

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

R.P.-K., through his) CIVIL NO. 10-00436 SOM-KSC
parents C.K.; R.T.D.,)
through his parents R.D.) ORDER GRANTING IN PART
and M.D.; and the HAWAII) AND DENYING IN PART
DISABILITY RIGHTS CENTER,) 1) DEFENDANT'S MOTION WITH
in a representative) REGARD TO EFFORTS IN
capacity on behalf of its) IDENTIFYING CLASS MEMBERS
clients and all others) AND 2) PLAINTIFFS' MOTION
similarly situated,) RE IDENTIFICATION OF CLASS
MEMBERS
Plaintiffs,)
vs.)
DEPARTMENT OF EDUCATION,)
State of Hawaii,)
Defendant.)
_____)

ORDER GRANTING IN PART AND DENYING IN PART
1) DEFENDANT'S MOTION WITH REGARD TO EFFORTS
IN IDENTIFYING CLASS MEMBERS AND 2) PLAINTIFFS'
MOTION RE IDENTIFICATION OF CLASS MEMBERS

Before the Court are 1) Plaintiffs' Motion Re Identification of Interested Class Members and 2) Defendant's Motion With Regard to Efforts in Identifying Class Members, both of which were filed on November 30, 2015. The parties filed their respective oppositions on January 6, 2016, and their respective replies on January 13, 2016.

This matter came on for hearing on January 27, 2016. Kristin Holland, Esq., Michelle Comeau, Esq., and Jennifer Patricio, Esq., appeared on behalf of Plaintiffs. Deputy Attorneys General Carter Siu and Ryan Roylo appeared on behalf of Defendant.

After careful consideration of the parties' submissions, the applicable law, and the arguments of counsel, the Court HEREBY GRANTS IN PART AND DENIES IN PART the Motions for the reasons set forth below.

BACKGROUND

As the parties are familiar with the extensive history of this case, the Court includes only those facts relevant to the disposition of the parties' motions.

On March 15, 2011, then-U.S. District Judge David Alan Ezra defined the class as:

All individuals residing in the State of Hawaii who are over the age of 20 on or before the first day of the school year (or who will imminently be over the age of 20 on that date) but under the age of 22 who are entitled to receive special education and related services from Defendant the Hawaii Department of Education under the Individuals With Disabilities Education Act.

Doc. No. 31.

On August 28, 2013, the Ninth Circuit determined that Act 163 violated the Individuals with Disabilities Education Act ("IDEA"). Doc. No. 134.

On August 22, 2014, then-Chief U.S. District Judge Susan Oki Mollway issued an Order Granting in Part and Denying in Part Plaintiff's Motion for Award of Compensatory Education and Appointment of Special Master; Order Denying Defendant's Motion for the Court to Determine the Appropriate Forum and Process for Evaluating Compensatory Education Claims of Class Members ("Compensatory Education Order"). In pertinent part, Judge Mollway ordered that the parties work with this Court concerning the following:

1) Determination of Class Members: as soon as practicable, but in no event later than September 22, 2014, the DOE must provide Plaintiffs' counsel with the name of every potential class member, accompanied by his or her last-known contact information. The DOE must include the names and last-known contact information of all individuals who might have been affected by the DOE's "age out" calculation, including individuals that the DOE concludes may have opted not to receive services, such as drop outs and those with employment. The DOE may

provide names by grouping similarly situated individuals. Magistrate Judge Chang will settle all disputes concerning the identification of class members;

2) Consideration of the DOE's ability to provide compensatory education to class members;

3) Identification of private service providers likely to be needed to provide compensatory education to class members and likely to be agreed to by the parties; and

4) Consideration of prompt class notification and of further class certification issues, with any modification of the existing class certification to be sought by motion(s) filed no later than October 31, 2014.

Compensatory Education Order, Doc. No. 187 at 3-4.

Since the issuance of the Compensatory Education Order, this Court has held 26 status conferences and more than one settlement conference to facilitate the identification of class members and/or resolution of this action.

