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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

E.R.K., by his legal guardian R.K., R.T.D., through his parents R.D. and M.D.; HAWAI`I 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' MOTION RE IDENTIFICATION OF INTERESTED CLASS MEMBERS; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE OF WORD COUNT; DECLARATION OF MICHELLE N. COMEAU;

vs. DEPARTMENT OF EDUCATION, State of Hawai`i, Defendant.	EXHIBITS 1 – 28; DECLARATION OF ZACHARY M. DIIONNO; DECLARATION OF NOREEN KANADA; DECLARATIONS OF NINETEEN CLASS MEMBERS; CERTIFICATE OF SERVICE

PLAINTIFFS' MOTION RE IDENTIFICATION OF INTERESTED CLASS MEMBERS

Plaintiffs E.R.K., by his legal guardian R.K., R.T.D., through his parents R.D. and M.D., each individually and on behalf of all those persons similarly situated, and HAWAI`I DISABILITY RIGHTS CENTER, in a representative capacity on behalf of its clients and all others similarly situated (collectively, "Plaintiffs"), by and through their attorneys, Alston Hunt Floyd & Ing ("AHFI") and Hawai`i Disability Rights Center ("HDRC") (together, "Class Counsel"), respectfully request the Court to rule:

(1) The Class—which is defined as "all individuals residing in the State of Hawaii who [are] over the age of 20 on or before the first day of the school year (or who will imminently be over the age of 20 on that date) but under the age of 22 who are entitled to receive special education and related services from Defendant the Hawaii Department of Education under the Individuals with Disabilities [Education] Act"— includes all of the following: (a) those individuals who have been identified by Plaintiffs as "interested class members" (Exhibit 23), (b) the remainder of the 1,800 individuals identified by Defendant Department of

Education ("DOE") in 2014 (Exhibits 5-7) who (i) were born during the relevant time period, (ii) did not receive a regular diploma, and (iii) have not unequivocally refused compensatory education after being contacted by Plaintiffs; and (c) any others who are within the class definition but not identified by the DOE.

(2) The Class Members are entitled to appropriate notice. Because the DOE has not provided current and accurate contact information for the Class Members to Class Counsel, nearly 1,200 Class Members have not received proper notice of their rights, and they will be entitled to express their interest in receiving compensatory education services or a settlement until 45 days after successful efforts have been made to contact them and they have an understanding of the nature of the services or other relief that is available to them;

(3) The DOE should bear responsibility for (a) obtaining, at its cost and in cooperation with all sister agencies of the State of Hawai`i, current contact information for the Class Members who have not yet been contacted, (b) providing that contact information to Class Counsel; evaluating each Class Member's situation and offering a suitable array of compensatory services (or a court-approved alternative settlement) to every interested Class Member; and

(4) With respect to the DOE's challenge to various Class Members:

- All individuals previously identified by the DOE and to whom the DOE has not objected are Class Members.
- The individuals the DOE objects to as exiting prior to age 20 (marked "E" on Exhibit 23) are Class Members.

- Individuals the DOE claims are "too young" (marked "U" on Exhibit 23) are presumptively Class Members unless they received continuous services until they reached the age of 22 or they withdrew after the DOE properly and timely informed them of their right to receive services at age 20 and 21. The DOE has not demonstrated that it provided such notice with respect to any of the individuals listed on Exhibit 23.
- The DOE has waived its objections to pilot group member R.G.; otherwise, individuals born prior to July 1, 1988, are not Class Members.

This Motion is brought pursuant to Rules 7 and 23 of the Federal Rules of Civil Procedure and L.R. 7.2 of the Local Rules of the United States District Court for the District of Hawaii. This Motion is based upon the attached memorandum in support, the declarations and exhibits attached hereto, the files and records herein, and such further and additional matters as may be presented prior to and at the hearing on this Motion, all of which are incorporated herein by this reference.

DATED: Honolulu, Hawai`i, November 30, 2015.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

Plaintiffs,

vs.

DEPARTMENT OF EDUCATION, State of Hawai`i,

Defendant.

Case No. 10-00436 SOM-KSC

MEMORANDUM IN SUPPORT OF MOTION

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The Class Members have been awarded a highly valuable compensatory remedy[1] that could significantly impact their lives. Yet approximately 1,200 Class Members—two-thirds of the Class—have not yet been reached through an effective notice that enables them clearly to understand the nature and value of that remedy. As a result, only about one third of the 1,800 of Class Members have been asked to express interest, and they have been asked to do so based only on vague information regarding the nature of compensatory education, without any specifics regarding their entitlements. Given the significance of this remedy and the vulnerable status of the Class Members, due process and fundamental questions of fairness to absent Class Members preclude "closing" the opportunity to obtain compensatory services, as the DOE is requesting, until more Class Members have been reached and made aware of the services or settlement that is being offered to them.

[1] As Plaintiffs have noted previously, in 2010, the DOE spent more than $23,000 per year for each special education student, and these Class Members, who suffered from greater disabilities, likely cost the DOE more than that. *See* ECF No. 173-1 (Mem. Supp. Mot. for Compensatory Education) at 7 & Ex. B. In other words, that is the amount the DOE saved by the State's illegally excluding Class Members from school.

The DOE claims that it cannot budget for a resolution unless the Court shuts the door on those who have not yet signed up for services, but that is plainly wrong. The DOE is perfectly capable of budgeting for providing compensatory services to the 400+ interested individuals while continuing efforts to reach the remainder. It can also extrapolate from the responses to date to determine how many of the remaining 1,200+/- Class Members are likely to want compensatory services. Budget discussions for following years can include resources required to serve additional persons located in 2016, with a target date for final requests for services in 2017. Moreover, to speed up progress with respect to the Class Members who have not been reached, the Court should require the DOE to coordinate with other State agencies to locate Class Members and inform them of these benefits, as the DOE has access to significantly more information and resources than Plaintiffs and has an indisputable legal duty to serve all Class Members.

The DOE wrongly insists that two-thirds of the interested Class Members are not entitled to anything. With respect to "dropouts" and others who left school prior to age 20, the DOE's contention that these individuals are not Class Members is flatly contradicted by the agreed upon class definition, which Judge Mollway refused to modify nearly a year ago.

With respect to those the DOE claims are "too young" to be affected by Act 163, the DOE ignores the fact that many of these Class Members were

misinformed about their rights by the DOE because they left school before Act 163 was finally repealed in 2014 and they were never given full, complete and accurate information regarding their right to return, in violation of the IDEA and the DOE's own policies. The DOE's proposed blanket exclusion of these individuals should be rejected. Finally, the DOE has waived its objections to various other Class Members by failing to object timely to their inclusion in the Class.

Therefore, the Court should rule that:

(1) The Class—which is defined as "all individuals residing in the State of Hawaii who [are] over the age of 20 on or before the first day of the school year (or who will imminently be over the age of 20 on that date) but under the age of 22 who are entitled to receive special education and related services from Defendant the Hawaii Department of Education under the Individuals with Disabilities [Education] Act"— includes all of the following: (a) those individuals who have been identified by Plaintiffs as "interested class members" (Exhibit 23), (b) the remainder of the 1,800 individuals identified by Defendant Department of Education ("DOE") in 2014 (Exhibits 5-7) who (i) were born during the relevant time period, (ii) did not receive a regular diploma, and (iii) have not unequivocally refused compensatory education after being contacted by Plaintiffs; and (c) any others who are within the class definition but not identified by the DOE.

