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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; EXHIBITS A AND B;
CERTIFICATE OF SERVICE**

DATE: February 26, 2016

TIME: 10:00 a.m.

JUDGE: Kevin S. C. Chang

vs.

DEPARTMENT OF EDUCATION,
State of Hawai`i,

Defendant.

**PLAINTIFFS' STATUS REPORT FOR FEBRUARY 26, 2016
STATUS CONFERENCE**

Plaintiffs submit the following status report in advance of the February 26, 2016, status conference.

I. SPECIAL MASTER

Plaintiffs understand that the Court called this status conference to discuss appointment of a special master. As Plaintiffs have argued previously, a special master is needed in this action to provide independent oversight and ensure the DOE actually delivers the compensatory education awarded in August 2014. ECF No. 187. The DOE has not allocated resources to delivery of services to hundreds of young adults, and even struggles to fill staffing positions that serve its existing special needs students. *See, e.g.,* Ex. A (Civil Beat Article, available at

<http://www.civilbeat.com/2016/02/doe-struggles-to-fill-positions-that-serve-special-ed-students/>).

This case involves a complex equitable remedy, and the class members seeking services will have a need for regular access to a special master. Especially in light of recently publicized information about the DOE's severe shortage of special education resources, *see id.*, a special master is needed to get services to the class.

II. SPECIAL MASTER MECHANISMS AND PROCESSES

Pursuant to Rule 53(a) of the Federal Rules of Civil Procedure, the Court may appoint a special master to address post-trial matters "that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."

The special master should focus on two primary objectives: (1) to create a structure for the DOE to comply with Judge Mollway's order requiring provision of compensatory education to the class members; and (2) to resolve individual disputes as they arise.

Within these objectives, the special master should be empowered to use all available means to: (1) identify the DOE's capacity to provide compensatory education for the class members

(who may be 29 or older before needed compensatory services have been completed); (2) identify the private service providers who may be needed to provide compensatory education to the class members and negotiate terms on which they will provide services to the class members; (3) develop an efficient procedure for requiring the DOE to determine promptly, consistent with the IDEA, what services are needed by each class member and where and by whom they can best be provided; (4) identify a team of independent experts who can assist the class members in evaluating the program proffered by the DOE and identifying and recommending alternative programs, if necessary; and (5) establish a procedure for conducting hearings to resolve any disputes between the DOE and class members regarding the nature, scope, and delivery of the required compensatory services.

The DOE should bear the cost of the special master because Plaintiffs have already prevailed in this action and because the purpose of the special master is to facilitate delivery of their court-ordered remedy. That should not come at a cost to the Plaintiffs. Nor do Plaintiffs have the resources to share in the cost of the special master.

Finally, although the DOE's current supplemental budget request does not include any additional funding for implementing services due under this case, Plaintiffs' understanding is that the DOE has until approximately April 2016 to request an amendment to its supplemental budget request as the funding bill moves through the legislature. The DOE should request additional funds immediately, to enable delivery of compensatory services as soon as possible.¹

¹ Unfortunately, the legislature may be under the false impression that the DOE has all the money it needs to provide the remedy ordered in this case—or even that the DOE has already provided the remedy ordered. Not only is the DOE failing to request funding for compensatory services, the DOE recently represented to the House Finance Committee that the DOE was actively working on locating and serving class members, and that it was in fact already providing services to the older class members. Suzanne Mulcahy, the head of the Office of Curriculum Instruction and Student Support, stated that the DOE was engaged in a “huge” “interagency collaborative effort” to locate and provide services to the older Class Members. *See* Ex. B (Olelo broadcast of 1/7/16 DOE legislative briefing, *available at* http://olelo.granicus.com/MediaPlayer.php?clip_id=52531, 03:18:04 to 03:22:31). Superintendent Kathryn Matayoshi stated that students in the “gap group,” meaning those released between 2010 and 2014, had been offered services at schools, and Ms. Mulcahy indicated that was being funded by the allocation the DOE had previously requested from the legislature for this case. *See id.* As the Court is aware, these statements are not accurate. There was no “interagency effort”; Plaintiffs were repeatedly rebuffed on their request for exactly that. And the older class members are not being served.

III. POSSIBLE CANDIDATES

Plaintiffs propose the following candidates:

Judge Karen M. Radius – Retired family court judge who helped establish the First Circuit Girls Court for at-risk and delinquent girls;

Judge Mike Town – Retired judge with 31 years of experience in criminal and family courts, as well as current mediator with Dispute Prevention & Resolution Hawai`i;

Robert A. Stodden, Ph.D. – Founder and retired director of the University of Hawaii’s (“UH”) Center on Disability Studies, and past president of the Association of University Centers on Disabilities; or

Charles Mueller, Ph.D. – Professor, Department of Psychology at UH.

IV. INCARCERATED CLASS MEMBERS

The DOE provided names of approximately 75 currently incarcerated individuals. All of these individuals should be presumed interested for purposes of budgeting for compensatory education.

V. SETTLEMENT

On October 29, 2015, Plaintiffs proposed a matrix with a global range of services that could be offered to Class Members with varying disabilities, based on Class Member characteristics that had been previously identified by the DOE. Plaintiffs request a response to this proposal from the DOE, as this document will be useful to frame settlement discussions.

