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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

E.R.K., by his legal guardian R.K., et. al,

Plaintiffs,

vs.

DEPARTMENT OF EDUCATION, State of Hawai‘i,

Defendant.

CIVIL NO. 10-00436 SOM-KSC

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION WITH REGARD TO EFFORTS IN IDENTIFYING CLASS MEMBERS [ECF NO. 297]; DECLARATION OF DEBRA FARMER; CERTIFICATE OF SERVICE

Hearing:
Date: January 27, 2016
Time: 9:30 a.m.
Judge: Hon. Kevin S.C. Chang

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION WITH REGARD TO EFFORTS IN IDENTIFYING CLASS MEMBERS

I. DISCUSSION

A. Federal Rules of Evidence Do Not Apply to This Court-Created Procedure

The main argument advanced by Plaintiffs to exclude their clients' education records is that they were not properly authenticated under the Federal Rules of Evidence. Plaintiffs do not challenge the educational records based on lack of "trustworthiness," relevance, or that the information contained therein, including birthdates, the date the student exited the public school system or the reasons for exiting, is inaccurate; rather, Plaintiffs seek to prohibit this Court from knowing more about these potential class members and why they should be excluded from participating in the remedial phase on this class action lawsuit. The problem with Plaintiffs' argument is that the Federal Rules of Evidence do not automatically apply to the current court-created process.

Plaintiffs are treating this case as if it will inevitably lead to numerous district court trials on the merits of each potential class member's claims. If that were the case, then the Federal Rules of Evidence may be applicable. The reality is that there cannot be a trial on the merits because Plaintiffs' class action complaint is over and Plaintiffs have already received the injunctive and

declaratory relief that they sought.[1] If compensatory education was sought in the underlying complaint, as Plaintiffs have continually claimed, then Plaintiffs were duty bound to introduce evidence of injury and/or need for compensatory education at that time. This was not a bifurcated trial that reserved the right to litigate the issue of damages at a later date. There was only one trial to resolve all issues and claims. Because Plaintiffs did not introduce any evidence substantiating the needs of each and every class member at trial, they are forever barred from introducing any evidence on the issue of compensatory education. Again, if Plaintiffs believe that the rules of evidence apply, then their claims are barred because they failed to produce any evidence at trial where the issue of liability and damages should have been litigated to judgment. In the alternative, if Plaintiffs want to explore the possibility of a class-wide settlement, then they must acknowledge that there will be no trial and the rules of evidence do not apply.

The Department has thus far agreed to participate in this court-created process in order to explore the possibility of a class wide settlement. The Department has nevertheless always maintained that the proper forum for determining individualized awards of relief is the administrative process mandated by the IDEA.[2] Congress did not confer jurisdiction upon district courts under the

[1] This case, for all intents and purposes, is moot.

[2] The rules of evidence do not apply in IDEA due process hearings. The U.S. Supreme Court recognized that "IDEA hearings are deliberately informal and

IDEA to award relief in the first instance; rather, the IDEA regulations are clear that district courts act as appellate courts. 20 U.S.C.A. § 1415(i)(2). If the matter is not adjudicated through the administrative process, any claim presented to the district court must be dismissed for failure to exhaust administrative remedies. Cataluna v. Vanderford, 2014 WL 7148723, at *3-4 (D. Haw. Dec. 12, 2014); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1300 (9th Cir. 1992). A party aggrieved by a decision rendered in the administrative process can appeal to the district court by filing a complaint. Thereafter, the district court is given jurisdiction to perform the following acts:

> **(i)** shall receive the records of the administrative proceedings;
> **(ii)** shall hear additional evidence at the request of a party; and
> **(iii)** basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C.A. § 1415(i)(2)(C). The available relief does not include compensatory damages. As noted by the Ninth Circuit Court of Appeals:

> It does allow district courts to "give all 'appropriate relief,' but absent legislative history suggesting the contrary, such a phrase is usually construed as a mere grant of jurisdiction ... and not of authority to award

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intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence." Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 61, 126 S. Ct. 528, 536-37 (2005).

> retrospective damages," *id.* (quoting 20 U.S.C. § 1415(e)(2)), whether they be compensatory or nominal. We thus conclude that dissatisfied plaintiffs such as Oman may not bring a claim for nominal damages under the IDEA.

C.O. v. Portland Pub. Sch., 679 F.3d 1162, 1167 (9th Cir. 2012).

Because the parties have engaged in proceedings that are outside the normal court and administrative process, there is no requirement that the federal rules of evidence apply, especially for purposes of this motion which is intended to update the Court on the efforts made to date in locating and identifying class members.