(2) The Class Members are entitled to appropriate notice. Because the DOE has not provided current and accurate contact information for the Class

Members to Class Counsel, nearly 1,200 Class Members have not received proper notice of their rights, and they will be entitled to express their interest in receiving compensatory education services or a settlement until 45 days after successful efforts have been made to contact them and they have an understanding of the nature of the services or other relief that is available to them;

(3) The DOE should bear responsibility for (a) obtaining, at its cost and in cooperation with all sister agencies of the State of Hawai`i, current contact information for the Class Members who have not yet been contacted, (b) providing that contact information to Class Counsel; evaluating each Class Member's situation and offering a suitable array of compensatory services (or a court-approved alternative settlement) to every interested Class Member; and

(4) With respect to the DOE's challenge to various Class Members:

- All individuals previously identified by the DOE and to whom the DOE has not objected are Class Members.
- The individuals the DOE objects to as exiting prior to age 20 (marked "E" on Exhibit 23) are Class members.
- Individuals the DOE claims are "too young" (marked "U" on Exhibit 23) are presumptively Class Members unless they received continuous services until they reached the age of 22 or they withdrew after the DOE properly and timely informed them of their right to receive services at age 20 and 21. The DOE has not demonstrated that it provided such notice with respect to any of the individuals listed on Exhibit 23.
- The DOE has waived its objections to pilot group member R.G.; otherwise, individuals born prior to July 1, 1988, are not Class Members.

II. FACTS

Plaintiffs brought this class action in July 2010 after the State of Hawai`i enacted Act 163, a law forcing special education students to exit school at age 20. *See* ECF No. 1; HRS § 302A-1134(c) (2010). Act 163 purported to terminate eligibility for education in the public schools for students who were twenty years of age or over on the first day of the school year.

The Plaintiff Class was defined by Judge Ezra in March 2011 to include:

> All individuals residing in the State of Hawaii who [are] over the age of 20 on or before the first day of the school year (or who will imminently be over the age of 20 on that date) but under the age of 22 who are entitled to receive special education and related services from Defendant the Hawaii Department of Education under the Individuals with Disabilities [Education] Act.

See Decl. Michelle N. Comeau ("Comeau Decl.") Ex. 1 at 2. The Class definition was later clarified by the parties' agreement with respect to the beginning eligibility date. *See* ECF No. 213 at 3-4 & Alston Decl. Ex. A thereto.

As the Court is aware, the Ninth Circuit ruled in 2013 that Act 163 violated the IDEA. *See E.R.K. ex rel. R.K. v. Hawaii Dep't of Educ.*, 728 F.3d 982 (9th Cir. 2013). A year after the Ninth Circuit's ruling, the State legislature repealed Act 163, thereby ensuring a right to continued special education services

for thousands of disabled young adults.[2] In August 2014, Judge Mollway ruled that the older Class Members, some 1,800 individuals, are entitled to "compensatory services to make up for the services missed as a result as that improper determination of ineligibility." *See* Comeau Decl. Ex. 2 at 2-3.

A. The DOE Refuses to Release Class Contact Information, Necessitating Multiple Motions to Compel

After the case was remanded back to the District Court, Plaintiffs sought to obtain the names of Class Members from the DOE. Shortly after the mandate issued, on October 1, 2013, the District Court conducted a status conference regarding the DOE's obligation to notify Plaintiffs of the decision. *See* ECF No. 142. However, by February 2014, the DOE had failed to notify any Plaintiff and was refusing to provide the identity and contact information of the Plaintiffs to Class Counsel. Plaintiffs were forced to make a motion on this issue, which was granted. *See* ECF No. 146 (*Motion to Compel*); ECF No. 155 (compelling DOE to release information).

In response, the DOE produced a list of 430 names, plus a list of 11 "opt outs," for a total of 441 individuals. The DOE later asserted that these names

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[2] *See* Legislative Reference Bureau, Bills Passed by the Hawaii State Legislature Regular Session of 2014 at 6, *available at* http://lrbhawaii.org/reports/legrpts/lrb/2014/passed14.pdf (SB 2134); http://lrbhawaii.org/reports/legrpts/lrb/2014/acts14.pdf (repeal effective July 7, 2014).

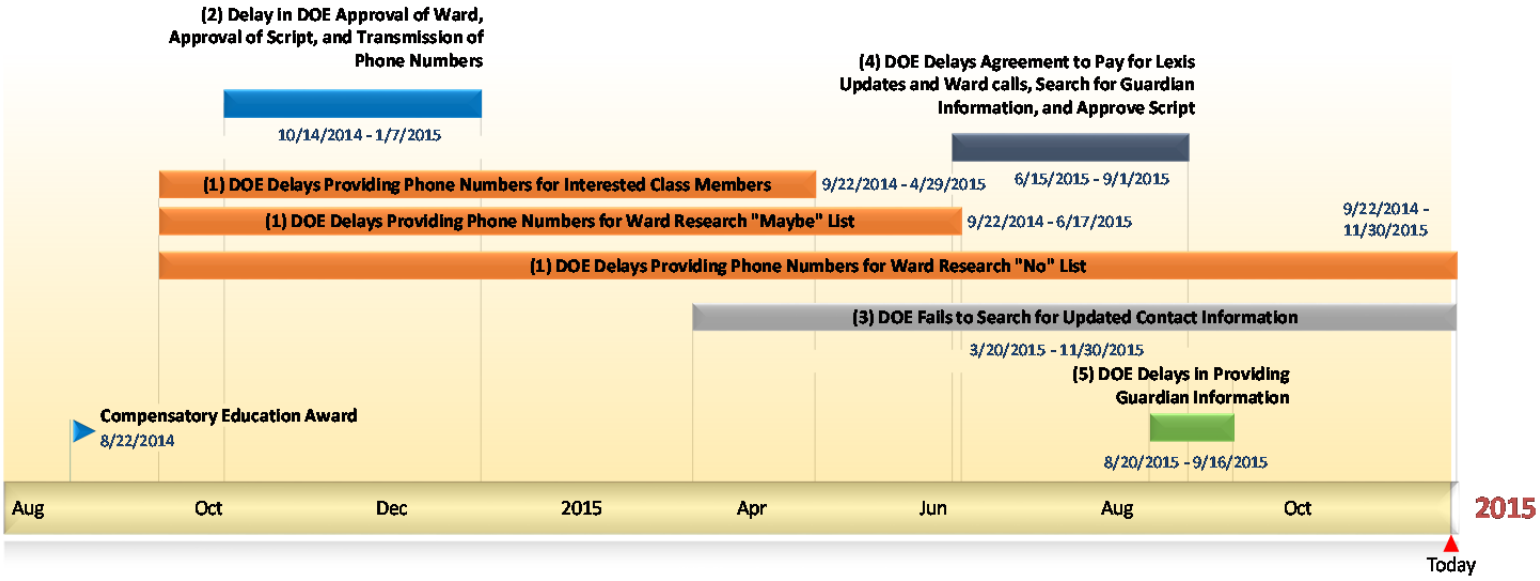
comprised the class. *See* Comeau Decl. Ex. 4 (7/21/14 Farmer Decl.) ¶ 34.[3] However, Plaintiffs have shown that the DOE's federally-mandated reports revealed upwards of 1,700 class members—including individuals who dropped out and those who received only certificates, instead of diplomas. *See* Comeau Decl. Ex. 3 (6/16/14 Alston Decl.) ¶ 6 & Exs. A & C thereto. Plaintiffs were again forced to make a motion to force the DOE to turn over all of the names, *see* ECF No. 171, and Plaintiffs' motion was granted in August 2014, *see* Comeau Decl. Ex. 2 (ECF No. 187).

B. The DOE Delays Efforts to Identify Interested Class Members

Judge Mollway ordered the DOE to produce the contact information for "all individuals who might have been affected by the DOE's age out calculation." Comeau Decl. Ex. 2 at 3. The Court also ordered the parties to work with Magistrate Judge Chang in identifying Class Members and "prompt class notification." *See id*. at 4. Between September and December 2014, the DOE produced 1,800 names and addresses to Plaintiffs. *See id*. ¶¶ 8-10 & Exs. 5-7. Plaintiffs sought to cooperate with the Court to facilitate "prompt class

[3] The DOE's federally-mandated reports show a total of 441 students exited because they reached the "maximum age" between the 2008-09 and 2012-13 school years. *See* Comeau Decl. ¶ 6 & Ex. 3. Presumably that is the list the DOE was using.

notification," but DOE delays repeatedly hindered notification to the Class, as follows:



(1) The DOE failed to provide the phone numbers for Class Members, and when Class Counsel requested the numbers, the DOE refused, insisting that phone numbers were not "contact information" under Judge Mollway's order. *See id.* ¶ 12.