To comport with the Ninth Circuit's ruling, the parties later refined the definition to "[a]ll IDEA eligible persons who turned age 20 after 7/1/10 and were made ineligible by Act 163 and all IDEA eligible

persons who were over age 20, but under age 22, on 7/1/10 and made ineligible by Act 163." Doc. No. 213, Decl. of Paul Alston, Ex. A.

On January 5, 2015, Judge Mollway orally denied Defendant's Motion for the Court to Modify the Class Definition.

DISCUSSION

As an initial matter, the Court addresses Plaintiffs' request to strike certain of Defendant's exhibits. The Court declines to do so. First, the Court believes that all exhibits should remain part of the record for the sake of completeness. Second, with respect to these Motions, the Court directed the parties to

include specific detailed information with regard to (1) costs and efforts made by all counsel and/or [the] DOE to identify class members, including but not limited to, provision of names and last-known contact information of all individuals who might have been affected by the DOE[']s age cut calculation, (2) the results of services provided by Ward Research and Lexis and (3) efforts made by all counsel to identify interested class members.

Doc. No. 284. Given the Court's directive, the

parties' exhibits are properly before the Court.

Finally, insofar as this is neither a trial nor an adjudication concerning the substantive merits of the case, admissibility is not at issue, and the strictures of the Federal Rules of Evidence do not apply.

A. Closing of the Class

Plaintiffs repeatedly argue that Defendant is attempting to relitigate Judge Mollway's Compensatory Education Order and that it has violated the same. This Court disagrees.

Judge Mollway indeed ordered that the class members are entitled to compensatory education. However, and perhaps more importantly, she ordered that initial determinations such as the scope of the class and availability of services be resolved first. Sadly, the process that Judge Mollway referred to this Court has seen little progress due to the parties' inability to reach agreements and resolve issues. At times, overzealous and overreaching advocacy has resulted in unnecessary delay, lack of cooperation, and undeniably interfered with the orderly progress and efficient

resolution of this action.

The award of compensatory education to class members and/or possible resolution cannot reasonably be addressed until the scope of the class is determined. The Court, having been entrenched in the identification and notification process for over a year and a half, finds that the identification process shall conclude, as well as efforts to contact identified potential class members, **on this Order's issuance date.** In addition, the Court orders the release of the interested class members' educational records pursuant to 34 C.F.R. § 99.31(a)(9). This will facilitate the timely and orderly progression of this case by making accessible to Plaintiffs' counsel the interested class members' educational records, and address Defendant's Family Educational Rights and Privacy Acts ("FERPA") concerns. No further delays will be permitted. The final identification of interested class members is long overdue and now is the time to proceed to the compensatory education phase of this process.

B. Additional Searches and Efforts

Plaintiffs request that Defendant be ordered to bear the cost of obtaining current contact information for class members who have yet to be contacted, providing that information to class counsel, and evaluating each class member's situation and offering a suitable array of compensatory services to every class member. This request is DENIED.

The Court finds that Defendant has made substantial efforts to identify and locate potential class members. Defendant has: 1) sent letters to potential class members, advising them of their right to receive special education until age 22 and advising them of their FERPA rights; 2) placed advertisements in newspapers on all islands running on multiple dates informing all potential class members of their rights under the IDEA; 3) provided Plaintiffs with a spreadsheet containing the contact information of potential class members; 4) reached out by telephone to obtain current addresses for the 413 (out of 1,800) FERPA pre-disclosure letters that were returned as

undeliverable; and 5) paid third-parties (e.g. Ward Research and LexisNexis) to aid in the search for and identification of interested class members.

Notwithstanding these efforts, Plaintiffs maintain that Defendant should obtain contact information from other Hawaii State agencies because it may have access to the same. Defense counsel has reached out to other Hawaii State agencies and the Court in fact ordered the Developmental Disabilities Division of the State of Hawaii Department of Health to release records of services for specified individuals. Doc. No. 287.