If the Court believes that the federal rules of evidence apply to this proceeding, the Department submits the declaration of Debra Farmer to authenticate the exhibits "P" – "R." The exhibits are also admissible under the "catchall" exclusion of Rule 807, Federal Rules of Evidence (FRE) as the trustworthiness of the educational records have not been challenged, the records are being used to challenge the class member status of disputed potential class members; its contents are probative and relevant to the determination of class member status, serves the general purposes of the Rules of Evidence[3] and is in the interests of justice. United States v. Bachsian, 4 F.3d 796, 798 (9th Cir. 1993).

[3] FRE Rule 102 states: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."

As for Exhibit "M," the Court wanted the costs associated with the process of identifying and locating potential class members. Whether it is properly authenticated is not the issue; the issue is that the Court requested this specific information and it was provided by the Department for informational purposes and nothing else. There is no reason why Plaintiffs should be challenging this exhibit as its contents are not germane to the discussion of whether Plaintiffs have satisfied their burden to establish Article III standing or whether the class should close on January 29, 2016. This exhibit is clearly not the "centerpiece" of the Department's motion.

B. Any Delay in Providing Compensatory Education Rests with Plaintiffs Pursuit of Class-Wide Remedies for Individual Class Members With Individual Needs

The Department has been made out to be the "bad guy" responsible for the alleged delay in providing compensatory education to potential class members. Plaintiffs, however, conveniently fail to mention the handful of class members already receiving compensatory education. These class members filed individual due process hearings requests and received awards of compensatory education by an administrative hearings office. This is the process that the IDEA mandates, but what Plaintiffs actively seek to avoid.[4] As detailed in the Department's

[4] The Department is interested in resolving these claims in a class-wide settlement, if possible. However, the incessant blame for the delay in providing compensatory education is unwarranted because any class member could have filed their own

Memorandum In Opposition to Plaintiffs' Motion Re Identification of Interested Class Members, Rule 23(b)(2) class actions are not appropriate for claims of individualized relief and yet Plaintiffs are proceeding as if it is.

Plaintiffs also advance the argument that the Department, and not Plaintiffs, has the burden of proof. As Plaintiffs state in their opposition, "[i]nstead of embracing its obligations and taking the lead in providing services, [the Department] has, throughout, shifted the burden of going forward to the Class Members." *See* Memo in Opp at pgs. 18-19. There is no citation to any case law to support this legal position. Nor are there citations refuting what is established law in IDEA cases, that "[a]bsent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." Schaffer, 546 U.S. at 57-58, 126 S. Ct. at 534-35. The U.S. Supreme Court clearly states that Plaintiffs, as the party seeking relief, bears the burden of persuasion. Plaintiffs have been reminded this time and time again but for some undisclosed reason do not believe that the law applies to them. Because Plaintiffs are waiting for someone else to satisfy Plaintiffs' burden, they are the true cause of any delay experienced in this case.

Plaintiffs' claim that the Department is in contempt of Judge Mollway's order because potential class members have not been provided with compensatory

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individual claim for compensatory education after the Ninth Circuit Court's decision was rendered in August 2013.

education lacks any basis in fact or law. Judge Mollway specifically stated that "there will, of course, need to be further decisions on what procedure to follow to provide compensatory education to class members." Those further discussions with Judge Mollway have not occurred and there has been no procedure established to provide compensatory education to class members. Thus, the current focus is not on the provision of compensatory education but who qualifies as a class member.

Moreover, the pilot group was an experiment and all parties were aware of that fact. It was believed that a small sampling would provide insight into how this case could be resolved on a class-wide basis. However, the pilot group experiment showed that resolution of these claims was more difficult and complex than previously thought. The Department and Plaintiffs do not agree on what is an appropriate compensatory education award, and there is no court-process created to resolve those differences. As stated previously, because Judge Mollway has yet to determine what that process will be, the Department cannot be blamed for the lack of any resolution.[5] Despite the impasse, Plaintiffs have conducted informal discovery on the pilot group members and recently completed two days of face-to-face interviews of various Department of Health case managers. The interviews

[5] As this Court is aware, the Department made a previous settlement offer that included the provision of IEP services. That settlement offer was rejected and it is unsure whether individual potential class members were made aware of the settlement offer and were provided the opportunity to accept or reject it.

did not provide insight into what would be a proper award of compensatory education for each pilot group member. Instead, it simply clarified the services listed on the pilot group members' individual service plans.

Furthermore, individual potential class members cannot blame the Department for their lack of compensatory education and/or services. Plaintiffs have decided that resolution of individual and distinct claims can be dealt with in a class-wide settlement, contrary to what FRCP Rule 23(b)(2) class actions are intended to accomplish, and asking that the burden of persuasion shift to the Department. Once Plaintiffs understand that their actions/inactions are causing the delay, or that a prolonged litigation was inevitable, then this case has a chance to move forward.

