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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

O.K., et al,

Plaintiffs,

vs.

JUDY TONDA, et al.,

Defendants.

CIVIL NO. 07-00504 HG-LEK

DEFENDANTS' OPPOSITION
TO PLAINTIFFS' "MOTION
FOR A PRELIMINARY
INJUNCTION"; DECLARATION
OF JUDY TONDA, EXHIBIT 1;
DECLARATION OF LINDA
RIVERA IN SUPPORT OF
DEFENDANTS' OPPOSITION
TO MOTION FOR
PRELIMINARY INJUNCTION;
DECLARATION OF
MAHEALANI ENOS IN
SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION;
EXHIBIT "A" - "B";
CERTIFICATE OF SERVICE

Date: February 11, 2008

Time: 10:30 a.m.

Judge: Hon. Helen Gillmor

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DEFENDANTS' OPPOSITION TO PLAINTIFFS'
"MOTION FOR A PRELIMINARY INJUNCTION"

I. INTRODUCTION

The named Plaintiffs¹ in this action are homeless children and their parents who contend they were denied access to public schooling because of the Defendants' alleged failures to follow the requirements of the McKinney-Vento Act (42 U.S.C. §§ 11301, *et. seq.*, hereinafter McKinney-Vento Act, MVA or the Act). Notably, the Plaintiffs do not contend that they currently are being denied access. While everyone acknowledges the seriousness of the problem of homelessness in the State of Hawaii, the Defendants believe the number of homeless children who have incurred any delays in access has remained very low, and that the Defendants have performed in a timely, reasonable and responsible manner to resolve any problems that arose in addressing a problem that all agree is intractable.

As this Court is aware the MVA provides grants to the states to provide assistance in enabling the states to ensure that each homeless child has equal access to the same free, appropriate public education as provided to other children. The MVA requires that a state take specific actions to achieve this goal:

¹ In a contemporaneously-filed Motion, Plaintiffs' counsel has requested class certification.

- Ensure that a state's regulations, practices, or policies do not act as a barrier to the enrollment, attendance or success in school of homeless children;
- Provide activities for, and services to, homeless children that enable them to enroll in, attend, and succeed in school, or, if appropriate, in preschool programs;
- Establish or designate an Office of Coordinator for Education of Homeless Children and Youths in the State educational agency;
- Prepare and carry out a State plan, previously submitted to the U.S. Department of Education; and
- Develop and implement professional development programs for school personnel to heighten their awareness of, and capacity to respond to, specific problems in the education of homeless children and youths.

Within the requirements set forth in the MVA, the local educational agency is given discretion as how to achieve these goals, and the Act does not set forth any specific method or activity that must be followed. The Plaintiffs' Motion appears to be predicated on the concept that if the Defendants have will not conducted themselves in the manner that Plaintiffs' counsel deems best in the future, we cannot be in compliance with the provisions of the Act. That is not the law, nor does it set the standard under which this Court should determine whether or not the

currently-named Plaintiffs (or any class certified by this Court) are entitled to a preliminary injunction against the Defendants.

The State of Hawai'i Department of Education (DOE) has created a task force to ensure it is in compliance with the requirements of the MVA. The person who has been appointed by Superintendent Hamamoto to chair this task force is Assistant Superintendent Daniel Hamada. Mr. Hamada has been diligently working with a staff for the past several months to prepare and implement an action plan. This action plan has been set forth in a 25-page spreadsheet which details the various parts of the provisions of the Act, and the actions the DOE is preparing to take, or has already undertaken, to ensure the State of Hawaii's regulations, practices, or policies do not act as a barrier to the enrollment, attendance or success in school of homeless children.

Given the size and scope of this undertaking, the Defendants do not believe a written declaration, or submission of documentation, would do justice to the efforts the DOE and Mr. Hamada have put into this project in the last several months. Therefore, we requested the opportunity to present Mr. Hamada's testimony before this Court. Not only will this provide Plaintiffs' counsel the opportunity to question Mr. Hamada as to the progress the DOE has made in ensuring it is in compliance with the Act, it will also provide this Court the opportunity to question him to address concerns the Court may have.

The Defendants suggest that after the Court has reviewed the written submissions, been presented further evidence by way of discovery responses,² and heard the testimony of Mr. Hamada, it will agree with the Defendants that there is no need to issue a preliminary injunction.

II. THE UNDERLYING FACTS DO NOT SUPPORT PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Plaintiffs have made a number of broad, unsubstantiated statements in support of their Motion for a Preliminary Injunction. They have taken the statements of a few individuals and extrapolated the alleged experiences of those individuals to whole classes of homeless persons, without providing this Court any support for those extrapolations. Simply because a few persons may have experienced temporary delays in obtaining benefits under the Act, it does not automatically follow that whole classes of individuals have been denied their rights.