The Court believes that Plaintiffs underestimate the burden to and manpower required of Defendant to coordinate with multiple State agencies to ascertain whether more recent contact information for potential class members is available. It is noteworthy that Plaintiffs did not avail themselves of third-party discovery processes in the more than one-year period they were in possession of the potential class members' last-known contact information. Once Defendant

provided the contact information, it was Plaintiffs' counsel's burden to contact the class members.

Plaintiffs could have taken any number of steps since then to obtain updated information for the class members whose contact information was discovered to be outdated, and to contact those individuals. It is surprising that Plaintiffs have incurred \$700,598.38 in attorneys' fees between August 22, 2014 through December 31, 2015, considering the limited progress that they have made and the current status of the case. Doc. No. 327, Decl. of Paul Alston at ¶¶ 7-8.

Judge Mollway's Compensatory Education Order did not require Defendant to take extraordinary steps or exhaust all resources in providing contact information to Plaintiffs. She simply ordered that

the DOE must provide Plaintiffs' counsel with the name of every potential class member, accompanied by his or her last-known contact information. The DOE must include the names and last-known contact information of all individuals who might have been affected by the DOE's "age out" calculation, including individuals that the DOE concludes may have opted not to receive services, such as drop outs and those with employment.

Compensatory Education Order, Doc. No. 187 at 3 (first emphasis added). Defendant has more than complied with the Compensatory Education Order.

Indeed, Defendant reluctantly followed the Court's suggestions at status conferences and provided funding and resources beyond that required by the Compensatory Education Order to avoid litigation and advance possible resolution of this issue. At this late stage in the drawn-out process concerning the identification of interested class members, Defendant is under no obligation to take additional steps to obtain the current contact information for potential class members.¹ Interestingly, Plaintiffs are quick to

¹ Plaintiffs also argue that the class members are entitled to appropriate notice. The Court finds it unnecessary to address the parties' arguments concerning the class members' right to notification pursuant to Federal Rule of Civil Procedure 23(b), but notes that it is unrealistic for class counsel to expect that current contact information be procured for each potential class member. Notification is an imperfect system and reasonable steps have been taken here to notify potential class members. Notices have not only been sent to last-known addresses, but also published in newspapers by Defendant and via articles and press releases by class counsel. The notification process desired by class counsel will be unduly

accuse Defendant of gross waste and/or mismanagement of funds, yet they seek an order for Defendant to incur additional expenses locating potential class members.² Plaintiffs' counsel sought to serve as class counsel and it was their responsibility, with the assistance (financial and otherwise) provided by Defendant, to communicate with prospective class members and ascertain which of those members wish to receive compensatory education.

Plaintiffs' request for Defendant to evaluate each class member's situation and offer a suitable array of compensatory services to every class member is premature and unnecessary. Until the interested class members are identified, it would be a tremendous waste

burdensome and costly, and will likely cause further delay in an already languishing process.

² Plaintiffs question the information in Exhibit M to Defendant's Motion, which reflects approximately \$3.4 million in costs incurred by Defendant to identify and locate potential class members. According to Plaintiffs, \$23,807.19 in costs have been incurred in connection with the identification of interested class members. However, the Court's determination regarding the class members does not turn on Defendant's expenditures related to the identification and/or location of the same.

of resources to conduct the evaluation sought by Plaintiffs. To the extent Plaintiffs seek information concerning services, they do not require an individualized services package to present to each potential class member during the inquiry phase. The attorneys designated as class counsel who have extensive experience with IDEA cases can, at a minimum, provide information to potential class members with respect to the types of services that are typically offered by Defendant. Therefore, while Defendant will be required to conduct assessments and ultimately provide appropriate compensatory education services for the interested class members,³ it is not required to do so in connection with the class identification process.⁴

³ The Court has scheduled a status conference on February 26, 2016, to discuss the possible appointment of a special master, mechanisms, processes, and possible candidates.