Although Plaintiffs sent letters to the Class Members at the addresses provided and held a press conference to seek out Class Members, *see id.* ¶ 11, Plaintiffs were not able to provide the Class Members meaningful information about the breadth of the compensatory remedy because Plaintiffs lacked information about the actual services the DOE would provide/pay for.[4] The

[4] Class Counsel also maintains a website, which is similarly limited by the lack of concrete information regarding services.

response rate was low—less than 125 people called seeking information in response to the letters or the press conference. *Id*. ¶ 11.[5]

(2) Since Plaintiffs had no phone numbers and the response to letters was low, in mid-October 2014 the Court suggested the parties engage a third party calling service for which the DOE was supposed to advance the costs. Plaintiffs agreed to cooperate and even obtained the proposals. However, the DOE insisted on oversight over the script and delayed transmitting the phone numbers to Ward, which delayed the beginning of the calls until January 7, 2015. *See id*. ¶ 13 & Ex. 9.

Using two sets of calls between January and March 2015, Ward was able to reach only 388 Class Members or their families out of more than 1,700 phone numbers provided. *See id*. Ex. 12. Out of that group, fully 55% were interested and an additional 12% said they might be interested. *See id*. Unfortunately, approximately 1,300 Class Members could not be contacted, *see id.*, because the DOE had provided stale and inaccurate information.

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[5] Of this group, Plaintiffs selected a "Pilot Group" of individuals who agreed to be a part of the first round of assessments and offers, and presented their names to the DOE in December 2014. *See* Comeau Decl. ¶ 23 & Ex. 19. The Pilot Group was then assessed in May and June 2015. The DOE issued reports in August 2015 concluding that 15 out of 18 individuals, more than 80%, had no right to compensatory education.

(3) By March 2015, it was apparent the addresses and phone numbers provided for many Class Members were useless. The DOE made no effort to update the contact information it had provided, even though many Class Members have updated contact information with the Department of Health, Department of Human Services, and the Department of Public Safety. *See* HRS § 92F-19.

(4) Plaintiffs undertook efforts to update the information available indirectly, including contracting with Lexis to investigate potential updated contact information and contracting with Ward to make additional calls to new numbers found. *See* Comeau Decl. ¶ 16. Plaintiffs sought the DOE's cooperation with this effort on June 15, 2015, but the DOE refused because Plaintiffs refused to agree with the DOE's condition that this would be the final effort made to contact Class Members. *Id*. ¶ 16 & Ex. 13. With the Court's help, the DOE eventually agreed to pay for the search at the July 30, 2015 status conference. *See* ECF No. 251 at 4. Plaintiffs then waited weeks while the DOE looked for guardian information (which it failed to provide on schedule) and approved the script. *See* ECF Nos. 251 (promising information); Comeau Decl. Ex 17. These delays cost the Class two and a half months, as Ward was not able to begin its calls until early September 2015. *See* Comeau Decl. ¶ 18.

Lexis was able to locate updated contact information for only about 571 Class Members, *see id*. ¶ 17, leaving approximately 730 Class Members still in

the dark. Of the 571 potential respondents, Ward was able to reach only 123 people. Out of that group, 56% responded yes (50) or maybe (19). *See id*. Ex. 16.

(5) Plaintiffs waited until mid-September 2015 for the parent and guardian information Plaintiffs were expecting to be provided in August, and then learned upon receiving only 41 legal guardian names that the DOE never intended to provide anything other than the legal guardians that the DOE had in its system. *Id*. ¶ 20 & Ex. 17. Plaintiffs were again forced to search for updated contact information indirectly by working with Lexis.[6]

As the Court is aware, Plaintiffs have repeatedly requested the DOE's assistance in expediting this process by using the DOE's contacts within other State agencies, but the DOE has flatly refused.[7] Approximately **1,175** individuals have still not been reached. *See id.* Exs. 5-7 (1,800 names), Ex. 12 (388 contacted), Ex. 16 (123 contacted); *id.* ¶ 11 (122 responses to letters).[8]

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[6] Plaintiffs are actively seeking to identify additional interested Class Members through their parents and guardians via a search that by Lexis and Ward Research, and are continuing to follow up with Class Members who expressed confusion in their responses to a prior Ward Research. *See* Comeau Decl. ¶ 21; DiIonno Decl. ¶¶ 4-6.

[7] The DOE has the power to obtain records from other agencies under HRS § 92F-19.

[8] The "assistance centers" are not discussed here because they were **only offered** to "undisputed"; i.e., known and identified, Class Members and so did not contribute in any way to the effort to locate absent Class Members.

C. Costs Associated with Identification of Interested Class Members

Costs for the letters sent totaled $2,219.98. *See* Ex. 8. The cost of Lexis's updating of the Class Member contact information has totaled $2,173.60 to date. *See* Ex. 14. The costs for the Ward Research calls have totaled $19,413.61 to date. *See* Exs. 11, 15.[9]

D. The DOE Fails to Provide a Remedy to Any Class Member for Fifteen Months

The DOE, which was tasked with providing compensatory services more than a year ago, has access to much of the baseline information it needs to provide a remedy in the form of the full educational records of every Class Member. The DOE also has the power to obtain the records regarding current services it needs from sister agencies under HRS § 92F-19. Yet the DOE, by its own admission, has not developed or even taken basic steps toward preparing a comprehensive plan of services for the Class over the past 15 months. *See, e.g.*, Comeau Decl. Ex. 18 (9/2/15 Farmer Depo.) 187:4-13 (DOE has not contacted

[9] These costs are nominal compared to the fees associated with Class Counsel's efforts to cooperate with the DOE in reaching Class Members, discussed above. Class Counsel and the Court spent months undertaking a variety of time-consuming efforts to contact the Class Members in a manner acceptable to the DOE. As it turned out, these efforts to accommodate the DOE's concerns resulted in ineffective communication because intermediaries (like Ward Research) were placed between the Class Members and Class Counsel and because they relied on stale, and largely useless, contact information supplied by the DOE, which disclaimed any duty to get better information by coordinating with sister State agencies.

service providers), 196:25-197:25 (DOE has not planned to provided services or set aside money for services).

In fact, the DOE has not developed a program of services for **any** Class Member. To date, more than 400 individuals have expressed interest in receiving compensatory services. *See* Comeau Decl. Ex. 23. However, the DOE has evaluated only 18, and made minimal proposals for services to only three in August 2015 (concluding the other 15 were not entitled to compensatory education). *See* Comeau Decl. ¶ 24 & Ex. 20. Plaintiffs made counterproposals for several Pilot Group members in September 2015, but heard nothing back. *See* ECF Nos. 279 at 3, 282 at 2; Comeau Decl. ¶ 24. Over four weeks ago, Plaintiffs proposed a services matrix with a global range of services that could be offered to Class Members with varying disabilities; aside from cursory feedback, the DOE has failed to respond. *See* ECF Nos. 282 at 1, 289 at 4-5; Comeau Decl. ¶ 26 & Ex. 22.

III. ARGUMENT

A. The Class Should be "Closed" Only if it Includes the 1,800 Class Names Provided by the DOE

This lawsuit, like all class actions, is a representative litigation—class representatives and their counsel are litigating claims of absent class members and securing relief on their behalf in exchange for precluding the individual adjudication of those claims at a later time. *See Cooper v. Federal Reserve Bank*

of Richmond, 467 U.S. 867, 874 (1984) ("under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation"); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 378-79 (1996) (prior class action precluded subsequent suit).

Moreover, because this is a 23(b)(2) class, it is "mandatory"—meaning there is no opt-out right. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (noting that subsection (b)(2) classes are not given a right to opt out). This means that absent class members will be bound by the court's decision, even if they are unaware of it.

The DOE proposes that, after November 30, 2015, Class Counsel should stop trying to reach affected Class Members to determine if they are interested in participating,[10] and the list of interested class members should be capped. *See* ECF No. 283 (DOE 10/28/15 Status Report) at 3. This would leave only a group of 411 with any potential remedy. *See* Comeau Decl. Ex. 23. The

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[10] This is not, as the DOE has repeatedly termed it, "solicitation." *See, e.g.*, ECF No. 283 at 3. Every absent class member is treated as an existing client for purposes of communications with class counsel. *See generally* Manual for Complex Litigation, Fourth, § 21.33 ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel."). Moreover, as the DOE is well aware, the Class Member has *already won* the right to his or her remedy; the communications are to inform him or her of this fact.