Specifically, it should be noted that a number of the allegations made by the Kaleuati Family and by Ms. Greenwood and her son Maklii are disputed by the Defendants. *See* Declarations of Linda Rivera, Mahealani Enos, and Defendant Judy Tonda. For instance, Linda Rivera notes that Ms. Kaleuati told her the family had moved from one school district to another, but did not explain that this move

² Defendants note that both sides have propounded discovery requests. Certain responses to those discovery requests are due after the briefs are due, but prior to the February 11, 2008, hearing.

was because they had become homeless. Therefore, Ms. Rivera provided Ms. Kaleuati with a Geographic Exception Form, which is the normal procedure when a family requests to attend a school in a district where they no longer reside, and there is no issue of homelessness.³ See Declaration of Linda Rivera.

As to Ms. Greenwood and Makalii, the classroom teacher denies ever threatening Ms. Greenwood or Makalii, or penalizing him in any manner because he was homeless. In fact, because Ms. Enos was aware of the family's situation, she inquired as to whether or not transportation was a problem, but Ms. Greenwood denied that transportation was a problem. In addition, Defendant Tonda specifically refutes many of the underlying claims, particularly the Plaintiffs' claims of hundreds or thousands of children whose needs have not been met. She reports that issues regarding Geographic Exceptions and posters have been addressed already; that each child's needs are is addressed individually; and that all federal funds have been spent reasonably in implementing the MVA.

Based on the above, Defendants do not believe that either of these families were denied equal access to the same free, appropriate public education, as provided to other children and youths because they were homeless. Additionally, as noted above, Defendants will be offering the testimony of Mr. Hamada to

³ It long has been DOE policy that a Geographic Exception is not needed in the event of homelessness.

provide this Court with testimony about DOE's efforts to ensure that it is in compliance with the Act.

III. PLAINTIFFS ARE UNABLE TO MEET THE STANDARD REQUIRED TO OBTAIN INJUNCTIVE RELIEF

A. The Plaintiffs Are Not Likely to Succeed on the Merits

The Ninth Circuit uses the following criteria for granting a preliminary injunction—strong likelihood of success on the merits; the possibility of irreparable injury to the plaintiffs if injunctive relief is not granted; a balance of hardships favoring the plaintiffs; and advancement of the public interest.

Mayweathers v. Newland, 258 F.3d 930, 938 (9th Cir. 2001).

To obtain a preliminary injunction in the Ninth Circuit, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits. *U.H. Professional Assembly v. Cayetano*, 16 F.Supp.2d 1242, 1244 (D. Haw. 1998).

1. The Plaintiffs Have Little Likelihood of Success.

The Plaintiffs argue that they are likely to succeed on this Motion based on the following claims: (1) the Defendants' alleged failure to employ and "empower" adequate personnel to implement the Act meaningfully; (2) DOE's alleged failure to adequately conduct outreach training and public notification

regarding the Act; (3) The Defendants' alleged failure to correct rules and regulations that function as a barrier to education; (4) The Defendants' alleged failure to allow children to remain in their home school; (5) The Defendants' alleged failure to provide comparative transportation services to and from school; (6) The Defendants' alleged failure to ensure immediate enrollment of homeless children in public school; and (7) The Defendants' alleged failure to develop and implement an appropriate dispute resolution procedure. Based on changes the DOE has begun implementing, as will be presented by Mr. Hamada, discussed above, the Plaintiffs cannot meet the tests set forth by the Ninth Circuit for issuance of a preliminary injunction.

As to the specific standard the Ninth Circuit uses in evaluating the likelihood of success on the merits, in *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), the court recognized that a plaintiff must establish a "strong likelihood" or "reasonable certainty" of prevailing on the merits. *Id.* at 33. As set forth in the sections below dealing with each of Plaintiffs' specific claims, it is extremely unlikely Plaintiffs will ultimately prevail on their claims.

2. The Plaintiffs Have Little Possibility of Showing Irreparable Injury.

The Ninth Circuit recognizes that "An alleged constitutional infringement will often alone constitute irreparable harm." *U.H. Professional Assembly, supra*, 16 F.Supp.2d at 1247. Therefore, there must be a likelihood of

immediate future harm to merit a preliminary injunction with a constitutional infringement. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Since even a violation of the Act does not constitute a constitutional infringement, the Plaintiffs must make a showing of more than immediate future harm.

Based on the facts, these Plaintiffs (or a class, should the Court certify one) are not suffering, and do not remain at risk of, irreparable harm. The violations of the Act alleged by these Plaintiffs have been resolved by the DOE, and the Plaintiffs are unable to show they (or those in any class) are being, or will continue to be, harmed by the actions of the DOE. In requesting the injunction, Plaintiffs merely speculate that they may be harmed in the future. Speculative injury is insufficient to show irreparable harm—there must exist a strong threat of irreparable injury. *Diamontiney v. Borg*, 918 F.2d 793 (9th Cir. 1990).

The Plaintiffs provide a quotation from *Orozco by Arroyo v. Sobol* 674 F.Supp. 125, 128 (S.D. N.Y. 1987), as support for their statement that “Even a brief disruption of a child’s education can have grave effects,” (Memo. Support, at 33), but did not choose to include the introductory sentence, which demonstrates that the quotation focused on irreparable harm when a child is denied attendance, not when there might be a few days delay in enrolling a child. The actual quotation reads:

There can be no doubt that plaintiff could suffer irreparable harm if she is denied attendance at a New York public school.