⁴ As evidenced by the arguments presented in their Motion for Order (1) Holding Defendant Department of Education in Civil Contempt For Violation of The Order [187] Order For Award of Compensatory Education Entered on August 22, 2014, (2) Imposing Civil Sanctions, Including Appointment of a Special Master, Plaintiffs misinterpret the Compensatory Education Order. Plaintiffs complain that Defendant has not provided

C. Scope of the Class

According to Plaintiffs, there are 437 interested class members.⁵ Doc. No. 330 (updated Exhibit 23 to Plaintiffs' Mot.). Defendant objects to 303 of these individuals, arguing that there are three categories of individuals who should be excluded from the class: 1) those who are too young to have suffered an injury due to Act 163, 2) those who turned 22 years of age at the time Act 163 was enacted and took effect on July 1, 2010, and 3) those who were 19 years or older when Act 163 took effect but who have not

services. However, the Compensatory Education Order did not require the provision of services at the outset. To the contrary, Judge Mollway ordered "certain initial determinations to be made before a final course of action is selected." Doc. No. 187 at 3. It is not until resolution of the issues and tasks referred to this Court that compensatory education will be broached. Id. at 4 ("Once these initial matters are addressed, there will, of course, need to be further decisions on what procedure to follow to provide compensatory education to class members."). Even so, the Pilot Group evidences efforts made to identify and assess viable options for the compensatory education services process that will be eventually be undertaken. Unfortunately, counsel were able to reach an agreement.

⁵ This figure does not include incarcerated class members.

suffered an injury in fact.⁶

1. Individuals Who Are Too Young

Defendant objects to individuals who were 19 years old or younger at the start of the 2013-14 school year because those individuals were not precluded from continuing their education until age 22 by Act 163, given Act 163's repeal prior to the commencement of the 2014-15 school year. Plaintiffs counter that Defendant never told many class members who left school prior to fall 2013 that they had a right to return at ages 20 and 21 or sent them a confusing, inaccurate notice

⁶ Additional categories were included in Defendant's Objections to Amended Exhibit 23: individuals who graduated; individuals who are IDEA ineligible/revoked eligibility; individuals who settled their claims; and individuals who are not interested. Many of these objections are asserted along with one or more of the aforementioned three categories of objections. In such instances, the Court has considered all of the objections but shall classify the individuals under one of the three main categories of objections. Where Defendant objects to an individual on the grounds that he/she is underage and exited before age 20, the individual shall be analyzed under the underage category. The Court believes this is appropriate because, as it will later discuss, exiting before age 20 does not alone disqualify an individual from the class.

regarding ability to receive services. Plaintiffs also submit that Defendant failed to demonstrate that the members who are "too young" actually received services at ages 20 or 21 or were aware that they had the right to do so. Defendant has provided educational records for the students they classify as "too young" or "underage", which establish that those students declined FAPE (in some cases multiple times) and/or a re-evaluation. See, e.g., Ex. V to Def.'s Objection. In any event, whether or not the individuals received services at 20 or 21 or were aware that they had the right to do so is not determinative.⁷ The fact is that Act 163 could not have precluded these individuals from obtaining services because it was repealed before the individuals would have aged out. For these reasons, the Court finds, as a general matter, that the

⁷ Plaintiffs reference Defendant's "Child Find" obligation pursuant to 20 U.S.C. § 1412(a)(3), which requires Defendant to identify, evaluate, and determine eligibility for disabled children. "Child Find" is not at issue in this litigation. Thus, it cannot serve as a basis for allowing individuals, who could not be impacted by Act 163 due to their age, to be included in the class.

individuals who were **19 years old or younger at the start of the 2013-14 school year** do not fall within the class definition and they are therefore excluded from the class.⁸

The Court makes an exception, however, with respect to certain individuals who submitted declarations attesting to the fact that they either did not receive notification that they were eligible for services at ages 20 and 21 and/or that they were told that they were not eligible for services from age 20. Specifically, the Court allows N.L., J.L.,⁹ B.C., L.M., D.M., K.C., M.M., E.O., D.P.-K., M.P., S.S., M.Z., I.P.-K., R.B., and S.B. to be a part of the class.