C. Objections to New Class Members

Plaintiffs' objection to the Departments' recent dispute over 46 newly identified potential class members is baseless. Plaintiffs have called people from the various Ward Research lists and have somehow convinced them to become interested potential class members. These new potential class members trickle in here and there. The Department indicated its objections to those newly identified, yet disputed, potential class members based on the formula that it has used in the past – if you are too young or too old you are not a class member. Others required more research into their educational files. All of this takes time, and the

Department believes that it gave fair notice to Plaintiffs of the objections. Ultimately, Plaintiffs' argument boils down to this: the Department should tell Plaintiffs who are the "newly" disputed class members and if not then the Department forfeits its rights to challenge their eligibility. This type of argument clearly shows why Plaintiffs are the cause of the delay in this case – they continually ask the Court to order the Department to do Plaintiffs' work for them. Plaintiffs have many attorneys, law clerks, and paralegals that have already over-staffed this case. The list that the Department worked off of came from Plaintiffs and the Department will not do what amounts to clerical work for Plaintiffs.

D. Speculative Injury is Not Injury in Fact for Article III Purposes

Plaintiffs have the burden of establishing that each potential class member has Article III standing, including class members who dropped out of school prior to turning 20. Dicion v. Mann Mortgage, LLC, No. CIV. 13-00533 JMS-KS, 2014 WL 1366151, at *3 (D. Haw. Apr. 4, 2014). Article III standing is not satisfied with allegations of injury; nor can the alleged injury be speculative, hypothetical or conjectural injury or even allegations of injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136-37 (1992); Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1100 (9th Cir. 2000)(Speculative injury insufficient to establish Article III standing).

Here, Plaintiffs attempt to establish Article III standing by claiming, without supporting legal authority or citations, that they were "denied the opportunity to receive services." This is insufficient and speculative. In order to establish Article III injury, each disputed potential class member must establish that they were deterred from and/or prevented from returning to school after age 20 because of Act 163. Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1136-37 (9th Cir. 2002)("[U]under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury"]. Judge Mollway also alluded to this requirement by stating that the drop-outs will need to prove causation. *See* Department's Exhibit A0095-96.

Plaintiffs have not submitted any evidence of any real injury in response to the Department's motion.[6] At a minimum, Plaintiffs were required to submit some evidence from each disputed class member to establish their Article III standing. Without it, those disputed potential class members have no standing and are not part of this class action.

[6] An award of compensatory education is an equitable remedy, and Courts are free to take into consideration the plaintiff's conduct, including whether or not he/she dropped out of school prior to filing a claim. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116, 1131 (10th Cir. 2008). In the Garcia case, the Tenth Circuit Court of Appeals upheld a district court ruling denying an award of compensatory education to a student who had attendance problems and dropped out of school.

E. Individuals Who Were Eligible to Attend School for the 2013-2014 School Year Did Not Suffer Any Injury Because of Act 163

Plaintiffs attempt to confuse and interject issues that are not related to the underlying lawsuit in an attempt to create Article III standing for those who were eligible to attend school for the 2014-2015 school year but for whatever reasons chose not to attend.[7] The facts, however, clearly establish that potential class members who were 20 years old or younger prior to the 2014-2015 school year (e.g. August 1, 2014), could not have been impacted by Act 163 because the law was revised/repealed approximately one month prior to start of the 2014-2015 school year. In other words, there is no causation between Act 163 and these individuals dropping out of school for 2014-2015 school year. This group of individuals simply cannot establish Article III standing.

F. The Department Has Not Waived its Rights to Exclude R.G.

Plaintiffs admit there are potential class members that are too old to have been impacted by Act 163. R.G. is among those who are too old but Plaintiffs

[7] Plaintiffs' FAPE letter claims are speculative and unsubstantiated by any declarations or other type of reliable evidence. And, even if real -- which the Department denies -- those claims are not part of the underlying lawsuit and cannot be used now to create a claim. Plaintiffs' "failure to inform" claim also does not appear in the underlying complaint; nor is there any law cited in the memorandum supporting this invented claim. Even assuming that the Department has a duty to inform all students of changes of all education laws -- which the Department denies -- Plaintiffs only submitted 14 declarations from "underage" potential class members that make that claim. A vast majority of "underage" potential class members did not submit their declarations and they should automatically be excluded from this class.

claim that the Department has waived its rights to exclude him from the class. The Department cannot waive this Court's subject matter jurisdiction and R.G.'s obligation to establish Article III standing. R.G. participated in the pilot project because Plaintiffs wanted him to be there. The Department agreed to engage in the experiment in hopes that it would lead to a class wide resolution. During the process, it was discovered that R.G. was too old and Plaintiffs were told of this objection. Simply put, there is no waiver.