“[I]nterruption of a child's schooling[,] causing a hiatus not only in the student's education but also in the other social and psychological development processes that take place during the child's schooling, raises a strong possibility of irreparable injury.” [Citation omitted; emphasis added.]

The Plaintiffs thus are unable to show a likelihood of success on their claims and none are currently being denied services required under the Act.

3. The Balance of Hardships Tips Sharply in Defendants' Favor.

In balancing the hardships, “the Court must identify the harm which a preliminary injunction might cause the Defendants and weigh it against the Plaintiffs' threatened injury.” *U.H. Professional Assembly, supra*, 16 F.Supp.2d at 1247.

Plaintiffs request both prohibitory (ceasing of violations of the Act) and mandatory (hiring of additional personnel, changes to DOE policies, etc.) injunctive relief. Since mandatory relief is more burdensome than mere prohibitory relief, the balance of hardships tips in favor of Defendants. *See Stanley v. University of Southern Cal.*, 13 F.3d 1313 (9th Cir. 1994) (a mandatory injunction is particularly disfavored and the court should deny such relief unless the facts and law **clearly** favor the moving party).

A second reason for finding that the balance of hardships tips sharply in favor of Defendants is that even if we assume Plaintiffs are able to show a fair likelihood of success on the merits, Plaintiffs have not demonstrated any threat of

immediate irreparable injury. The injunction would require Defendants to implement mandatory injunctive relief without any likelihood that Plaintiffs would suffer future irreparable harm.

4. The Plaintiffs are Unable to Meet the Standard for Obtaining Injunctive Relief.

Plaintiffs have identified seven areas where they believe the Defendants have failed follow the Act. Defendants note they are unaware of any student that has been denied enrollment in his home school, or in a school closest to where the student is living, once the student has been identified as being homeless. Other alleged inadequacies are being addressed, as set forth below. While the Plaintiffs claim that there are widespread problems in the DOE's implementation of the MVA, there is not proof of that. Limited problems—and the problems alleged in this case have been limited in number as well as time—do not provide a basis for a systemwide injunction. As the Supreme Court counseled in *Lewis v. Casey*, 518 U.S. 343, 359-60, 116 S.Ct. 2174, 2184, 135 L.Ed.2d 606 (1996)(emphasis added):

... Was that inadequacy widespread enough to justify systemwide relief? . . . These two instances were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief. *See Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 417, 97 S.Ct. 2766, 2774, 53 L.Ed.2d 851 (1977) (“[I]nstead of tailoring a remedy commensurate with the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope”); *id.*, at 420, 97 S.Ct., at 2776 (“[O]nly if there has been a systemwide impact may there be a systemwide remedy”); *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558, 61 L.Ed.2d 176 (1979) (“The

scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class”).

a. The Defendants’ alleged failure to employ and “empower” adequate personnel to implement the Act meaningfully.

The Plaintiffs claim that the defendants have failed to employ and “empower” adequate personnel to implement the Act meaningfully. Mr. Hamada will testify about the number of positions that will be added to the DOE solely for the purpose of further implementing the MVA, and the date the DOE expects to have those extra persons in the field.

While the Plaintiffs contend that the State Coordinator “is charged with monitoring LEA Liaisons to ensure state-wide compliance with the McKinney-Vento Act” (Motion, at 17), the Act does not contain any such requirement. While the U.S. DOE report states that the State must ensure that the LEAs comply with the requirements of the MVA, and that section 80.40 of the EDGAR generally requires that as a recipient of grant funds the State is responsible for monitoring grant and sub-grant supported activities and ensuring compliance with applicable federal requirements, the Act does not set forth any specific method for ensuring this compliance.

b. The Defendants’ alleged failure to adequately conduct outreach training and public notification regarding the Act.

Recently the DOE has placed posters regarding the rights of homeless families at all DOE offices, schools, and identified homeless shelters in the State of

Hawaii. The DOE has issued a letter to all staff (who signed that they received the letter), relating to the rights of the homeless. A copy of that letter is attached to this Memorandum, as Exhibit "A." Additionally, on or about January 4, 2008, Mr. Hamada issued a Memorandum to Complex Area Superintendents and Principals which followed up on the earlier letter providing the name, address, and telephone number of homeless shelters that are in partnership with the DOE's McKinney-Vento program. This Memorandum instructs the Complex Area Superintendents and Principals to refer to the information as part of their school's registration procedure, especially as it relates to any address provided by a family, as not all families will identify themselves as McKinney-Vento eligible. A copy of that letter is attached to the Memorandum as Exhibit "B." Mr. Hamada will testify about what further steps the DOE is taking conduct outreach training and public notification regarding the Act.

c. The Defendants' alleged failure to correct rules and regulations that function as a barrier to education.

The DOE has already begun to take measures to ensure that its procedures, policies and practices are in line with the Act. For example, the DOE has reiterated its policy that Geographic Exceptions are not required with homeless children. *See* Exhibit "A." The DOE is currently formulating other changes to its procedures, policies and practices to ensure the DOE is in full compliance with the Act. Mr. Hamada will testify as to what steps the DOE has taken in this regard.

d. The Defendants' alleged failure to allow children to remain in their home school.