2. Individuals Who Are Too Old

Defendant wishes to exclude individuals whose

⁸ G.J.-M., identified as no. 124 in Exhibit U to Defendant's Objection, shall not be excluded because her birthdate is January 20, 1993.

⁹ J.L. is noted as both "undisputed" and objected to as underage in Defendant's Exhibit U to its Objection. Given J.L.'s birthdate, he is not underage, so the Court accepts him as undisputed, notwithstanding Defendant's prior characterization of him as a dropout.

birthdates are prior to July 1, 1988, on the basis that they were 22 years of age at the time Act 163 took effect. Seven individuals are at issue: R.G., N.M., J.N., L.R., A.D., K.K.¹⁰ and C.T. Plaintiffs agree to dismiss N.M., J.N., and L.R. so those individuals will not be part of the class. Exhibit P to Defendant's Motion establishes that C.T.'s birth date is June 15, 1989, so he cannot be excluded as "too old".

In its Reply, Defendant clarified that A.D. attended Loveland through age 22 on "stay put" and C.T. remained in school until age 22. Reply at 13. Exhibit Q to Defendant's Motion sets forth what appears to be payments to Loveland on behalf of A.D. during the 2013-14 school year.¹¹ Accepting as true Defendant's representation that A.D. attended Loveland until he aged out, A.D. should be excluded from the class.

¹⁰ K.K. (No. 141) is objected to as "too old" in Exhibit U to Defendant's Objection. However, the parties did not discuss her in their briefing. Neither do the records include her birthdate. If she was 22 at the time Act 163 took effect, then she is excluded from the class.

¹¹ This demonstrates that A.D. was receiving services while Act 163 was in effect.

With respect to C.T., Defendant claims that he remained in school until he aged out. Exhibit Q0009 indicates that C.T. withdrew in July 2011, which would have made him 22 at the time he exited. C.T. is therefore excluded from the class.

Although R.G.'s birth date is February 25, 1988, Plaintiffs argue that he should be part of the class because he was a member of the Pilot Group and Defendant has waived any objection to his inclusion. The Court disagrees. It is unclear why R.G. was ever included in the Pilot Group in view of his birth date.¹² Adhering to the class definition, he does not qualify. There is no question that he was 22 at the time Act 163 took effect, so he could not have been impacted by, or suffered an injury as a result of, Act 163. Whether or not Defendant timely objected to his inclusion is

¹² R.G. submitted a declaration explaining that he has been actively participating in this lawsuit as a member in the Pilot Group and that he has invested a great deal of time in this lawsuit. Although the Court sympathizes with R.G., he cannot be a class member merely because he was erroneously included in the Pilot Group.

irrelevant, as Defendant's alleged failure does not confer standing upon R.G. A person who does not fall within a class definition, or suffer an injury caused by the claims in a lawsuit, simply cannot obtain relief.

In sum, A.D., R.G., N.M., J.N., L.R, and C.T. are excluded from the class. K.K. is also excluded if her birthdate is prior to July 1, 1988.

3. Individuals Who Exited School

A number of questions remain with respect to the individuals who Defendant wishes to exclude from the class due to their decision to voluntarily exit school prior to turning age 20. It is unclear whether they were misinformed about their rights or not informed about their rights, and whether the information provided or withheld affected their decision to seek services from Defendant. Because these individuals fall within the range of individuals who could have been affected by Act 163, i.e., individuals over the age of 20 on or before the first day of the school year (or who will imminently be over

the age of 20 on that date) but under the age of 22, the Court finds that they shall remain part of the class. The fact that they were eligible to receive services, regardless of whether they availed themselves of that opportunity, warrants their inclusion in the class.

