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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

Case No. 10-00436 SOM-KSC

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

DATE: July 23, 2015

TIME: 9:15 a.m.

JUDGE: Kevin S. C. Chang

vs.

DEPARTMENT OF EDUCATION,  
State of Hawai'i,

Defendant.

**PLAINTIFFS' STATUS REPORT REGARDING  
THE DOE'S PROVISION OF COMPENSATORY EDUCATION**

Plaintiffs submit the following report regarding the status of the DOE's provision of compensatory services to the Class.

**I. ASSESSMENT REPORTS FOR THE PILOT GROUP**

The DOE provided the Pilot Group reports (18 total) to Plaintiffs between July 13-17, 2015. The Reports were completed between June 9-23, 2015. The DOE has not explained why the reports were withheld from its counsel and Plaintiffs' counsel for several weeks.

In any event, the Court has received copies of the reports as well for its confidential, in camera review. Plaintiffs are working with their experts to review and analyze the assessments and provide alternative recommendations for services, and will update the Court on the status of this process at the status conference. Their preliminary evaluations indicate (1) the DOE's assessments

were too "academic" and gave too little consideration to the students' current needs, as young adults; and (2) the services offered are "compensatory" but far from what can be considered "just compensation." If they are to be fully compensated, the class members must receive a more comprehensive package of services that address their specific areas of needs and that factor in their own styles of learning as well as the extent of time it takes each of them to learn new information.

Plaintiffs are also in the process of gathering feedback from families. Their comments generally also focus on the length of services offered, the failure of the reports to address regression issues, and frustration at offers of services that do not reflect their children's goals or needs.

For example, R.G. was offered a year of computer classes, even though his expressed goal is performance and acting, and he is already able to use a computer. The family noted that speech services or community college classes would be more appropriate. As previously mentioned, the only service offered to E.R.K. consisted of (1) help connecting a day program provider, even though his family is already fully aware of these programs, and

(2) speech therapy, which is of low value given E.R.K.'s capabilities. A.K.'s family has noted significant regression in several areas (such as math concepts, speech, ability to focus, and behavior), yet the DOE offers only to assist the family in creating visual schedules for A.K. All of these individuals lost out on two years of services, yet the DOE proposes ignores the need to compensate fully for this loss.

The class requires a multi-faceted compensatory remedy. For those families that expended their own funds on private services, reimbursement of the amount expended is appropriate. This is not a form of damages but is considered an equitable remedy under the IDEA. *See, e.g., Sch. Comm. of the Town of Burlington v. Dep't of Educ. of the Commw. of Mass.*, 471 U.S. 359, 370-71 (1985). As an example, one member of the Pilot Group attends a Goodwill program designed to replicate the services the class member received at the DOE, at a cost of \$2,400 per month. Others have paid certain amounts for portions of services that would have been provided by the DOE had their child been permitted to attend school (*i.e.*, drama class to replace an extracurricular activity such

as a drama club). The IDEA permits reimbursement of these costs as part of a compensatory remedy.

However, for the majority of the pilot group (and, presumably, the class) only compensatory *services* (or the amount needed to pay a private provider for an appropriate program) will be required.

Class members who lost a full complement of services for two years are entitled to services that are designed to bring them to where they should be today but for that loss. That is why the DOE's offers are grossly inadequate.

## **II. PROGRESSING WITH SERVICES TO THE SECOND GROUP OF CLASS MEMBERS**

Plaintiffs ask for the Court's assistance in moving forward with assessing the second group of class members. As discussed at the status conference on June 25, 2015, there are approximately 300 former students ready and waiting to be assessed and offered services. The parties have twice discussed the Court's proposal to set up dates and times for individuals in the second group to come and sign up to be assessed and to sign their forms.<sup>1</sup> Thus far the

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<sup>1</sup> *I.e.*, the FERPA consent and whatever additional consents the DOE is going to require to do assessments and offer services. Again, the individuals in the second group, a group which largely

DOE has been unwilling to move forward with scheduling of this group, even those who are undisputedly entitled to services.