DOE's proposal to "close the Class" as of November 30, 2015, is doubly unfair to the affected Class Members.

First, this is barely a quarter of the number of disabled Class Members who are entitled to a remedy in this action. The DOE provided approximately 1,800 names to Plaintiffs in 2014. *See id*. Exs. 5-7 (DOE lists of names). This number is consistent with the DOE's own statistics (as reported to the U.S. Department of Education) tracking the number of students who were prematurely terminated based on age (either with or without receiving a certificate), or who dropped out.[11] *See* Comeau Decl. Ex. 3 (6/16/14 Alston Decl.) ¶ 6 & Exs. A & C thereto; *see also* ECF No. 288-1 (summarizing updated statistics through 2014 showing the DOE prematurely terminated services to more than 1,182 individuals who "reached maximum age" or received a certificate and listed more than 500 SPED students as dropouts). Yet only approximately 600 of these individuals have been reached to date.[12] *See* Comeau Decl. ¶¶ 11 & Exs. 12, 16. The DOE's

[11] Although the DOE seeks to exclude individuals born after August 5, 1993, and individuals who left school before reaching the age of 20, neither of these limitations are appropriate. *See* Part III.F.-G., below.

[12] As discussed in Part III.C.1., below, due process for special needs groups such as this Class constitutes more than simply the letter or publication that would ordinarily be sufficient; verbal communication with Class Members, armed with basic information about what they will actually be receiving, is essential to providing Class Members notice of the substantial benefit they have won.

proposal, therefore, effectively excludes nearly 1,200 absent Class Members from the benefit of the Court's grant of compensatory education.

Secondly, although the absent Class Members were wronged by Act 163, **none of these individuals** would have any right to bring his or her own lawsuit, because the resolution of this suit would preclude them from doing so. *See Matsushita*, 516 U.S. at 378-79. The DOE has offered no justification for this patently unfair result other than a generalized complaint about "delaying the resolution" of this litigation and a claimed inability to obtain settlement authority or offer compensatory services because it does not know the number of Class Members. *See* ECF No. 283 (DOE 10/28/15 Status Report) at 3; ECF No. 289 (11/10/15 DOE Status Report) at 4-5.

The DOE is not so paralyzed. There are more than 400 individuals who have expressed interest in receiving services, and Plaintiffs have proposed a services matrix that can guide the provision of services to those individuals. *See* Comeau Decl. Exs. 22-23. The DOE should anticipate that the 200 or so Class Members who are incarcerated will also desire services. *Cf. id*. ¶ 25. Services can and should be budgeted and offered to those individuals while contact efforts continue for the remainder of the Class. This will allow those who have been waiting for services to receive their remedy, while providing a concrete template for the hundreds of remaining Class Members to understand the remedy they have been awarded. At this point in the litigation, therefore, the Class should be

"closed" only if it includes all Class Members entitled to a remedy by Judge Mollway's order—including the 1,800 individuals whose names were provided by the DOE (subject to corrections and additions, as noted herein).[13]

B. The DOE Has Needlessly Delayed Identification of Interested Class Members Through Its Insistence on Ineffective Contact Methods and Through Its Failure to Obtain More Up to Date Contact Information

Over the past 13 months Plaintiffs have cooperated with the Court in various time-consuming efforts to contact the Class Members that were all hindered by the same thing—stale and incomplete contact information the DOE provided from years-old student files. Plaintiffs agreed to this process because: (1) they believed that the DOE, which is charged with providing special education to eligible children in this state, would act in good faith to assist in this effort; (2) Plaintiffs wanted to avoid motion practice as long as it appeared possible to work cooperatively, as the Court preferred; and (3) they hoped that the indirect methods, which have been successful in other types of class actions, would be successful here. Unfortunately, these efforts did little to meet the Class Members' needs.

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[13] The Class listing should also include those eligible individuals who were not on the DOE's 2014 lists but who subsequently approached class counsel as a result of outreach efforts; those individuals are already listed on the "interested class member list." *See* Comeau Decl. Ex. 23.

Plaintiffs were and are entitled to full contact information—including phone numbers. However, the DOE has consistently refused to provide them despite Judge Mollway's order, needlessly interfering with Class Counsel's ability to contact the Class even as it became clear that verbal communications with the Class Members were critical to the decision to participate for many. *See* Comeau Decl. ¶¶ 11-12, 31, & Exs. 9, 12; DiIonno Decl. ¶¶ 5-6.

Efforts to cooperate with the DOE in using a DOE-approved script with a third party call service to reach Class Counsel's own clients (in exchange for the DOE's promise to advance the costs of the search and calls immediately) resulted in five months of delays due to DOE stalling on the scripts, the process, and the parent/guardian contact information. *See* Comeau Decl. ¶¶ 13-20 & Exs. 9-17.

As Plaintiffs have scrambled to seek out updated contact information indirectly through a database service with limited success, the DOE has failed to undertake even basic inquiries to try to update the stale contact information by contacting its sister agencies which maintain updated contact information on Class Members because these agencies regularly interact with them. Indeed, when an employee of one of these agencies volunteered to help locate more than 10% of the class who were incarcerated and are therefore under the direct control of the State, the Attorney General's office ordered him to stop shortly after Plaintiffs reported this information in a status report. *See* Comeau Decl. ¶ 25 & Ex. 21.

The Class Members should not be punished for the DOE's delays and attempts to obstruct Class Counsel. Instead, the DOE should now be forced to undertake a coordinated effort with other agencies *to actually reach the remaining Class Members.* The Class should not close until these additional efforts have been made to reach the remaining individuals.

C. Interested Class Members Should Not Be Denied the Right to Participate While Efforts Are Ongoing to Reach Them and While the Class Members Are Unaware of What Will Be Available to Them

1. Due Process Requires Notice Procedures Tailored to the Unique Circumstances of this Class

The Court should deny the DOE's proposal because it needlessly violates due process rights of the absent Class Members by risking the preclusion of their claims without actual notice to the Class Members of their right to compensatory education.[14] "The core of due process is the right to notice and a

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[14] Due process to absent class members "plays a pivotal role" in courts' analysis of preclusion, both in the context of ordinary and representative actions. Bassett, Debra Lyn, "Just Go Away: Representation, Due Process, and Preclusion in Class Actions," 2009 B.Y.U. L. Rev. 1079, 1097 (2009); *see, e.g.*, *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process ...."); *Foster v. St. Jude Medical, Inc.*, 229 F.R.D. 599, 604 (D. Minn. 2005) ("Because the judgment in a class action has claim preclusion (res judicata) implications ... for the absent class members, due process requires that the interests of absent members be adequately represented by the named class members." (alteration in original)); *Morgan v. Ward*, 699 F. Supp. 1025, 1034 (N.D.N.Y. 1988) (limitations on the (continued...)

meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). The Court has ordered that Class Members receive notice of their right to compensatory education. Those that cannot be reached will lose the opportunity to participate in the remedy phase of this litigation, including receiving an offer of compensatory services, as well as the ability to be informed of and either agree or object to a potential settlement of their claim.

Due process comprises more than merely a written notice for special needs groups such as the disabled, the elderly, or those without means or education. The adequacy of process is determined "with reference to the characteristics of the group who have to use it." *Gray Panthers v. Schweiker*, 652 F.2d 146, 166 (D.C. Cir. 1980); *see also Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."). "[P]articularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence." *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652-53 (2d Cir. 1999).

(...continued)

preclusive effect of a class action "are necessitated ... by the due process problems raised when the judgment preclusion doctrines are applied to class members who were unaware that their membership in the class could foreclose subsequent actions to recover money damages").