As far as the DOE is aware, no children have been denied the right to remain in their home school once they have been identified as homeless. *See* Declaration of Linda Rivera. However, the DOE intends to clarify its procedures, policies and practices to ensure that staff who perform enrollment at the schools are aware of the requirements of the MVA. Mr. Hamada will testify as to what steps the DOE has taken in this regard.

e. The Defendants' alleged failure to provide comparative transportation services to and from school.

The DOE already has begun developing a plan to provide more robust transportation services to children who have been displaced from their home school due to becoming homeless. The issue of providing transportation services to homeless children is considered the most difficult hurdle faced by school districts nationwide in complying with the MVA. Mr. Hamada will testify as to what steps the DOE has taken in this regard.

f. The Defendants' alleged failure to ensure immediate enrollment of homeless children in public school.

As noted above, the Defendants are unaware of any students who have been denied immediate enrollment in public school once they have been identified as being homeless. It is the policy of the DOE that a homeless child is entitled to immediate enrollment without requiring records that are normally required, such as

academic records, medical records, or proof of residency. Mr. Hamada will testify as to what steps the DOE has taken to ensure that all staff involved in the enrollment of students are aware of the law, and about the DOE's procedures, policies and practices in this area.

g. The Defendants' alleged failure to develop and implement an appropriate dispute resolution procedure.

The DOE already has in place an official complaint-appeal procedure for situations in which a parent disagrees with any determination made regarding enrollment. The procedure asks the parent to appeal the enrollment determination decision to the Complex Area Superintendent. If this is still not satisfactorily resolved, the next level of appeal is to the DOE Superintendent. Mr. Hamada will testify as to what steps the DOE has taken to ensure that all staff involved in the enrollment of students are aware of the law, and about the DOE's procedures, policies and practices in that regard.

For these reasons, the Plaintiffs cannot meet the standard for obtaining injunctive relief, and the Court should deny their Motion.

IV. THE NAMED PLAINTIFFS LACK STANDING TO SEEK INJUNCTIVE RELIEF AGAINST THE DEFENDANTS

Jurisdiction is a threshold issue that "cannot be waived by the parties nor ignored by the courts." *California v. LaRue*, 409 U.S. 109, 113 n. 3, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972). Here, since the Plaintiffs' claims have become moot, the

Plaintiffs do not have standing and this Court does not have jurisdiction to hear this case. In *Jobie O. v. Spitzer*, Slip Copy, 2007 WL 4302921, *4 (S.D.N.Y. 2007)(emphasis added), the court reviewed the issues of standing and mootness as applied to class actions. The Court noted:

Special concerns exist with regard to class action mootness, and the Supreme Court focused on these problems—including the timing of class certification—in a series of decisions in the mid-1970's. [Citations omitted.] As a general rule, if the named plaintiff's claims become moot prior to class certification, the entire action becomes moot and the case is dismissed. [Citations omitted.] But if the class is certified before the named plaintiff's claims become moot, he may continue to represent the class, even though his own claims later becomes moot. [Citations omitted.]

There are three familiar exceptions to the general rule: class action claims may survive a mootness challenge if they become moot because (a) the defendant voluntarily ceases the injury-causing conduct in an attempt to evade judicial scrutiny; (b) the claims are inherently transitory; or (c) the claims are capable of repetition, yet evading judicial review. *See Davis*, 440 U.S. at 631; *Sosna*, 419 U.S. at 399-400; *Comer*, 37 F.3d at 798.

A. Jurisdiction of Federal Courts.

The Supreme Court has stated unequivocally that “those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.” *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 1665 (1983) (citing *Flast v. Cohen*, 392 U.S. 83, 94-101, 88 S.Ct. 1942, 1949-1953 (1968)).

The case or controversy limitation of Article III requires that a party invoking federal jurisdiction has standing – that is a “personal stake” in the outcome of an action. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691 (1962).

Plaintiffs [must] . . . demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

Lyons, supra, 461 U.S., at 101, 103 S.Ct., at 1665 (quotations and citations omitted). *See also O’Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974). The “[s]tanding doctrine functions to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.” *Jackson v. California Dept. of Mental Health*, 399 F.3d 1069, 1073 (9th Cir. 2005) (quoting *Friends of the Earth, inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 191, 120 S.Ct. 693 (2000)).

Specifically, “when injunctive relief is sought, litigants must adduce a “credible threat” of **recurrent** injury.” *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985) (citing *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983) and *Lyons*)(emphasis added). “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if

unaccompanied by any continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. at 495-496, 94 S.Ct., at 675-676.

B. No Sufficiently Real and Immediate Threat of Harm Exists.

The Plaintiffs contend that they have standing to seek injunctive relief because of past harm they allegedly suffered and because of possible harm that may be suffered by other homeless families. The Plaintiffs’ bald assertions fail to adduce a credible threat of recurrent injury to establish standing to seek injunctive relief. It is the understanding of the Defendants that the issues relating to the denial of public school services has been adequately addressed for all three Plaintiff families. The Defendants expect to provide evidence as to that issue either at the hearing on the Motion for Preliminary Injunction, or in a supplemental pleading, following receipt of the discovery responses.

