

DOUGLAS S. CHIN 6465
Attorney General,
State of Hawai'i

CARTER K. SIU 7313
RYAN W. ROYLO 6329
HOLLY T. SHIKADA 4017
Deputy Attorneys General
235 S. Beretania Street, Room 304
Honolulu, Hawai'i 96813
Tel. (808) 586-1255
Fax (808) 586-1488
Email: Carter.K.Siu@hawaii.gov

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

**DEFENDANT'S STATUS REPORT;
CERTIFICATE OF SERVICE**

Date: August 27, 2015

Time: 10:45 a.m.

Judge: Hon. Kevin S.C. Chang

DEFENDANT'S STATUS REPORT

Defendant DEPARTMENT OF EDUCATION, State of Hawai'i ("Department") submits the following Status Report in the above entitled case.

I. Amended Pilot Group Assessment Reports

Plaintiffs express discontent because the assessors did exactly what Plaintiffs wanted them to do – to consider regression in their analysis and to factor that into their offer of compensatory education services. What Plaintiffs fail to do is to provide any analysis or discussion concerning whether the methodology employed by the assessors was flawed and if so, why.

Plaintiffs also lose sight of the applicable law in this circuit, which states that an award of compensatory education is to remedy educational deficits caused by a denial of FAPE. As noted by the Ninth Circuit:

Compensatory education is an equitable remedy that seeks to makeup for 'educational services the child should have received in the first place,' and 'aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA.

R.P. ex rel. C.P. v. Prescott Unified School District, 631 F.3d 1117, 1125 (9th Cir. 2011). This district has interpreted this to mean that a "compensatory education award is designed to catch a child up to where he or she would be if the school district had provided a FAPE." I.T. ex rel. Renee T. v. Department of Educ., 2013 WL 6665459 at *6 (D.Haw. Dec. 17, 2013).

While Judge Susan O. Mollway has ordered that Plaintiffs are entitled to compensatory education, it does not mean that an award of compensatory education is required in every case. Courts have discretion in determining whether to award compensatory education and can, in rare circumstances, determine that compensatory education is not an appropriate remedy. For instance, in Parents of Student W. v. Puyallup School Dist. No. 3, 31 F.2d 1489 (9th Cir. 1994), the Ninth Circuit Court of Appeals determined that under the facts of that case, compensatory education was not appropriate. In that case the Ninth Circuit recognized the court's power to "apply a fact-specific analysis [] and decide that a generalized award of compensatory education is not appropriate." Id., 31 F.2d at 1497; see also T.B. ex rel. Brenneise v. San Diego Unified School Dist., 2011 WL 1212711 at *3 (S.D. Cal. March 30, 2011) ("It will be a 'rare case when compensatory education is not appropriate,' but the fact-specific analysis of the equities may demonstrate that such relief is not appropriate.").

The Ninth Circuit has also ruled that an award of compensatory education to a student's teacher, rather than to a particular student, was an appropriate remedy. Park, ex rel. Park v. Anaheim Union High School Dist., 464 F.3d 1025 (9th Cir. 2006). In Park, the Ninth Circuit agreed that an award that did not directly benefit the student was appropriate when there was no evidence that student would benefit from direct compensatory education. Id., 464 F.3d at 1034.

Other circuits have also held that an award of compensatory education requires a detailed factual analysis. Reid ex rel. Reid v. D.C., 401 F.3d 516, 524 (D.C. Cir. 2005)(“[T]he inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place”). In fact, those courts also concur that an award of compensatory education is not automatically awarded even though an entitlement to compensatory education is proven through a denial of FAPE:

Even if entitlement to an award is shown through a denial of a free and appropriate public education, it may be conceivable that no compensatory education is required for the denial of a FAPE either because it would not help or because the student has flourished in his current placement.

Phillips ex rel. T.P. v. District of Columbia, 932 F.Supp.2d 42, 50 (D.D.C. 2013).

Defendants believe that the assessors have appropriately applied the correct legal analysis in determining: (1) where each pilot group member was academically (and behaviorally) upon exiting the Department, (2) where they would have been had each pilot group member been provided a FAPE up to their 22nd birthday, and (3) what, if any, services are required to “catch” these pilot group members up to where they should have been at age 22. If there are any

concerns about this analysis, the Department is willing to discuss it at the upcoming status conference.

II. Delivery of Services to Class Members

Plaintiffs complain that obtaining information about the private providers who may be willing and able to provide compensatory education service to the class members has been a one-sided effort. This issue has been addressed at multiple status conferences to date. The Court recognizes that the Department must conduct itself in accordance with the procurement laws and as such, is unable to approach private providers at this point to inquire about their providing services to the class members. As a result, the Court has informed Plaintiffs that it would be best for them to contact the private providers and obtain information such as the ability of a private provider to provide services to the class members, how long it would take for a provider to “ramp up” so it could provide services, etc. To date, the only information provided by Plaintiffs has been information from Easter Seals.

The Department has contracts with the following providers who could likely provide services to class members:

- Alaka‘i Na Keiki
- Bayada Habilitation (Bayada Home Health Care)
- Care Hawaii, Inc.
- Hawaii Behavioral Health
- Special Olympics

While the Department is willing to consider expanding and extending the contracts it has with its current providers, the Department must ensure there would be no procurement violations before engaging in any such discussions with these current providers. The Department has also stated on multiple occasions that it is willing to contract with other providers to provide services to class members; however, because of the procurement laws, the Department is unable to approach private providers prior to a solicitation of bids. Thus, Plaintiffs continual complaints about the Department not making efforts to engage with current providers or contract with others is non-productive and the Department reiterates that this is something it is unable to do at this time.