For example, in the context of welfare recipients, the Supreme Court emphasized the importance of oral communications over written submissions for a population that generally lacks education or professional assistance. *Goldberg*, 397 U.S. at 268-69; *accord Gray Panthers*, 652 F.2d at 165-66 (written notices to elderly, disabled beneficiaries resolving their benefits claims held constitutionally deficient because of the affected population's unfamiliarity with legal notices and processes; urging oral notice on remand). In *Memphis Light v. Craft*, 436 U.S. 1 (1978), the Court required a utility company to explain the procedures available for challenging a bill in a way that could be understood by the company's "lay consumers" with varying levels of education and experience. *See id*. at 14 n.15. In *Covey v. Town of Somers*, 351 U.S. 141 (1956), the Court found notice of a foreclosure by publication in a newspaper to be unconstitutional with respect to a known incompetent. *See id*. at 146-47.

The responses in this case by disabled class members and their families are entirely consistent with this principle. It is not disputed that many Class Members, former special education recipients who were unable to complete high school by age 20, are disabled. For those who cannot work because of their disability, they will also be surviving on limited means. Indeed, some are homeless. *See* DiIonno Decl. ¶ 7. Based on the estimate provided by the State's Corrections Education Specialist, likely 11% (200/1,800) are incarcerated. *See* Comeau Decl. ¶ 25.

Unsurprisingly, therefore, the legal notices published by the DOE in the newspaper yielded only 22 returning Class Members. *See id*. Ex. 4 (6/21/14 Farmer Decl.) ¶ 27. Letters sent out by Plaintiffs—to addresses that were several years old—yielded only 122 responses out of 1,800 letters sent. *See* Comeau Decl. ¶ 11. A personal phone call from Ward Research, by contrast, even using a prepared script, yielded response rates of 56%-67% potentially interested among those individuals who were reached. When class counsel followed up with calls to individuals who said "no," and the individuals were able to take the time they needed to understand the lawsuit and the concept of "compensatory education," fully a third of the individuals who had told Ward they were not interested in receiving services decided to participate. DiIonno Decl. ¶ 6.

Unfortunately, the fact remains that there are substantially more eligible Class Members than have been reached to-date.[15] Plaintiffs are therefore actively seeking to identify interested Class Members through their parents and guardians via a search currently being conducted by Lexis and Ward Research,[16] and are continuing to follow up with Class Members who expressed confusion or

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[15] The largest known group is likely the incarcerated class members. Plaintiffs fully expect that nearly all members of this group will want services: what else do they have to occupy their time? The DOE does not deny it is obligated to serve this group, but it is unclear how the State will meet this obligation.

[16] This search became necessary only because the DOE refused to provide parent information in September 2015. *See* Comeau Decl. ¶ 20.

uncertainty in their responses to a prior Ward Research. *See* Comeau Decl. ¶ 21; DiIonno ¶¶ 5-6. These continuing efforts are necessary and entirely appropriate under the circumstances of this case, where the remedy granted offers a particularly valuable entitlement to a group of largely disabled individuals. *Cf. Hansberry v. Lee*, 311 U.S. 32 (1940) (Due Process requires that the notification procedure "fairly insure[] the protection of the interests of absent parties who [were] to be bound by it"); *Goldberg*, 397 U.S. at 268-69; *Gray Panthers*, 652 F.2d at 165-66. Indeed, as discussed below, the DOE should bear the burden of identifying interested Class Members.

2. The Class Should Not Close Until Class Members Are Better Informed of the Services or the Settlement Available to Them

There are likely to be additional individuals who will express interest if and when it is known what services will be available to them. Their lack of knowledge is caused by the DOE's inaction over the past 15 months; the Court should not prevent these Class Members from obtaining relief.

Given the fact that the Class Members were deprived of one to two years of education, and given the yearly estimated cost of more than $23,000, *see* ECF No. 173-1at 7 & Ex. B, the value of the services made available to individual Class Members is significant. However, Class Counsel has not been able to be specific in its communications with Class Members with respect to exactly what services will be offered beyond the basic requirements of compensatory education

for this Class—that the services are designed to make up for what was taken away, that they will not involve returning to the DOE, and that they are free. *See, e.g.*, Comeau Decl. Ex. 10 (Ward Research call script).

Those Class Members and families that have taken the time to call class counsel—a fraction of those who are eligible Class Members—have consistently demonstrated confusion as to whether the services involve returning to high school, how the services will interact with services they currently receive, and what type of services will be available to them. Comeau Decl. ¶ 31; Decl. Zachary DiIonno ¶ 5; Decl. Noreen M. Kanada ¶ 5. As one settlement administrator has observed in the context of a settlement fund, the value of the perceived benefits to the class member is a "key driver of claims-filing rates. A class member must feel the benefits being offered are worth the time and effort required to file a claim." Allen, Tiffany, "Anticipating Claims Filing Rates in Class Action Settlements" (quoted in *De Leon v. Bank of Am., N.A. (USA)*, 2012 WL 2568142, at *19 (Apr. 20, 2012)). Class Counsel's inability to provide specific information to Class Members regarding the actual benefits they are likely to receive has undoubtedly served to deter otherwise eligible Class Members from claiming the compensatory services they have been awarded.

The DOE bears the blame for this confusion. The DOE—which was tasked with actually providing the compensatory services more than a year ago—has not made any significant progress in offering a remedy to any Class Member.

The DOE's deponent, Debra Farmer, admitted during her deposition that the DOE had not contacted any service providers, planned for services, or set aside any money for compensatory services to the older Class Members since Judge Mollway's order. *See* Comeau Decl. Ex. 18.

As the Court is aware, the Pilot Group process resulted in the DOE's conclusion in July and August 2015 that 80% of the Pilot Group was not entitled to any remedy (despite the Court's order) and suggesting two months to one year of limited tutoring and counseling for the other three people. *See id.* Ex. 20. Plaintiffs made counterproposals to several of the DOE's proposals in September 2015, but heard nothing back. *See* ECF Nos. 279 at 3, 282 at 2; Comeau Decl. ¶ 24.

Plaintiffs then prepared a services matrix proposing a global range of services that could be offered to Class Members with varying disabilities, but again, received only cursory feedback and no meaningful response. *See* Comeau Decl. ¶ 26; Ex. 22 (Services Matrix); ECF No. 289 at 4-5. This lack of information—obviously—has worked to the DOE's benefit, as the DOE is now seeking to close the class and thereby presumably retain the funds it would

otherwise have had to expend on providing compensatory services for the absent class members.[17]

Finally, because this is an IDEA case, Class Counsel have never advised the Class Members to expect a damages remedy as opposed to services. *See* Comeau Decl. ¶ 31; DiIonno Decl. ¶ 8; Kanada Decl. ¶ 6. In light of the parties' discussions with the Court at recent status conferences, it now appears, however, possible that the remedy, if it takes the form of a settlement, may include a monetary component. It would be patently unfair to the Class if a settlement in this nature was reached but was available only to those who had claimed a right to compensatory education services, which is a very different remedy.

In sum, given the significant value associated with the remedy being offered to the Class Members, the apparent necessity of verbal contact with Class

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[17] This result is the equivalent of a "claims made" process with a reversion provision in the settlement context—a "questionable feature" of some proposed settlement agreements whereby class members receive their remedy only by affirmatively submitting claims, and the defendant retains whatever funds are not claimed by class members. It is well-recognized that a reversion clause, combined with a claims process, "creates a financial disincentive on the Defendants' part to seek out Class Members and pay claims." *See Childs v. United Life Ins. Co*., No. 10–CV–23, 2012 WL 1857163, at *4 (N.D. Okla. May 21, 2012); *Small v. Target Corp*., 53 F. Supp. 3d 1141, 1143-44 (D. Minn. 2014); *In re TJX Cos. Retail Sec. Breach Litig*., 584 F. Supp. 2d 395, 405 (D. Mass 2008) (("[I]n a reversionary common fund or a claims-made settlement, the defendant is likely to bear only a fraction of the liability to which it agrees."); *see generally* Newberg on Class Action § 12:18 ("Necessity for a claiming process", discussion of risks of reversion clauses and the negative effect of a claiming process on a defendant's actual liability).

Members, and the Class Members' understandable confusion with respect to the benefits that they will ultimately receive, the Court should not unnecessarily cut short Class Members' right to receive a remedy.