The Supreme Court has spoken to this threshold requirement in *Los Angeles v. Lyons* by requiring a “sufficiently real and immediate” threat to show an existing controversy. 461 U.S., at 102, 103 S.Ct., at 1665. The Court in *Lyons* found that the plaintiff failed to allege a case or controversy for injunctive and declaratory relief when he failed to establish a real and immediate threat that he would again be stopped for a traffic violation (or another violation) by a police officer who would illegally choke him into unconsciousness without provocation or resistance on his part. *Id.*, at 105-106, 103 S.Ct., at 1667.

In making this decision, the *Lyons* Court was guided by earlier precedent, specifically *O'Shea v. Littleton, supra*:

Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.

O'Shea v. Littleton, 414 U.S. at 495-496.

The Plaintiffs' claims that their rights under the MVA were violated in the past (which the Defendants do not believe occurred), does not automatically entitle them to injunctive relief.

Further, because the Plaintiffs lacked standing at the time they filed their Motion for Preliminary Injunction, the "capable of repetition yet evading review" exception to the mootness doctrine does not apply. Specifically, the second prong of this exception, the requirement to show a "reasonable expectation" that the same parties will be subjected to the same offending conduct, does not apply. Therefore, any expectation by the Plaintiffs that they will be denied services in the future would not entitle them to a federal judicial forum, without a showing that such a deprivation is likely to occur.

VI. THE COURT MUST TAKE THE COST OF COMPLIANCE INTO CONSIDERATION IN RULING ON THE PLAINTIFFS' MOTION

The McKinney-Vento Act was originally authorized in 1987, and, most recently, reauthorized as part of the No Child Left Behind Act of 2001 ("NCLB").

The NCLB contains the following provision:

Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

20 U.S.C. § 7907(a)

The Defendants assert that the plain meaning of this section is that states and school districts may not be required, in complying with the NCLB, and by extension, the MVA, “to spend any funds or incur any costs not paid for under this Act [the NCLB].” 20 U.S.C. § 7907(a).

The Spending Clause gives Congress the authority “to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. Const. Art. I, § 8, cl. 1. This authority includes the power to require states to comply with federal directives as a condition of receiving federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (Congress may require each state to raise its minimum drinking age to 21 in order to receive its full share of federal highway funds). In addition, Congress may use its spending power to pursue objectives outside of Article I's “enumerated legislative fields.” *Id.* at 207 (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

The Supreme Court's decision in *Dole* guides our analysis. *Dole* sets forth

five limitations on the federal spending power. First, the language of Article I requires that Congress use its power to further “the general welfare.” *Dole*, 483 U.S. at 207. The second limitation requires Congress to state all conditions on the receipt of federal funds “unambiguously” so as to “enabl[e] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Third, the conditions attached to federal funds might be invalid if they are not related “to the federal interest in particular national projects or programs.” *Dole*, 483 U.S. at 207-208. The fourth limitation is that financial incentives offered by Congress must not be so significant that they amount to coercion. *Dole*, 483 U.S. at 211. Finally, spending and conditions on funds must not violate any other constitutional provision. *Id.* at 208.

Therefore, the key to the analysis of a Spending Clause statute is the following principle of statutory construction arising from our system of federalism: in return for federal funds, the states agree to comply with federally imposed conditions and such conditions must be imposed unambiguously and with a clear voice. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)

Accordingly, where as here, a preliminary injunction would “result in a substantial increase in the obligations of the state[s] without any clear statement from Congress to provide notice” thereof, this Court is without authority to issue

such an injunction.

This rule as to a constitutionally mandated clear statement is firmly grounded in the Supreme Court's decision in *Pennhurst, supra*. At issue in *Pennhurst* was whether the Developmentally Disabled Assistance and Bill of Rights Act should be interpreted to impose on states an obligation to fund the rights recognized in the Act. 451 U.S. at 16-17. The Supreme Court rejected that interpretation of the Act, which was ambiguous on the point, explaining that “we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.” *Id.*

The Court reasoned that this clear statement rule both ensures that participants in a Spending Clause program are aware “of the conditions” of the program, *id.* at 17, and that the Congress that enacts a statute—not the judicial or executive branches—will make the fundamental choice regarding the extent to which, if at all, a federal program is intended to intrude upon and displace state and local prerogatives. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 464 (1991).

For that last reason, the clear statement rule applies with particular force where the federal government seeks to intrude upon and displace state and local authority in an area, such as public education, over which states and their subdivisions have long held sway. As the *en banc* Fourth Circuit explained in *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997):

Insistence upon a clear, unambiguous statutory expression of congressional intent to condition the States' receipt of federal funds in a particular manner is especially important where, as here, the claimed condition requires the surrender of one of, if not the most significant of, the powers or functions reserved to the States by the Tenth Amendment—the education of our children.

Id. at 566.

“Today education is perhaps the most important function of state and local governments.” *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)). *See also Milliken v. Bradley*, 418 U.S. 717, 741(1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools...”); *United States v. Lopez*, 514 U.S. 549 (1995) (“[Education is an area] where States historically have been sovereign.”).

