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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: September 3, 2015

TIME: 9:00 a.m.

JUDGE: Kevin S. C. Chang

vs.

DEPARTMENT OF EDUCATION,
State of Hawai'i,

Defendant.

**PLAINTIFFS' STATUS REPORT FOR SEPTEMBER 3, 2015
STATUS CONFERENCE**

Plaintiffs submit the following status report in advance of the September 3, 2015, status conference.

**I. ASSESSMENTS AND SERVICE PLANS FOR PILOT GROUP
AND REMAINING CLASS MEMBERS**

At the last status conference, the Court discussed with the parties the DOE's latest iteration of the Pilot Group reports, and asked the parties to consider ways to move forward with getting services to the Class Members, including the question of whether the parties would be amenable to holding a roundtable discussion with several experts regarding services for six or so students.

Plaintiffs are open to this, but are concerned that after waiting four months for DOE assessments of 18 students, engaging in a non-binding roundtable discussion with new independent assessors, who would also need to meet with the students and prepare reports,

is going to further delay delivery of remedies in this case. Should the roundtable be successful brokering an agreement as to services for the individuals involved, six of the 18 assessed, that would resolve the question of services for only a handful. While a roundtable may be feasible, Plaintiffs are concerned that it will not solve the problem.

Plaintiffs request that the Court consider an alternative approach for the second group ready for services (at least for the “undisputed” individuals, who number nearly 100). Plaintiffs are working on a proposal and will bring it to the status conference.

The alternate approach will propose expedited, but individualized, management of compensatory education services for the class without DOE assessments. Based on Plaintiffs’ communications with their consultants, as well as IDEA requirements, Plaintiffs firmly believe meaningful services cannot be offered without some form of individual assessments, but it is now clear that the DOE should not be the entity conducting the assessments. To make this workable in the class context, there must be a system in place to provide fair, expedient assessments for many (hundreds) of people. The DOE’s process of the past several

months has proved impractical. It is unworkably slow and has produced poor results. Assessments for fewer than 20 individuals began in May 2015, and the current round of reports was not issued until nearly four months later.

The DOE's assessments and recommendations are also demonstrably inadequate—concluding for nearly 85% of the Pilot Group that “Compensatory services are not needed,” and offering only a few months or a single service to the remainder—despite the fact that the Pilot Group members lost 1-2 years of **a full complement** of educational and related services.¹ *See R.P. ex rel.*

¹ The DOE's case law on why this is an appropriate conclusion *even when the plaintiff has demonstrated the denial of a FAPE* is sparse and easily distinguishable. The DOE relies on two cases, one in which the court found that the plaintiff's parents contributed to the denial of a FAPE and the plaintiff was nevertheless able to graduate from high school, and a another where the plaintiff was already receiving compensatory services from another entity, and the other services the plaintiff wanted reimbursed were unrelated to remedying any educational deficiency. *See Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489 (9th Cir. 1994); *Phillips ex rel. T.P. v. District of Columbia*, 932 F. Supp. 2d 42, 50 (D.D.C. 2013). Plainly, neither of those situations applies here. Moreover, as Judge Mollway explained in her order granting compensatory education to the Class, “it may be a rare case when compensatory education is not appropriate to remedy an IDEA violation.” ECF No. 187 at 2, quoting *R.P. ex rel. C.P. v. Prescott Unif. Sch. Dist.*, 631 F.3d 1117, 1125-26 (9th Cir. 2011). As Plaintiffs have explained repeatedly, Judge Mollway then ordered compensatory education be

C.P. v. Prescott Unif. Sch. Dist., 631 F.3d 1117, 1125 (9th Cir. 2011) (the goal of compensatory education is to place each plaintiff in the position he or she would have been in had a full complement of educational and related services never been taken away).

With respect to the roundtable, Plaintiffs are willing to participate, but request that the significant costs associated with the roundtable be borne by Defendant.² Cost shifting is appropriate in this instance because (1) this roundtable is necessitated by the DOE's own faulty recommendations; (2) Plaintiffs requested that the DOE run these assessments using independent consultants (or even mutually agreeable DOE assessors) months ago but were repeatedly refused, requiring Plaintiffs to simply wait while the DOE's chosen assessors proceeded without any input from Plaintiffs; and (3) the consultants appearing for Plaintiffs will assist the Court in determining services for individual Class Members,

provided—repudiating the DOE assessors' near-uniform conclusion that no services need be provided. ECF No. 187 at 2-3.

² Plaintiffs estimate the costs to include approximately 10-15 hours of time at \$250/hour for four experts, for a total of about \$10,000-\$15,000.

and therefore fall under the experts that may be ordered by the Court under Rule 706 of the Federal Rules of Evidence.

II. DELIVERY OF SERVICES TO CLASS MEMBERS

Per the Court's request, Plaintiffs are continuing to reach out to the organizations identified as providers who may be needed to provide compensatory services to Class Members. In general, they would need a funding commitment and several months to ramp up in order to provide services to a significantly increased number of individuals.

III. DOE'S DISPUTED CLASS MEMBER LIST

Early last week, Plaintiffs provided the DOE with Plaintiffs' listing of the Class Members. As discussed in the status conference on August 20, 2015, Plaintiffs expected the DOE to respond with objections to certain of the Class Members. Plaintiffs provided the list in Excel format for this purpose. Instead, the DOE provided Plaintiffs a separate list of "undisputed class members." Plaintiffs request guidance from the Court in resolving this issue, as Plaintiffs still lack a single list of Class Members with the DOE's objections.

IV. “HELP DESKS” FOR CONSENT FORMS

Plaintiffs’ understanding is that the help desks are proceeding beginning on September 8, 2015, and that the letter has been sent. There are four dates on Oahu and four neighbor island dates. The parties disputed language in the letter advising Class Members that they would not receive services if they did not respond by September 28, 2015. Plaintiffs strongly objected to establishing a cutoff date of September 28, 2015, particularly given the fact that there will need to be multiple rounds of the help desks. In response, the DOE agreed to change the letter’s language to indicate that if a Class Member did not respond by September 28, 2015, that “may impact” their ability to receive services.

V. OUTREACH TO REMAINING CLASS MEMBERS

Plaintiffs have transmitted the updated list of telephone numbers to Ward Research. Ward has confirmed that it is ready to make the calls once the script is finalized. Plaintiffs provided a draft call script to the DOE on August 18, 2015. Plaintiffs did not receive a response from the DOE until August 28, 2015. Plaintiffs provided additional input on August 30, 2015. Plaintiffs are still

waiting to hear whether the DOE has any additional changes to the script.

Plaintiffs continue to wait on contact information for the parents and guardians. The DOE promised to provide this information on August 20, 2015, but later reported that it was unable to meet this deadline. This information has been in process now since late July, and Plaintiffs ask that the DOE provide a concrete date by which the information will be available so that this portion of the case can move forward.

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

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

CERTIFICATE OF SERVICE

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

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

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Attorneys for Defendant
DEPARTMENT OF EDUCATION

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

/s/ Michelle N. Comeau
PAUL ALSTON
KRISTIN L. HOLLAND
MICHELLE N. COMEAU
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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 Status Report

From: <hid_resp@hid.uscourts.gov>
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U.S. District Court

District of Hawaii

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The following transaction was entered by Comeau, Michelle on 9/1/2015 at 8:44 AM HST and filed on 9/1/2015

Case Name: P.-K. et al v. Department of Education, State of Hawai'i
Case Number: [1:10-cv-00436-SOM-KSC](#)
Filer: M. D.
R. T. D.
Hawaii Disability Rights Center
E.R. K.

Document Number: [263](#)

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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