D. The DOE, as a Department of the State of Hawai`i, Should Be Responsible for Finding the Missing 1,200 Class Members and Identifying Those Interested in Participating in Services or Settlement

The DOE has been ordered to provide a remedy to the older Class Members. ECF No. 187. The DOE has access to the records of all of the other agencies of the State of Hawai`i. HRS § 92F-19. This includes tax records, Medicaid records, and records associated with state benefits (including assistance payments and benefits provided by the Division of Vocational Rehabilitation, among others). Plaintiffs have no such access. At this point in the case, the best way to reach the remaining class members is through information that is truly up to date, provided in a manner that is designed to reach Class Members where they actually are and in a manner that allows them to ask questions. The State is well-positioned to make this effort; Plaintiffs are not. For example, a jointly-crafted explanation of the right to compensatory education services could be provided by a Class Member's DOH case manager. The prison system could utilize its Corrections Education Specialists to meet with incarcerated Class Members. At a minimum, the Department of Taxation could provide the DOE with actual, current contact information for Class Members that could be used to contact those missing

Class Members whose updated contact information was not available to Lexis's data sources.[18]

E. The DOE Has Waived Its Objections to the Unobjected-to Class Members

Plaintiffs have received objections to 231 Class Members. *See* Comeau Decl. ¶¶ 29-30 & Ex. 23. Plaintiffs request the Court deem the remaining names supplied by the DOE, for whom the DOE failed to submit any objections over the past year, to be members of the Class.

F. "Dropouts" and Others Who Exited Prior to Age 20 Are Class Members

The DOE objects to approximately one-third of the interested Class Members, contending they are not Class Members at all because they exited school prior to age 20 and were therefore (the DOE claims) not affected by Act 163. The DOE's motion on this issue was already heard and rejected in January 2015, *see*

[18] Indeed, the DOE currently performs community outreach via "Operation Search," its campaign to identify children in need of special education services. *See* Comeau Decl. Ex. 25 (Operation Search brochure). The DOE also understands the need to coordinate with other agencies when working with the disabled population, as Operation Search itself involves referrals to the Department of Health and the Department of Human Services for individuals over 22 seeking services. *See id*. Although Operation Search does not reference the present lawsuit, its website may have generated calls by Class Members to the DOE, the DOH, or the DHS. Plaintiffs have received no information from the DOE about any such calls.

ECF No. 220, and the DOE has offered no reason for this Court to revisit the Court's determination.

In December 2015, the DOE moved to "modify" the Class with a limitation that individuals who exited school six months or more prior to the age of 20 be deemed presumptively ineligible. ECF No. 200 ("Motion to Modify the Class Definition"). This would include dropouts and individuals who exited with certificates of completion. *See id*. at 2-3. Under the DOE's plan, the individual would have the burden of rebutting the presumption if he or she desired services. *Id.* at 5. Judge Mollway heard arguments on the motion and denied it from the bench. *See* ECF No. 220.

Such a proposal, as the DOE correctly recognized, would have modified the class definition. The current Class includes:

> All individuals residing in the State of Hawaii who [are] over the age of 20 on or before the first day of the school year (or who will imminently be over the age of 20 on that date) but under the age of 22 who are entitled to receive special education and related services from Defendant the Hawaii Department of Education under the Individuals with Disabilities [Education] Act.

Plainly, this definition does not exclude individuals who exited school prior to reaching the age of 20.

Indeed, it is undisputed that every special education student who left the DOE without earning a regular diploma is entitled at any time to return and seek to continue his or her education until he or she turns 22. *See* 20 U.S.C.

§ 1412; 34 C.F.R. §§ 300.101, 300.102. The DOE is required to provide services upon request. The DOE is also required to notify students of their right to return each year. *See* Ex. 7 (6/21/14 Farmer Decl.) ¶¶ 18-20; Ex. 28 (6/24/15 Farmer Depo.) 71:8-15; 81:20-82:2. However, once Act 163 was adopted, that right was cut off for students age 20 and 21, and special education students became "ineligible" at age 20 because—and only because—of Act 163.

Indeed, even before these students "aged out" at 20 under Act 163, they were sent false and misleading annual letters ("FAPE Letters") that failed to advise the students that they continued to be eligible to receive special education; instead, they were told they would "no longer be eligible for special education" and "will no longer receive this notice" if the recipients did not respond before a date early in the school year. *See, e.g.*, Ex. 27 (sample FAPE letters). The letters also misrepresented to students that they would lose their right to seek special education if they did not respond within days of receiving the form letter, in contravention of the IDEA's mandate that SPED be made available to all disabled children. *See* 20 U.S.C. § 1412; 34 C.F.R. § 300.101. After age 20, of course, they received no letters because Act 163 did not allow them to enroll.

Judge Mollway denied the DOE's motion to modify the class definition by presumptively excluding individuals who exited school prior to age 20. The DOE's renewed attempt to mount the same objections consists of nothing more than a spreadsheet listing "E" next to 119 individuals who dropped out,

received certificates, or otherwise left school prior to being forced to leave.[19] *See* Comeau Decl. Ex. 23. No new facts or law supports the DOE's renewed attempt to modify the class definition to exclude these individuals. The Court should therefore deem the individuals identified on Exhibit 23 who are objected to as "E" to be Class Members eligible for compensatory education.

G. The DOE Has Failed to Demonstrate that Class Members Born After the DOE's Cutoff Date of August 5, 1993, Are Excluded from the Class and Ineligible for Compensatory Services Through This Case

According to the DOE, all Class Members who turned 20 after August 5, 1993 (the start of the 2013-14 school year) would not have been affected by Act 163 and are therefore ineligible for compensatory services. *See id*. Ex. 24(8/4/15 C. Siu Ltr.) at 1; *id.* Ex. 25 (10/9/15 C. Siu Ltr.). This proposed blanket exclusion is flawed because it fails to acknowledge that the DOE **never told** many Class Members who left school prior to fall 2013 that they had a right to return at ages 20 and 21, and when they left school they would have been told that their eligibility terminated at age 20. Therefore, the fact that these Class Members did not turn up at their home schools looking for re-enrollment in 2013 or 2014 should not disqualify them from seeking compensatory services in this lawsuit.

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[19] The DOE has disputed all but one of these individuals solely on the basis that the Class Members left school prior to age 20. *See id*. Ex. 23. Therefore, if the Court finds in Plaintiffs' favor on this issue, these individuals should be deemed "undisputed."

The IDEA does not simply assume that everyone knows the law and will seek out the FAPE to which they are entitled. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) (the IDEA does not permit school districts to simply wait for parents to demand special instruction). Instead, the IDEA imposes an affirmative obligation on school systems to "ensure that all children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in in need of special education and related services, are identified, located, and evaluated." *Id*. at 519; 20 U.S.C. § 1412(a)(3XA).

The duties to identify, evaluate, and determine eligibility for disabled children are collectively known as the "Child Find" obligation. The Child Find mandate applies to all children who reside within a State, including those who attend private schools and public schools, highly mobile children, migrants, the homeless, and wards of the state. 20 U.S.C. § 1412(a)(3). It is a well-established right under the IDEA. *See, e.g., DL v. District of Columbia,* ___ F. Supp. 3d ___, 2015 WL 3630688 (D.D.C. June 10, 2015) (granting summary judgment to plaintiff class for violations of Child Find by school district through 2007 and finding genuine issues of fact precluded summary judgment to district for later timeframe).

Consistent with this, the DOE's policy is to send a letter **every year** to special education eligible individuals to advise them that they can come back to school. *See* Comeau Decl. Ex. 4 (6/21/14 Farmer Decl.) ¶¶ 18-20. A sampling of

these letters is attached. *See id*. Ex. 27. As discussed above, the letters are plainly misleading—suggesting that the former student has only a short period to respond otherwise he or she will no longer be eligible for a FAPE.

Many of the Class Members being challenged by the DOE as "too young" left school when they were 17 or 18, in 2011 or 2012. *See, e.g*., Decl. K.C.[20] Act 163 was in effect, and so if they had any understanding at all regarding their right to return to school (which they may not have), they would have understood that this right terminated at age 20.