DATED: Honolulu, Hawai`i, February 24, 2016.

/s/ Michelle N. Comeau

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EDUCATION

DOE Struggles To Fill Positions That Serve Special Ed Students

One in three school psychologist positions and one in four speech pathologist positions are vacant within the Department of Education.

FEBRUARY 17, 2016 · By Jessica Terrell

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5

Finding qualified special education teachers is not the only [staffing challenge](#) facing Hawaii schools.

As of Feb. 1, one out of every three school psychologist positions within the [Department of Education](#) was vacant. Only 56 percent of high-level occupational therapist positions are filled. And the DOE is also trying to recruit 484 educational assistants — employees of varying skills and education levels who work with special education students.

The vacancies come at a time of increased attention on Hawaii’s special education inclusion rates. Hawaii lags behind the national average in the amount of time special education students spend in inclusive classrooms with their peers.

“When we have discussions about inclusion being the best practice for the special education community, there is a need to understand what resources are available to make the inclusion setting a success,” [Board of Education](#) Vice Chair Brian De Lima said. “It goes hand in hand that that if you are unable to fill the vacancies then you are unable to implement best practices for providing the best education for special education students.”

	Position Total	% Filled	Total Vacant	% Vacant
Educational Assistant III	3022	84%	484	16%
Speech Pathologist IV	231	77%	53	23%
School Psychologist	84	62%	32	38%
DP User Support Tech. II	128	77%	30	23%
Occupational Therapist IV	27	56%	12	44%

EXHIBIT A

Recruiting special education teachers is the Department of Education's top staffing priority, but the department is also trying to chip away at other vacancies.

The DOE has been implementing a number of short- and long-term strategies to address the problem, Barbara Krieg, the DOE's assistant superintendent of human resources, told the Board of Education on Tuesday.

Educational assistants are no longer required to have an associate's degree, but instead can take a course and pass an exam to qualify for the position, Krieg said.

The DOE is also streamlining its application process, making better use of social media as a recruiting tool, increasing advertising, and looking at ways to occasionally hire experienced employees at a higher pay rate than the most basic entry level pay or offer bonuses for some positions.

"We tend to be competitive for upper- and mid-range salaries," Krieg said. "We're not so competitive for entry level."

The starting salary for a 10-month educational assistant is \$26,030 a year. Starting pay for a school psychologist is \$55,236.

Some parts of the state are hit harder than others. Recruiting in Maui County is the biggest challenge right now, Krieg said. Of the 484 vacant educational assistant positions, 85 are on Maui and 71 are on the big island.

"When complex areas or schools are unable to fill vacant positions then we contract out for folks who can help provide services to students," Assistant Superintendent Suzanne Mulcahy said in an email sent by the DOE's communications department. "In the event that someone is not available, which has been a real concern for both speech pathologists and school psychologists, the case load is redistributed to provide coverage. This may mean that all the speech pathologists each take on another 2 or 3 cases and go to other schools, for example."

DOE Classes of Work with 10 or More Vacancies as of 2-1-16

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Position	Position Total*	% Filled	Total Vacant	% Vacant	Filled Perm	Filled Temp	Vacant Perm	% Vacant Perm	Vacant Temp	% Vacant Temp
Tractor Operator	22	45%	12	55%	10		11	50%	1	5%
Occ Therapist IV	27	56%	12	44%	15		12	44%		0%
Clinical Psychologist VI	29	59%	12	41%	11	6	7	24%	5	17%
School Psychologist	84	62%	32	38%	47	5	23	27%	9	11%
Cafeteria Helper (less than 1.0 FTE)	469	73%	127	27%	162	180	46	10%	81	17%
Educ Asst III (less than 1.0 FTE)	989	75%	249	25%	497	243	79	8%	170	17%
DP User Support Tech II	128	77%	30	23%	26	72	6	5%	24	19%
School Custodian II (less than 1.0 FTE)	419	77%	97	23%	275	47	79	19%	18	4%
Speech Pathologist IV	231	77%	53	23%	178		52	23%	1	0%
Office Assistant III (less than 1.0 FTE)	238	78%	52	22%	101	85	22	9%	30	13%
School Baker	191	84%	30	16%	161		30	16%		0%
Behavioral Hlth Splct IV	312	85%	47	15%	210	55	20	6%	27	9%
School Security Attendant	262	85%	38	15%	177	47	15	6%	23	9%
Educ Asst III	2033	88%	235	12%	1323	475	87	4%	148	7%
Office Assistant III	808	90%	82	10%	568	158	42	5%	40	5%
School Custodian III	192	92%	15	8%	177		15	8%		0%
School Custodian II	680	93%	49	7%	605	26	44	6%	5	1%
School Health Aide	252	94%	14	6%	238		14	6%		0%
School Cook II	198	94%	11	6%	187		11	6%		0%

* Position totals reflect the number of authorized positions. However, not all positions are subject to recruitment, at the discretion of the school/office.

Hawaii's high cost of living, market demands, the availability of training programs and turnover rates all impact Department of Education vacancies.

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DEPARTMENT OF EDUCATION

DATED: Honolulu, Hawai`i, February 24, 2016.

/s/ Michelle N. Comeau
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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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