with the DOE regarding these assessments in order to discuss issues such as this.

Nevertheless, Plaintiffs are not delaying or impeding assessments. All are proceeding as scheduled. Indeed, rather than hold things up, even where the DOE has refused to allow parents or their counsel to attend, parents and counsel have simply acquiesced and stepped aside.

II. Locating Remaining Class Members

Plaintiffs have asked the DOE to marshal the additional resources of other state agencies to track down the 70% of the Class that the DOE has so far failed to contact. The DOE has ignored that request. Plaintiffs have obtained an initial quote to obtain new addresses and phone numbers via a Lexis service, and will bring that material to the status conference.³ This case cannot advance with respect to the remaining Class Members without the DOE's acceptance of its responsibility to search for Class Members beyond simply providing long outdated addresses and phone numbers.

³ Plaintiffs are also waiting for the telephone numbers of the 48 Class Members who told Ward Research in January and February 2015—nearly *six months* ago—they wanted more information regarding the services available. The DOE has, to date, refused to provide those Class Members' phone numbers to class counsel, and so class counsel has been unable to follow up with these individuals.

III. Compensatory Services to Remaining Class Members

On Friday, May 29, 2015, the DOE submitted a draft letter that it proposes to send to Class Members. The problem with the DOE's letter was that it proposes to use outdated assessments (in violation of federal law) and gives no hint of the wide array of services that might be available to the Class Members. Rather, it implied that the DOE is only offering more of the same old same old to a group of people it mistreated in the first place.⁴

Although the DOE wants the Court to think otherwise, Plaintiffs have encouraged the DOE to provide appropriate continuous service to class members. Shortly after the Ninth Circuit ruled, the AG's office was told in a 9/7/2013 email from Paul Alston (emphasis added):

It is not our intention to hinder or delay the delivery of appropriate services, but for over 3 years the DOE has cheated children of appropriate services and based IEPs on the false premise that services ended at age 20. So, we are going to take all necessary action to undo that harm. **It is imperative that the class members now get their all services they are entitled to . . .**

⁴ In addition, it reflected a "one size fits all" approach, saying that the DOE would provide two years of service, when, in fact, courts customarily reject a "one for one" approach to compensatory education. As the D.C. Circuit explained, this "cookie-cutter approach runs counter to both the 'broad discretion' afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce." *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 523 (D.C. Cir. 2005).

Plaintiffs have asked the DOE to change the letter to offer services based on updated assessments and IEPs, as required by federal law. Plaintiffs also requested information regarding the DOE's plan to reach the Class Members.

Finally, as discussed in prior status conferences, the DOE has not provided Plaintiffs or the Court with information regarding several critical aspects of this case. In an effort to investigate the DOE's capabilities, planning, and funding with respect to the class, Plaintiffs have noticed a Rule 30(b)(6) deposition regarding the following matters:

1. Efforts taken since August 31, 2013, to extend Special Education and Related Services programs to students aged 20-22.
2. The amounts budgeted in Fiscal Years 2013-14, 2014-15 and 2015-16 for Special Education and Related Services programs to students aged 20-22; and the amounts expended to date for such services.
3. The DOE's capacity to provide services to persons aged 20-26 who are entitled to (a) special education and related services and/or (b) compensatory education.
4. How and where the DOE intends to provide services for Class Members aged 20-26 and what resources the DOE has—in terms of facilities, staff, and money—for that purpose.
5. The actual average per child cost to the DOE of Special Education and Related Services in Fiscal Years 2013-14, 2014-15, and the anticipated per child costs for

Fiscal Years 2015-16 and 2016-17.

This deposition will proceed on June 24, 2015, by agreement of the parties.

DATED: Honolulu, Hawai'i, June 1, 2015.

/s/ Michelle N. Comeau
PAUL ALSTON
KRISTIN L. HOLLAND
MICHELLE N. COMEAU
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date and method of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

Served electronically through CM/ECF on June 1, 2015:

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Attorneys for Defendant
DEPARTMENT OF EDUCATION

DATED: Honolulu, Hawai`i, June 1, 2015.

 /s/ Michelle N. Comeau
PAUL ALSTON
KRISTIN L. HOLLAND
MICHELLE N. COMEAU
Attorneys for Plaintiffs

DONNA AHUNA - Activity in Case 1:10-cv-00436-SOM-KSC P.-K. et al v. Department of Education, State of Hawai'i Status Report

From: <hid_resp@hid.uscourts.gov>
To: <hawaii_cmecf@hid.uscourts.gov>
Date: 6/1/2015 4:56 PM
Subject: Activity in Case 1:10-cv-00436-SOM-KSC P.-K. et al v. Department of Education, State of Hawai'i Status Report
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U.S. District Court

District of Hawaii

Notice of Electronic Filing

The following transaction was entered by Comeau, Michelle on 6/1/2015 at 4:56 PM HST and filed on 6/1/2015

Case Name: P.-K. et al v. Department of Education, State of Hawai'i

Case Number: [1:10-cv-00436-SOM-KSC](#)

Filer: M. D.
R. T. D.
Hawaii Disability Rights Center
E.R. K.

Document Number: [233](#)

Docket Text:

STATUS REPORT by M. D., R. T. D. (through his parents R.D. and M.D., for themselves and on behalf of a class of those similarly situated,), R. D., Hawaii Disability Rights Center, E.R. K.. (Attachments: # (1) Certificate of Service)(Comeau, Michelle)

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