Despite the prior explanation and discussion regarding the possible procurement issues, Plaintiffs continue to complain about what they perceive to be a one-sided effort. The Department believes that this issue has been thoroughly discussed and the Department's potential limitations have been fully explained; therefore, the Department will not respond any further to this issue.

III. DOE's Challenge to Class Members

At the last status conference, the Court asked that the Plaintiffs provide a list of the disputed class members. Instead, Plaintiffs sent a listing of all interested potential class members.

The Department will be providing Plaintiffs a list of the undisputed class members shortly.

IV. “Help Desks” for Consent Forms

The parties continue to exchange drafts of a letter to be sent out to the undisputed class members informing them of their right to be assessed for purposes of determining an award of compensatory education.

Blank consent forms will be given to Plaintiffs’ counsel shortly.

V. Outreach to Remaining Class Members

The Department will be working with Plaintiffs on the script.

Dated: Honolulu, Hawai‘i, August 26, 2015.

/s/ Carter K. Siu
CARTER K. SIU
RYAN W. ROYLO
HOLLY T. SHIKADA
Deputy Attorneys General

Attorneys for Defendant
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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on August 26, 2015, a true and correct copy of **DEFENDANT'S STATUS REPORT** was duly served electronically through CM/ECF on the following at their last known address:

PAUL ALSTON

palston@ahfi.com

MICHELLE N. COMEAU

mcomeau@ahfi.com

LOUIS ERTESHIK

louis@hawaiidisabilityrights.org

MATTHEW C. BASSETT, ESQ.

mattbassettesq@gmail.com

JENNIFER V. PATRICIO

jpatricio@hawaii Disability Rights.org

HAWAI'I DISABILITY RIGHTS CENTER

JASON H. KIM

jkim@schneiderwallace.com

Attorneys for Plaintiffs

Dated: Honolulu, Hawai'i, August 26, 2015.

/s/ Carter K. Siu

CARTER K. SIU

RYAN W. ROYLO

HOLLY T. SHIKADA

Deputy Attorneys General

Attorneys for Defendant

DEPARTMENT OF EDUCATION

State of Hawai'i

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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U.S. District Court

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
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[STATUS REPORT ; Certificate of Service by Department of Education, State of Hawai'i. \(Siu, Carter\)](#)

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Adam T. Snow Adam.T.Snow@hawaii.gov, Gina.M.Lum@hawaii.gov,
Holly.T.Shikada@hawaii.gov, Kari.K.Noborikawa@hawaii.gov, Richlynn.C.Kong@hawaii.gov,
Yvette.K.Achong@hawaii.gov, Zandra.S.Yamamoto@hawaii.gov

Carter K. Siu Carter.K.Siu@hawaii.gov, carter.siu@gmail.com, Gina.M.Lum@hawaii.gov,
Holly.T.Shikada@hawaii.gov, Lianne.T.Chung@hawaii.gov, Richlynn.C.Kong@hawaii.gov,
Zandra.S.Yamamoto@hawaii.gov

Claire Wong Black cblack@ahfi.com, lchang@ahfi.com, notice@ahfi.com

Gary S. Suganuma Gary.S.Suganuma@hawaii.gov, Gina.M.Lum@hawaii.gov,
Holly.T.Shikada@hawaii.gov, Lianne.T.Chung@hawaii.gov, Richlynn.C.Kong@hawaii.gov,
Zandra.S.Yamamoto@hawaii.gov

Harvey E. Henderson , Jr harvey.e.hendersonjr@hawaii.gov, derick.y.ikemoto@hawaii.gov

Holly T. Shikada holly.t.shikada@hawaii.gov, Lianne.T.Chung@hawaii.gov,
Richlynn.C.Kong@hawaii.gov

Jason H. Kim jkim@schneiderwallace.com, mail@schneiderwallace.com

Jennifer Visitacion Patricio jpatricio@hawaiiidisabilityrights.org, mike@hawaiiidisabilityrights.org

Kristin L. Holland KHolland@ahfi.com, notice@ahfi.com, nyanagihara@ahfi.com

Kunio Kuwabe Kunio.Kuwabe@hawaii.gov, Gina.M.Lum@hawaii.gov,
Holly.T.Shikada@hawaii.gov, kkuwabe@objectionsustained.com, Lianne.T.Chung@hawaii.gov,
Richlynn.C.Kong@hawaii.gov, Zandra.S.Yamamoto@hawaii.gov

Louis Erteschik louis@hawaiiidisabilityrights.org, mike@hawaiiidisabilityrights.org

Matthew C. Bassett mattbassettesq@gmail.com, mike@hawaiiidisabilityrights.org

Michelle N. Comeau mcomeau@ahfi.com, dka@ahfi.com, notice@ahfi.com

Paul Alston palston@ahfi.com, notice@ahfi.com, rjkg@ahfi.com

Ryan W. Roylo ryan.w.roylo@hawaii.gov, Gina.M.Lum@hawaii.gov, Holly.T.Shikada@hawaii.gov,
Lianne.T.Chung@hawaii.gov, Richlynn.C.Kong@hawaii.gov, rwroylo@aol.com,
Zandra.S.Yamamoto@hawaii.gov

Steve K. Miyasaka steve.k.miyasaka@hawaii.gov, gina.m.lum@hawaii.gov,
holly.t.shikada@hawaii.gov, Lianne.T.Chung@hawaii.gov, richlynn.C.kong@hawaii.gov,
Zandra.S.Yamamoto@hawaii.gov

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Chrystn K.A. Eads
Alston Hunt Floyd & Ing
1001 Bishop St Ste 1800
Honolulu, HI 96813

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