Adhering to the “clear statement” rule, the Sixth Circuit Court of Appeals recently held that if the NCLB (which includes the MVA) requires states to comply with all NCLB requirements even when a state must incur additional costs not paid through federal funds, there is no clear notice of that obligation. *See School District of the City of Pontiac v. Secretary of the United States Department of Education*, ___ F.3d ___, 2008 WL 60187 (C.A.6 [Mich.], Jan. 7, 2008). There the Court specifically concluded that: “. . . a state official deciding to participate in NCLB could reasonably read § 7907(a) to mean that her State need not comply with requirements that are ‘not paid for under the Act’ through federal funds.” *Id.*

at 19 (quoting *Pennhurst, supra*).

Mr. Hamada will testify about the cost of implementing the MVA, which DOE has voluntarily undertaken. The Defendants note that the Plaintiffs' motion has not addressed this issue. Based on the above, the Defendants suggest that the Court must consider the cost of implementing the relief requested by the Plaintiffs. If the cost of such relief exceeds the funds that the DOE has received from the federal government, the relief that the Plaintiffs request is not available. Since the Plaintiffs have not considered this issue, or shown that the relief requested will not exceed the funds received, the Plaintiffs' Motion should be denied.

VII. CONCLUSION

Wherefore, for the reasons set forth above, the Defendants respectfully request this Court deny the Plaintiffs' request in its entirety.

DATED: Honolulu, Hawai'i, January 24, 2008.

/s/ RANDOLPH R. SLATON
CARON M. INAGAKI
JOHN F. MOLAY
RANDOLPH R. SLATON

Deputy Attorneys General
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

O.K., et al.

Plaintiffs,

vs.

JUDY TONDA, et al.,

Defendants.

CIVIL NO. 07-00504 HG-LEK

DECLARATION OF JUDY
TONDA; EXHIBIT 1

DECLARATION OF JUDY TONDA

I, Judy Tonda, declare to the best of my knowledge upon information and belief as follows:

1. I am a Defendant in this matter. I am employed at the State of Hawai'i, Department of Education ("DOE"), as the DOE liaison to all of the DOE schools. I supervise the administration of funds received from the federal government under the McKinney-Vento Act ("MVA").

2. I have personal knowledge of the matters set forth herein and am competent to testify thereto in a court of law.

3. In regard to the Declaration of KANANI KAAIAWAHIA BULAWAN, at ¶ 7, using State funding through the McKinney-Vento grant, the DOE provides city bus passes for most homeless students continuing at their school of origin upon request. DOE does not provide bus passes for these

student's parents due to cost. Adult bus passes cost double the amount of student passes, therefore, providing adult's bus passes would limit the number of student passes the DOE would be able to fund. In December 2007, the DOE drafted a plan in which the DOE's Student Transportation Office would provide the bus passes and the DOE's MVA grant would provide one-way bus tokens for students who apply for passes after the middle of the month. Though this plan is still in draft form, the DOE has begun implementing the program. Using MVA grant money, the DOE has purchased 100 one-way student bus tokens, which are being distributed through the Student Transportation Office.

4. In her Declaration, at ¶ 2, ELAINE CHU states that she is a surrogate parent for foster children. The MVA does not apply to foster children.

5. In regard to the Declaration of LOKELANI CORREA, at ¶ 2, the Family Promise Shelter system is a mainland program that utilizes church members to house homeless families. I have been in contact with Kent Anderson ("Anderson"), Director; and Christie McPherson ("McPherson"), Case Manager, and have discussed the McKinney-Vento Act ("MVA") with both Anderson and McPherson, both of whom know how to contact me if they have any questions. In the past, both Anderson and McPherson have contacted me regarding enrollment issues and school placement questions, and we have resolved their concerns. In reference to ¶ 2, in December 2007, the Homeless Concerns Office distributed

posters and brochures to all schools and shelters. The posters and brochures contained information regarding homeless students MVA rights. The schools were required to display the posters in a prominent area. All teachers and staff were required to sign off that they have received MVA information. Shelter representatives were required to sign off that they have received the posters and they were directed to post them.

6. In regard to ¶ 22 of the Declaration of ALICE GREENWOOD, prior to the 2007 – 2008 school year, training was provided regarding MVA rights to Title I school Principals, and beginning in the 2007 – 2008 school year, more in-depth training was provided to Title I school Principals. In reference to ¶ 29, to sign up for the bus passes, students must sign up for the bus pass every year; students are not automatically issued a bus pass. In reference to ¶ 38, shelter managers were informed of a change in transportation procedures that were to take effect in July 2007. Despite her governmental and community activity, Ms. Greenwood never has contacted me with her problems or concerns, even though she was informed that I needed to be contacted for information regarding bus passes. In reference to ¶ 40, free bus passes and bus transportation are provided if a student is eligible for them, they are not given out based solely on a student's homeless status. Free bus passes are provided to homeless students who are continuing at their school of origin. Student transportation provides free bus

service for homeless students who reside outside of the one (1) mile radius of the school. Since December 2007, schools have been required to prominently display posters informing the public of their MVA rights. These posters have also been distributed to shelters, who have been directed to post them.