This determination is consistent with Judge Mollway's ruling denying Defendant's motion to modify the class definition. In its motion, Defendant requested a rebuttable presumption that any class member who voluntarily left six months or longer before his or her 20th birthday to be deemed ineligible for compensatory education. Had Judge Mollway believed that these individuals should be excluded from the class, she could have granted the motion. See also Compensatory Education Order, Doc. No. 187 at 3 (including drop outs as those who might have been affected by Defendant's "age out" calculation).

4. Additional Categories of Objections

Exhibit U includes additional objections to the identified interested class members.

a. Individuals Who Have Graduated or Settled Their Claims

Individuals who have graduated or settled their claims should be excluded from the class.

b. Individuals Who Are Not Interested

Individuals to whom Defendant objects as not interested will not be excluded, unless they were also objected to as underage, like J.M. (No. 199). This is because such individuals may have changed their minds since they were initially contacted.

c. Individuals Who Are Ineligible or Revoked Eligibility

Defendant has identified 17 individuals as IDEA ineligible or having revoked eligibility. It is unclear why these individuals are ineligible. Therefore, the Court shall not exclude these individuals at this time. If it turns out that they are in fact ineligible, they will be excluded from the class.

5. Individuals Who Are Incarcerated

Defendant has not challenged the inclusion of incarcerated individuals, and these individuals are a

subgroup that cannot be ignored. Due to the complications with notifying potential class members who are presently incarcerated, the Court finds that the class should include those incarcerated individuals who would not otherwise be excluded from the class on one of the bases identified above.

For the reasons articulated in this Order, the class shall include: 1) all undisputed individuals identified in Exhibit U to Defendant's Objection; 2) N.L., J.L., B.C., L.M., D.M., K.C., M.M., E.O., D.P.-K., M.P., S.S., M.Z., I.P.-K., R.B., and S.B. (individuals who are underage but who submitted declarations representing that they did not receive notice that they could receive services until age 22); 3) individuals identified in Exhibit U to Defendant's Objection who were not underage and who voluntarily exited school before age 20; and 4) incarcerated individuals who would not otherwise be excluded from the class on one of the grounds identified in this Order.

CONCLUSION

In accordance with the foregoing, the Court HEREBY GRANTS IN PART AND DENIES IN PART the parties' Motions.

The class is hereby closed. No further efforts shall be undertaken to identify or contact potential class members. The Court orders the release of the class members' educational records to Plaintiffs' counsel.

Additionally, the Court reminds counsel of the following provisions: Rule 1 of the Federal Rules of Civil Procedure, which emphasizes a shared responsibility to cooperate and secure the just, speedy, and inexpensive determination of every action, and Section 11 of the Guidelines of Professional Courtesy and Civility for Hawaii Lawyers regarding settlement and alternative dispute resolutions.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 18, 2016.




Kevin S.C. Chang
United States Magistrate Judge

CV 10-00436 SOM-KSC; R.P.-K., et al. v. DEPARTMENT OF EDUCATION; ORDER GRANTING IN PART AND DENYING IN PART 1) DEFENDANT'S MOTION WITH REGARD TO EFFORTS IN IDENTIFYING CLASS MEMBERS AND 2) PLAINTIFFS' MOTION RE IDENTIFICATION OF CLASS MEMBERS

DONNA AHUNA - Activity in Case 1:10-cv-00436-SOM-KSC P.-K. et al v. Department of Education, State of Hawai'i Order on Motion for Miscellaneous Relief

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U.S. District Court

District of Hawaii

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ORDER GRANTING IN PAR AND DENYING IN PART 1) DEFENDANT'S MOTION WITH REGARD TO EFFORTS IN IDENTIFYING CLASS MEMBERS AND 2) PLAINTIFFS' MOTION RE IDENTIFICATION OF CLASS MEMBERS re [293], [297] -

Signed by MAGISTRATE JUDGE KEVIN S.C. CHANG on 2/18/2016.

"The class is hereby closed. No further efforts shall be undertaken to identify or contact potential class members.

The Court orders the release of the class members' educational records to Plaintiffs' counsel."

(emt,)

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1:10-cv-00436-SOM-KSC Notice has been electronically mailed to:

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