After that point the DOE was obligated by the IDEA and its own policies to advise these Class Members that they were eligible to return to school until they reached the age of 22. However, many Plaintiffs and their families received **no** such notification or, at best, received a confusing and misleading notice.[21] They remained unaware that they had any rights or eligibility under the IDEA at age 20 or 21.

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[20] In support of this motion, Plaintiffs submit 19 declarations that represent a sampling of the Class Members who are objected to as "too young." In nearly every case, the Class Member, who had left school while Act 163 was in effect, received no notice advising him or her, or their parents, regarding eligibility to return to school at age 20 or 21. Those who did receive a notice were confused by the language.

[21] And the DOE has acknowledged that the FAPE letters were not sent to individuals over age 20 until August 2014. *See* Ex. 4 ¶¶ 18-20.

Other Class Members plainly were excluded based on their age, even in 2014. For example, M.P., who attended school on Maui, turned 20 during the 2013-14 school year. In the spring of 2014, he was required to leave school because, he was told, he had "aged out." Decl. W.P. ¶ 4.[22] Plainly, the DOE's contention that all individuals who were born on or after August 5, 1993, were not affected by Act 163 is wrong.

Therefore, the Court should reject the DOE's proposed cutoff date for "underage" Class Members. Given the DOE's failure to notify these Class Members of their rights, they should be presumptively eligible for compensatory education unless they received continuous services until they reached the age of 22 or the DOE properly informed them of their right to receive services at age 20 and 21. The DOE has not demonstrated this with respect to any of the individuals listed on Exhibit 23.[23]

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[22] Act 163 was still in effect at this time, as the law was not repealed until July 2014.

[23] Act 163 formalized a pre-existing policy by the DOE force special education students to leave school at age 20. *See B.T. ex rel. Mary T. v. Dep't of Educ.*, 637 F. Supp. 2d 856, 865 (D. Haw. 2009) (declaring prior policy to be "blatant discrimination in violation of the IDEA and Section 504 of the Rehabilitation Act of 1973"). Pilot Group member R.G. was one of those individuals, who aged out under the prior policy and turned 22 just prior to the implementation of Act 163. *See* Decl. R.G. ¶¶ 1-3. He understood he was part of this Class because what had happened to him was the same as what had happened to the other Class Members. *See id*. ¶¶ 3, 8. He and his mother participated in the Pilot Group assessments and expended over 12 hours in connection with that exercise alone, not to mention time

(continued...)

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant its motion and permit the Class Members to continue to continue to identify themselves as interested in receiving compensatory education services or a settlement until additional, successful efforts have been made to reach the nearly 1,200 absent Class Members and until the Class Members have an understanding of the nature of the services or other relief that is being offered. Plaintiffs request the Court clarify that the DOE, not Plaintiffs, bears responsibility for identifying interested Class Members. Finally, Plaintiffs request the Court rule that those individuals who are listed on the attached "interested class members" list are class members, subject only to the limitations discussed above.

(...continued)

spent in meetings and other communications with counsel. *See id*. ¶¶ 5-7. The DOE was given his name as a part of the Pilot Group, and never objected to R.G. until August 4, 2015. *See* Comeau Decl. ¶ 28 & Exs. 19, 24. This is a textbook example of the doctrine of waiver, as the DOE's inaction caused R.G. and his mother to expend time and resources and it would have been a simple matter for the DOE to raise any objection it had in December 2014 when it received R.G.'s name along with just 21 others in the Pilot Group. Other than R.G., Plaintiffs have agreed with the DOE that individuals born prior to July 1, 1988, are not Class Members.

Finally, with respect to the handful of class members objected to as allegedly "not interested," "IDEA-ineligible/revoked eligibility", "graduated," "refused offer," or "settled claims," the DOE has failed to produce documents or other evidence in support of these claims to date. The Court should determine that the DOE has forfeited these objections.

DATED: Honolulu, Hawai`i, November 30, 2015.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

Plaintiffs,

vs.

DEPARTMENT OF EDUCATION, State of Hawai`i,

Defendant.

Case No. 10-00436 SOM-KSC

CERTIFICATE OF WORD COUNT

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.5, I hereby certify that the Memorandum in Support of PLAINTIFFS' MOTION RE IDENTIFICATION OF INTERESTED CLASS MEMBERS was typed using 14-point, Times New Roman font and contains 8,994 words, exclusive of case caption, table of contents, table of authorities, exhibits, declarations, certificates of counsel, and certificate of service.

DATED: Honolulu, Hawai`i, November 30, 2015.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

E.R.K., by his legal guardian R.K.; R.T.D., through his parents R.D. and M.D.; HAWAI'I DISABILITY RIGHTS CENTER, in a representative capacity on behalf of its clients and all others similarly situated,

Plaintiffs,

vs.

DEPARTMENT OF EDUCATION, State of Hawai`i,

Defendant.

Case No. 10-00436 SOM-KSC

DECLARATION OF MICHELLE N. COMEAU

DECLARATION OF MICHELLE N. COMEAU

I, MICHELLE N. COMEAU, do hereby declare that:

1. I am an attorney with the law firm of Alston Hunt Floyd & Ing ("AHFI"), counsel for Plaintiffs in this matter.

2. Unless otherwise stated, I make this Declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

3. I make this Declaration in support of Plaintiffs' *Motion re Identification of Class Members*.

4. Attached hereto as **Exhibit 1** is a true and correct copy of the *Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification*, ECF No. 31, filed March 15, 2011.

5. Attached hereto as **Exhibit 2** is a true and correct copy of the *Order Granting in Part and Denying in Part Plaintiff's Motion for Award of Compensatory Education and Appointment of Special Master*, ECF No. 187, filed August 22, 2014.

6. Attached hereto as **Exhibit 3** are true and correct copies of the Declaration of Paul Alston (ECF No. 173-2), Exhibit A (ECF No. 173-3), Request for Judicial Notice (ECF No. 173-5), and Exhibit C (ECF No. 173-6), which were previously submitted by Plaintiffs in support of their *Motion for Award of Compensatory Education and Appointment of Special Master* on June 16, 2014. Exhibit C, as explained in the Request for Judicial Notice, represents portions of the DOE's federally-mandated reporting to the U.S. Department of Education regarding its special education population for the 2008-09 school year through the 2012-13 school year. The sum of the "reached maximum age" rows on each page of Exhibit C is 441 students.

7. Attached hereto as **Exhibit 4** is a true and correct copy of the Declaration of Debra Farmer (ECF No. 176-1), which was previously submitted by Defendant in support of its *Opposition to Plaintiff's Motion for Award of Compensatory Education and Appointment of Special Master* on June 21, 2014.

8. Attached hereto as **Exhibit 5** is a true and correct redacted copy of a September 24, 2014, listing of names provided by Adam Snow, counsel for Defendant, along with Mr. Snow's transmittal letter. (An unredacted copy is concurrently being filed under seal.)

9. Attached hereto as **Exhibit 6** is a true and correct redacted copy of a November 12, 2014, listing of names provided by counsel for Defendant, along with Mr. Snow's cover email. (An unredacted copy is concurrently being filed under seal.)

10. Attached hereto as **Exhibit 7** is a true and correct redacted copy of a December 31, 2014, listing of names provided by Kunio Kuwabe, counsel for Defendant, along with Mr. Kuwabe's cover email listing the total number of names provided as 1,800. (An unredacted copy is concurrently being filed under seal.)

11. After receiving each of these lists, my office sent out letters to the Class Members. Attached hereto as **Exhibit 8** are true and correct copies of the invoices associated with the mailing of these letters. Plaintiffs also held a press conference regarding the letters being sent out on or about September 29, 2014. I am informed and believed based on my office records of Class Member responses that 122 individuals responded to the letter or press conference to provide their interest in participating in compensatory education.

12. The DOE did not provide telephone numbers with its lists. I requested the phone numbers from the DOE multiple times, including via email on October 29, 2014, via letter on November 4, 2014, via phone (with Adam Snow) on November 10, 2014, via letter on November 14, 2014, and via email on December 4, 2014. In January 2015, the DOE, via its counsel Harvey Henderson, indicated the DOE would not provide phone numbers. Attached hereto as **Exhibit 9** are true and correct copies of the written correspondence discussed above (without attachments).