7. In regard to ¶ 11 of the Declaration of OLIVÉ KALEUATI, the receptionist referred to has been informed that Geographical Exceptions (“GE”), do not apply to homeless students who are continuing at their school of origin, or to students who are enrolling in any public school that non-homeless students who live in the attendance area in which the student is actually living are eligible to attend. Ms. Kaleuati and I have been working together for approximately two years and she knew that I work with homeless children and she could have called me to help her with her situation. I am sad that she did not come to me when she encountered this problem. In reference to ¶¶ 22 and 23, after reviewing my data for 2004 – 2005, I found that the Kaleuatis’ were listed as one of the Waianae Community Outreach (“WCO”) clients, and WCO, to my knowledge, only services those on the leeward coast. In regard to Dole Middle School, if the Kaleuatis’ were living on one of the leeward beaches and receiving assistance from WCO, they would not be eligible for Dole Middle School. In reference to ¶ 26, in the late 1990’s I was contacted by Helen Kimball, who was then Director of Ohana Ola, and was asked to conduct parenting classes for residents at Ohana Ola. Since then I have worked with Ohana

Ola during the summer to schedule parenting classes to be started near the beginning of the school year. Ohana Ola residents are required to attend these classes. During these classes I share with the residents what my job duties are, including my work with homeless families. I also specifically mention the MVA, and inform residents what their rights are under this Act. While I do not have exact dates of all parenting classes, I am sure that Ms. Kaleuati was in attendance. During these parenting classes I provide residents with my contact information and tell them that if they need any help with school issues they can ask their shelter case manager, or contact me directly. As part of my standard practice, within the past two years, I provide to shelter residents the "Parent Pack" folder (a copy of which is attached as Exhibit "1"), which is purchased through MVA grant funds; this "Parent Pack" folder contains information on MVA rights. In reference to ¶ 27, Ms. Kaleuati did attend parenting classes. I felt as if we got along very well and that she was comfortable with asking me for help. Ms. Kaleuati was invited to be a member of the Committee of Practitioners ("COP"), as a homeless parent representative. The COP is an advisory committee for Title I of the No Child Left Behind Act ("NCLB"). I invited Ms. Kaleuati to be on the COP because I felt she was articulate and knowledgeable about the homeless situation, and I felt that she could provide valuable insight. Since I was aware of her situation, I offered to give her a ride to the meetings. I did not have contact with her during the summer of

2007, and therefore was not aware of her situation. Had I known what was going on I would have helped her to stay at Leihoku Elementary and to provide bus transportation for her children, which is what I would have done had I known of anyone in a similar situation.

8. In ¶ 5 of the Declaration of VENISE LEWIS, based on the MVA, the DOE is not required to pay for neighbor island trips. In reference to ¶ 11, in July 2007, all homeless shelters on Oahu received a letter informing them that bus passes for homeless students would be available through the DOE's Student Transportation office. When Ms. Lewis called my office, someone may have informed her that we no longer distribute the bus passes and that the request must go through the DOE's Student Transportation office, and may have informed her that she could get an application through her case manager. My office staff, however, would not have informed her that the application would be forwarded to the Department of Transportation, because the DOE's Student Transportation office handles student bus passes. Our phone logs have no entry indicating that Ms. Lewis contacted our office on August 1, 2007, but the phone logs do indicate that Ms. Lewis contacted our office on August 14, 2007. Our office did inform her that they would fax the application forms to Maili Elementary, which we did. Maili Elementary then informed our office that they had completed the forms and Lani Solomona, the Oahu MVA Liaison, then contacted Ms. Lewis, that day, to let

her know that the forms were completed and they were only awaiting her signature for process.

9. In regard to the Declarations of BRIDGET MORGAN and DANIEL POLLARD, at ¶ 2, the MVA does not apply to guardians ad litem for foster children.

10. In regard to the Declaration of CINDY PRICE, at ¶ 7, if parents are not willing to let us know that they have moved into a shelter or are homeless, we will not know of their current situation, and therefore will not be able to provide appropriate services. In reference to ¶¶ 9 and 10, MVA posters have been up at the Kakaako Shelter since it opened in approximately the Spring of 2006. During the Summer of 2006, Ms. Solomona and I tried to meet with all parents with school aged children in order to sign their children up with transportation services. The shelter director, Utu Langi, and Suvina Goo, from the Waikiki Health Center, have also been provided with information on the MVA as well as information on the services we provide.

