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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 STATUS REPORT;  
CERTIFICATE OF SERVICE**

Date: September 3, 2015

Time: 9:00 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. Assessments and Service Plans for Pilot Group And Remaining Class Members**

Plaintiffs proposal significantly eliminates the need for the help desks developed by the Court. The proposal to do away with Department assessments negates the time, labor, and effort that the Department and its attorneys have already devoted to the process. This includes the time the Department spent arranging for the help desk locations, the time spent going over the letter sent to the undisputed class members with Plaintiffs' counsel, and the expense of printing and mailing the letters to the undisputed class members. If this is the course of action that Plaintiffs seek, then they should reimburse the Department and its attorneys for its time and effort in moving the case forward.<sup>1</sup>

As noted at the last status conference, Plaintiffs levied criticism against the amended assessment reports based on their own opinion, rather than on the opinion of an educational expert who has reviewed the records and conducted his/her own assessment. Because of this, the Department requested the Plaintiffs to provide constructive criticism to aid in the process; but as can be seen from Plaintiffs'

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<sup>1</sup> Plaintiffs' are "concerned that [a roundtable] will not solve the problem", but then request that the Department pay their experts \$10,000-15,000 to sit at the round table.

status report the baseless criticisms continue without any helpful recommendations.

What has been argued previously and what has been made abundantly clear in Plaintiffs status conference report is that Plaintiffs do not want to invest their own time and expense to work up their case. This is one of the major reasons why the case cannot resolve. We have informed Plaintiffs of their Article III standing obligations to establish injury in fact:

‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136

(1992). We also assume that Plaintiffs are aware that under the IDEA, Plaintiffs seeking relief have the burden of proof to establish their damages. Schaffer v. Weast, 546 U.S. 49, 128 S.Ct. 528, 537 (2005). Despite Plaintiffs obligations under the law to prove their injury, Plaintiffs want to unfairly shift this burden onto the Department and have the Department pay for educational experts to establish Plaintiffs’ case for compensatory education services. The Department refuses to

undertake the financial obligations that Plaintiffs are required to undertake in representing their individual clients.

Plaintiffs also cite to Rule 706 of the Federal Rules of Evidence in an attempt to avoid any financial obligations to pay for its own experts.<sup>2</sup> However, this is a misuse of the rule. At this time, the only party in need of an expert are Plaintiffs as the Department's assessors can serve as expert witnesses. As one court noted, "[q]uite simply, 'litigant assistance' is not the purpose of Rule 706." Carranza v. Fraas, 471 F. Supp. 2d 8, 11 (D.D.C. 2007); Gorton v. Todd, 793 F. Supp. 2d 1171, 1182 (E.D. Cal. 2011) ("Expert witnesses are rarely appointed under Rule 706 because the adversary system is usually sufficient to promote accurate factfinding.").

Plaintiffs should be reminded that Defendants still contend, and reserve their rights, to allege and assert that resolution of these individualized cases must be made in accordance with the IDEA through the administrative hearings process. As this Court is aware, the Federal Rules of Evidence do not apply in administrative hearings in general,<sup>3</sup> and specifically, those hearings held pursuant

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<sup>2</sup> What Plaintiffs fail to recognize is that the trial on the legal claims in this case is over and there will be no second trial on the merits of the Complaint. Nor did Plaintiffs ever request for compensatory education as a component of their requested relief, and therefore presentation of evidence at trial was unnecessary.

<sup>3</sup> "The strict rules of evidence governing the admissibility of hearsay in judicial proceedings are not applicable to administrative hearings." Marlowe v. U.S. Immigration and Naturalization Service, 457 F.2d 1314, 1315 (9<sup>th</sup> Cir.1972);

to the Individuals with Disabilities Education Act. See Fed. R. Evid. 1101.

Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1101 (C.D. Cal.

2000); D.D-S. v. Southold Union Free Sch. Dist., 09-CV-5026 JS WDW, 2011 WL

3919040 (E.D.N.Y. Sept. 2, 2011) aff'd sub nom. D. D-S. v. Southold Union Free

Sch. Dist., 506 F. App'x 80 (2d Cir. 2012)(Impartial due process hearings have

"relaxed rules of evidence" and the hearings officer was not bound by either state

or federal rules of evidence."). In Hawai'i, due process hearings are conducted at

the Office of Administrative Hearings, Department of Commerce and Consumer

Affairs, whose rules clearly state that the "admissibility of evidence at the hearing

**shall not be governed by the laws of evidence.**" Hawai'i Administrative Rules,

§16-201-21 (emphasis added).

As discussed at the previous status conference, the Department is willing to discuss with Plaintiffs the appropriate legal standard to evaluate Plaintiffs' individualized claims for compensatory education services. To date, Plaintiffs have failed to provide any case law or suggestions on the appropriate legal analysis.

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Calhoun v. Bailar, 626 F.2d 145, 148 (9<sup>th</sup> Cir. 1980)("[S]trict rules of evidence do not apply in the administrative context.")

**II. Delivery of Services to Class Members**

There is no update from the last status conference.

**III. DOE's Disputed Class Member List**

In the Department's last status conference report, it was reported that Plaintiffs failed to provide the Department with a list of the disputed class members. The Department has on more than one occasion informed Plaintiffs of their obligation to present a list to the Department of the disputed class members. In Plaintiffs' latest status conference report, they fail to explain why the list of disputed members was not presented to Defendants.

**IV. "Help Desks" for Consent Forms**

The Department sent out a letter with changes that were verbally requested by Plaintiffs following the August 27, 2015 status conference. The letters were mailed out to the undisputed class members on August 28, 2015. The help desk dates were amended to reflect the late mailing as the first help desk will be set up on September 8, 2015.

Blank consent forms were already e-mailed to Plaintiffs' counsel.

**V. Outreach to Remaining Class Members**

The Department and Plaintiffs have agreed to a script. Plaintiffs' counsel e-mailed the script to Ward Research on September 1, 2015. It was the Department's understanding that Ward Research would only be calling those

prospective class members whose contact information was updated through the Lexis/Nexis search process and that Ward Research would not be provided with the names of those individuals whose contact information remain unchanged. The Department is unaware whether Ward Research was provided with these instructions and would like assurances that the appropriate list and instructions will be provided to them.

With respect to guardian contact information, the Department reports that the search is 57% complete.

Dated: Honolulu, Hawai'i, September 2, 2015.

/s/ Carter K. Siu  
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CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

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Dated: Honolulu, Hawai'i, September 2, 2015.

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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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**District of Hawaii**

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