13. In mid-October 2014 the Court suggested the parties engage a third party calling service for which the DOE was supposed to advance the costs. Plaintiffs agreed to cooperate. Plaintiffs obtained proposals from Ward Research and two other firms. The DOE insisted on oversight over the script. Exhibit 9, above, contains the parties' discussion regarding revisions to the script. Attached hereto as **Exhibit 10** is a true and correct copy of the final version of the script.

14. Ward Research made its "Round 1" and "Round 2" calls in January, February, and March 2015. Attached hereto as **Exhibit 11** are true and correct copies of the invoices from Ward Research associated with the calls.

15. Attached hereto as **Exhibit 12** are true and correct copies of the emails from Becki Ward and Margarita Ayala of Ward Research to Class Counsel and counsel for the DOE, reporting on Ward Research's calling results in February 2015 and March 2015. Plaintiffs have not included the various spreadsheet attachments listing calling results for each Class Member because they are lengthy; however, Plaintiffs will produce this information if the Court would like.

16. Attached hereto as **Exhibit 13** are true and correct copies of correspondence between myself and counsel for the DOE between June 15, 2015, and June 18, 2015, regarding Plaintiffs' proposal to use Lexis to attempt to update contact information for missing Class Members.

17. In August 2015, Plaintiffs contracted with Lexis Nexis's Accurint service to run updates on the stale contact information. After the search was complete, my office provided the results to Ward Research and requested that Ward advise how many "new" phone numbers were obtained. Based on information provided by Ward, I am informed and believe that Lexis obtained additional information for 571 Class Members. Attached hereto as **Exhibit 14** is a true and correct copy of the invoice for the August 2015 Lexis search.

18. Ward Research made its "Round 3" calls in early September 2015. Attached hereto as **Exhibit 15** is a true and correct copy of the invoice from Ward Research associated with the calls.

19. Attached hereto as **Exhibit 16** is a true and correct copy of an email dated October 2, 2015, from Margarita Ayala of

Ward Research to Class Counsel and counsel for the DOE, reporting on Ward Research's calling results in September 2015. Plaintiffs have not included the various spreadsheet attachments listing calling results for each Class Member because they are lengthy; however, Plaintiffs will produce this information if the Court would like.

20. Attached hereto as **Exhibit 17** is a true and correct copy of an email and redacted attachment I received from DOE counsel Ryan Roylo, dated September 16, 2015, regarding contact information for guardians of Class Members. The list Mr. Roylo provided contains 41 names. I did not realize until I received this email that the DOE never intended to provide parent information since Class Counsel had filed multiple status reports regarding the delayed receipt of "parent and guardian" information and the DOE had never objected or clarified. Mr. Roylo subsequently confirmed that the DOE would not provide parent information.

21. My office is presently working with Lexis and Ward Research to update information regarding Class Members' parents and to place calls to those individuals. As of the date of this declaration, Lexis had completed its search and Ward Research was

reviewing the information to determine what contact information is new and what is a duplicate.

22. On September 2, 2015, I attended the deposition of Debra Farmer, Defendant's Rule 30(b)(6) witness. Attached hereto as **Exhibit 18** is a true and correct copy of the transcript of the deposition.

23. The "Pilot Group" consists of 18 individuals who volunteered to participate in the initial round of assessments and service offers. My office initially provided these names to counsel for the DOE on December 4, 2014. Four other individuals' names were provided as well, but they did not participate in the Pilot Group. Attached hereto as **Exhibit 19** is a true and correct redacted copy of the list provided to the DOE on December 4, 2014. (The unredacted copy is concurrently being filed under seal.) The DOE did not object to any individuals on the list.

24. In May and June 2015, the Pilot Group members were assessed. In August 2015, the DOE issued reports proposing services. The Court has previously been provided copies of these reports. Out of the 18 reports, 15 reported that "An additional 2 years of education would not produce alternate results,"

"Compensatory services are not needed to remedy a free appropriate public education that was not provided," and the Class Member is "not entitled to compensatory education services." Attached hereto as **Exhibit 20** is a true and correct redacted copy of one of these reports with this language on page 6 and 7 (the other 14 have identical language), as well as true and correct redacted copies of the three reports that did offer compensatory services. Although Plaintiffs submitted counterproposals for K.C., V.C., J.C.C., and K.S. on September 28, 2015, and for M.P. and G.R. on October 6, 2015 (these were also submitted to the Court on those dates), Plaintiffs have received no response from the DOE to these counterproposals.

25. In September 2015, I was contacted by a Corrections Education Specialist employed by the Department of Public Safety, who offered to help locate incarcerated Class Members. After looking at the first half of the Class Member list, he reported that 97 Class Members appeared to be incarcerated. I then reported in a status report that Plaintiffs have learned approximately 200 Class Members are or were incarcerated and that Plaintiffs were working to identify and contact those

individuals. *See* ECF No. 279 at 5. When I emailed him the following week to find out the status of the search, the employee told me he had been ordered by the Attorney General's office to stop searching for Class Members. Attached hereto as **Exhibit 21** is a true and correct copy of my October 28, 2015, email to the employee, and his response.

26. On October 29, 2015, Plaintiffs proposed a services matrix with a global range of services that could be offered to Class Members with varying disabilities. Attached hereto as **Exhibit 22** is a true and correct copy of this services matrix. The DOE provided cursory feedback in a status report, *see* ECF No. 289 at 4-5, but has not provide a response to the matrix.

27. Attached hereto as **Exhibit 23** is a true and correct redacted copy of a spreadsheet listing the Class Members who have expressed interest as of November 16, 2015, along with my cover email to DOE counsel of that date. (An unredacted copy is concurrently being filed under seal.) This is the most recent listing of Class Members who have expressed interest.

28. These names have been provided to Defendant on a rolling basis as they were received. I transmitted a list of 115

individuals on December 4, 2014. On June 16, 2015, I transmitted an updated list (306 interested individuals) to the DOE. On August 4, 2015, I received a letter from DOE counsel Carter Siu, regarding objections to certain of these Class Members based on age. Attached hereto as **Exhibit 24** is a true and correct redacted copy of that letter. (An unredacted copy is concurrently being filed under seal.) This was the first objection the DOE made to Pilot Group member R.G.

29. In August 2015, my office compiled all the interested Class Member names received to date and provided the list in a spreadsheet format to Defendant so that Defendant could list its objections. On October 9, 2015, counsel for Defendant supplied its objections to those names (231 people), and marked 93 people as "undisputed." Attached hereto as **Exhibit 25** is a true and correct redacted copy of the DOE's objections. (An unredacted copy is concurrently being filed under seal.) Plaintiffs examined the DOE's objections and subsequently removed five Class Members. Exhibit 23 reflects the DOE's responses and Plaintiffs' updates.

30. I emailed the DOE updated versions of this list on September 29, 2015, October 19, 2015, and November 16, 2015.

Other than the October 9, 2015, objections, Plaintiffs have received no other objections from the DOE to this list.

31. I communicate regularly with Class Members, individually and via group communications. I have never advised the Class Members to expect a damages remedy. When I speak with Class Members, I have found many do not understand they are entitled to compensatory education services from the DOE even though they are no longer in high school, that these services are in addition to what they may be receiving already, and that they will not have to go back to their high school campus in order to get these services.

32. Attached hereto as **Exhibit 26** is a brochure for the DOE program "Operation Search." I obtained this brochure on November 30, 2015, from the DOE website's "Special Education" page, at http://www.hawaiipublicschools.org/TeachingAndLearning/SpecializedPrograms/SpecialEducation/Pages/home.aspx.

33. Attached hereto as **Exhibit 27** are true and correct redacted copies of FAPE letters from the DOE dated September 16,

2013, September 16, 2014, and May 1, 2015, which were provided to my office and HDRC by former special education students.

34. I attended the deposition of Debra Farmer on June 24, 2015. Attached hereto as **Exhibit 28** is a true and correct copy of excerpts from the deposition transcript of Debra Farmer, Defendant's Rule 30(b)(6) witness, taken on June 24, 2015.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai`i, November 30, 2015.

/s/ Michelle N. Comeau
MICHELLE N. COMEAU