Plaintiffs want to keep making progress and get the next round of assessments underway so that members can receive the services they are entitled to as soon as possible. Given the size of this group, the DOE and class counsel need to be working *now* to plan for and coordinate this process. Plaintiffs request the DOE be ordered to proceed with the next phase of assessments.

### **III. DISPUTED CLASS MEMBERS**

At the last status conference, the DOE indicated it may still wish to challenge several hundred members of the Class as allegedly ineligible for services. The DOE has not stated who these individuals are or why they are being challenged now, nearly nine months after their names were initially provided to Plaintiffs. This presents obvious practical problems as Plaintiffs endeavor to reach the 1,300 class members who have not yet been contacted, because

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came from the DOE's lists, have *already indicated* that they want services.

this group apparently contains hundreds of people the DOE does not believe are eligible.<sup>2</sup>

Plaintiffs have requested the DOE provide, by August 15, 2015, a list of every class member it intends to dispute, as well as all relevant documentation regarding the claim of ineligibility so that a finder of fact is able to evaluate the DOE's claim. Without this information, Plaintiffs are left in limbo as to appropriate next steps for hundreds of individuals.

To date the DOE has identified approximately 89 individuals it believes are ineligible to receive services. Plaintiffs have sought information from the DOE as to why the DOE identified them as persons who might have been affected by Act 163, but the DOE has stated that it will not provide that information. Plaintiffs have also sought information regarding which of these individuals were properly informed of their right to return to school (via FAPE letters). However, the DOE has stated that it will not provide FAPE

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<sup>2</sup> If this amorphous group is comprised of those who left the DOE voluntarily before turning 20, there is no basis for the DOE to continue to dispute their eligibility—they raised this issue before Judge Mollway earlier, and she rejected the notion that the DOE could evade its obligation to provide services to those who were eligible to return up to age 22.

letters without signed FERPA consents from the individual class members. The parties are continuing to discuss this issue, but the DOE's position is causing unnecessary delay. Plaintiffs urge the Court to issue an order compelling disclosure to cut this Gordian knot.

#### **IV. REIMBURSEMENT OF COSTS FOR CONTACTING REMAINING CLASS MEMBERS**

As the Court is aware, approximately 1,300 class members have not yet been reached, and the DOE has stated that it is unable to provide updated information from other State agencies. It is the DOE's obligation under the IDEA's "Child-Find" requirements to make its best efforts to find and keep track of eligible children under age 22. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111. For the majority of children, this necessarily includes keeping track of the information of parents and guardians of eligible individuals. It is continuing obligation, *see Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 600 (M.D. Pa. 2014), yet the large number of unreachable class members strongly suggests that the DOE has not met this obligation.

Given the present state of the DOE's contact information, Plaintiffs requested in June 2015 that the DOE advance the cost of \$2,080.00 to run a Lexis search to locate individuals who have not yet been reached. This is a reasonable and necessary given the DOE's obligation to provide compensatory services to these individuals, per Judge Mollway's August 2014 order.

The parties have not been able to reach an agreement on this issue even though it has been raised several times. Plaintiffs request that the Court order the DOE to pay these costs. Plaintiffs also request the Court **disclose the names of parents/guardians of the unreachable class members**, to facilitate Plaintiffs' efforts to contact this population of disabled adults and to make sure that the Lexis search provides the best results.

#### **V. RULE 30(B)(6) DEPOSITION**

Plaintiffs have contacted the DOE to schedule the continuation of the Rule 30(b)(6) deposition, as discussed previously by the parties. The DOE claims it cannot reconvene until mid-August. The parties will find a mutually agreeable date.

DATED: Honolulu, Hawai`i, July 21, 2015.

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



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

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**From:** <hid\_resp@hid.uscourts.gov>  
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**Date:** 7/21/2015 8:51 AM  
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**U.S. District Court**

**District of Hawaii**

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**Case Number:** [1:10-cv-00436-SOM-KSC](#)  
**Filer:** M. D.  
R. T. D.  
Hawaii Disability Rights Center  
E.R. K.

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**Docket Text:**

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

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