As for A.D., Plaintiffs' counsel should be aware that his claim was resolved and he attended Loveland through age 22 on "stay put." C.T. also remained in school until he aged out at 22 years old. *See* Exhibit Q0009. Both cannot be considered class members without any evidence refuting their records.

G. Plaintiffs Failure to Contact Their Clients is an Impediment

Plaintiffs are unable to convince their clients to sign FERPA consent forms for the release of their records. FERPA consent is not a barrier erected by the Department, but a requirement imposed by the federal government. FERPA ensures that an individual's protected educational records are provided only to those people authorized to receive and review them. The hesitation and/or refusal exhibited by some of the "interested" potential class members is an indication that they do not want to share their educational records with class counsel. That is the barrier, and the Department plays no part in that process.

The window of opportunity for potential class members to indicate true willingness to participate in the process cannot be unlimited. A January 29, 2016 deadline for Plaintiffs to obtain FERPA consent forms is more than generous and afforded Plaintiffs' counsel over a year to contact and obtain the necessary consents/authorizations to prosecute their individual claims. The Department therefore requests that its motion be granted.

III. CONCLUSION

Based on the foregoing, the Department of Education seeks a finding and determination that: (1) despite the Department not having the burden, it made reasonable efforts and spent considerable time and money in identifying interested potential class members; (2) the pool of interested potential class members be closed as of November 30, 2015; and (3) the Plaintiffs' are required to submit signed FERPA consent forms by January 29, 2016.

Dated: Honolulu, Hawai'i, January 13, 2016.

/s/ Carter K. Siu
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Attorneys for Defendant
DEPARTMENT OF EDUCATION
State of Hawai'i

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

E.R.K., by his legal guardian R.K., et. al, Plaintiffs, vs. DEPARTMENT OF EDUCATION, State of Hawai'i, Defendant.	CIVIL NO. 10-00436 SOM-KSC DECLARATION OF DEBRA FARMER Judge: Hon. Kevin S.C. Chang

DECLARATION OF DEBRA FARMER

I, Debra Farmer, do hereby declare that:

1. I am the head of the Special Education Section of the Hawai'i Department of Education (Department).

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth.

3. As part of the current class action lawsuit, my office has been asked to locate and produce the educational records of potential class members.

4. A potential class members' educational records are stored in physical files.

5. If a record was generated electronically, an electronic copy of that record would be stored on the Department's computer database.

6. Each school is responsible for inputting certain information into the Department's database, including a student's name, date of birth, address, student identification, date of admission, date of exit, and an assigned exit code.

7. The aforementioned information is contained in a form entitled Student Profile, which can be printed from the database.

8. All of the educational records and information are kept and maintained by the Department in the course of its regularly conducted administrative activities.

9. I am very familiar with Department's educational record keeping system, both in physical files and in the electronic database.

10. Under my direction, my department searched for and located the educational records relevant to each identified potential class member, including any records and information contained within the Department's data base.

11. I oversaw the collection of records relevant to former students identified as "disputed" by the Department of the Attorney General.

12. I have reviewed the records that were attached as Exhibits "P," and those are true and correct copies of educational records that the Department located and provided to the Department of the Attorney General's office.

13. I have reviewed the records that were attached as Exhibits "Q," and those are true and correct copies of educational records that the Department located and provided to the Department of the Attorney General's office, including payment information for student A.D. to attend Loveland Academy through age 22. df

14. I have reviewed the records that were attached as Exhibits "R," and those are true and correct copies of educational records that the Department located and provided to the Department of the Attorney General's office.

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawai`i, January 13, 2016.

/s/ Debra Farmer
Debra Farmer
Administrator, Special Education Section
DEPARTMENT OF EDUCATION
State of Hawai'i

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

E.R.K., by his legal guardian R.K., et. al,

Plaintiffs,

vs.

DEPARTMENT OF EDUCATION, State of Hawai'i,

Defendant.

CIVIL NO. 10-00436 SOM-KSC

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 16, 2016, a true and correct copy of **DEFENDANT'S MOTION WITH REGARD TO EFFORTS IN IDENTIFYING CLASS MEMBERS** was duly served electronically through CM/ECF on the following at their last known address:

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Dated: Honolulu, Hawai‘i, January 13, 2016.

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

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District of Hawaii

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Case Name: P.-K. et al v. Department of Education, State of Hawai'i
Case Number: 1:10-cv-00436-SOM-KSC
Filer: Department of Education, State of Hawai'i
Document Number: 317

Docket Text:
REPLY re [312] Memorandum in Opposition to Motion,, *Defendant's Reply Memorandum in Support of Motion with Regard to Efforts in Identifying Class Members [ECF No. 297]; Declaration of Debra Farmer; Certificate of Service* filed by Department of Education, State of Hawai'i. (Attachments: # (1) Declaration Debra Farmer, # (2) Certificate of Service)(Siu, Carter)

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