11. In regard to the Declaration of ESTHER SANTOS, at ¶ 6, information on students' MVA rights have been distributed to all schools state-wide. In reference to ¶ 7, Wailuku Elementary issues have been specifically addressed. I have spoken with Wailuku Elementary staff and have informed them that the MVA does not require proof of residency, health records, or birth certificates. I have also

informed them that when they encounter this situation again they should contact me to assist them. Furthermore, for the past two school years, the annual Title I Mandatory Meetings for Updates on Framework for School Improvement, Title I Handbook, and Fiscal requirements, which is attended by all Title I school principals, included a presentation on homeless concerns. During this presentation, attendees are informed that the MVA does not require proof of residency, health records, or birth certificates. In addition to this presentation, in the 2006-2007 school year, all schools received the MVA poster, which specifically states that the MVA eligible students do not need a proof of residency, health records, or birth certificates, in order to enroll. In the 2007 – 2008 school year, all schools have received posters and brochures. I have known Ms. Santos for approximately four (4) years. When I initially met her I introduced myself to her and gave her my card, which included my contact information. Furthermore, MVA funds have been used to provide the KHAO shelter with tutors. In reference to ¶ 12, my main contact with the KHAO shelter has been Fran Joswick, who was the director of KHAO until her recent retirement. Ms. Joswick knew of my work with homeless families. Since Ms. Joswick was the director of KHAO, throughout the years, I periodically provided her with posters and brochures regarding the MVA. I was never asked to present information to her staff, but would have been willing to do so upon request. I am not aware of the training provided to her staff regarding the

MVA, however, I do train the PTT's / Tutors, who are paid through MVA grant funds, regarding MVA rights and requirements. In reference to ¶ 15, I was not made aware of the situation mentioned regarding the bus issue on Maui. In her statement Ms. Santos stated that she contacted Roberts Hawaii and spoke with their head, James Kauhi; however, at that time Mr. Kauhi was the DOE's Transportation Officer for Maui. Mr. Kauhi and I have worked together in the past to arrange for the transportation of homeless students to and from school. Had I been made aware of the situation I would have worked with Mr. Kauhi to do what we could to get the students transportation to and from school. In reference to ¶ 25, I was in contact with Ms. Santos about a situation regarding a birth certificate. I did inform Ms. Santos that I would assist the family in enrolling the student immediately. I called the school and informed school staff that homeless students do not need a birth certificate, proof of residency, or health records to enroll. I informed the school that the student must immediately be enrolled, which the school did. I then contacted Ms. Santos and informed her that the student had been enrolled, all that was required at that point was a parent completing school enrollment forms. Ms. Santos told me that she did not know about these services, which surprised me. In reference to ¶ 27, Ms. Santos stated that she was told, approximately two (2) years ago that I was the DOE person responsible for homeless issues. However, in ¶ 12, Ms. Santos stated that no one from the DOE has ever told parents or me that a

homeless child has a right to stay in their old school. Ms. Santos has admitted to knowing that I am responsible for homeless issues, I previously provided her my contact information, and, as she stated herself, I have been in contact with her approximately three times a year in the past two years. During this time, Ms. Santos, admittedly knowing I am responsible for homeless issues, could have asked me questions or for assistance, however, during that time she did not. When she did finally come to me for assistance with the birth certification situation I was able to provide her assistance and we were able to get the child enrolled immediately. In the past, prior to May 2007, along with the annual letter, we have provided all shelters with school supplies. In December of 2007, I visited the shelter to deliver MVA posters and brochures and asked a shelter representative to sign off stating that the poster and brochures were received. During this visit I met with Ms. Santos at which time she apologized for making her declaration. She said that she was the only one who had information and was directed by her supervisor to make the declaration. I know that she knew me and felt confident that she knew she could contact me at any time regarding homeless issues.

12. Since I've been working with homeless families, approximately eleven (11) years, I can only think of a few students, approximately six, whom we knew were homeless and in school but who then no longer attended school, whether having moved to the mainland or for some other reason. The DOE

addresses each child's needs on a case by case basis, and always has worked out each child's problems. There occasionally are delays but we try to work out each problem as quickly as possible. To the best of my knowledge, there are no large numbers of homeless children whose problems have not been addressed.

13. Prior to the 2007 – 2008 school year the MVA grant funds purchased city bus passes for all students attending schools outside the Honolulu district, on Oahu. However, in the 2007 – 2008 school year all homeless children on Oahu, attending their school of origin, received city bus passes through the transportation office. As far as bus passes are concerned, MVA grant funds in the 2007 – 2008 school year are only used to purchase one-way bus tokens.

14. In regard to the U.S. DOE Findings, in Finding 1, the Geographic Exception form is not used as part of the enrollment process for Homeless Students. In regard to Finding 2, information, such as posters and brochures, has been disseminated to all schools and homeless shelters state-wide informing the public of MVA rights. In regard to Finding 3, the DOE already has submitted to the U.S. DOE a plan for independent monitoring of the MVA program, and has begun implementing the plan. DOE is scheduled for a two-year cycle for review; the DOE Cross-Functional Monitoring Team will conduct monitoring during their monitoring cycles.

15. Throughout the approximately eleven (11) years I have worked in my position, all funds have been spent in pursuit of the MVA, all funds have been spent reasonably and all funds have been accounted for.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Hawai'i.

DATED: Honolulu, Hawai'i, January 24, 2008.



JUDY TONDA

Important Information
for Your Child's Success
in School...



EXHIBIT 1

Keep IMPORTANT School Papers Here



What do I keep in this folder?

- School records (IEP, shots, etc.)
- Grades or report cards
- Test results
- Samples of your child's schoolwork
- Birth certificates
- Other health records

Schools most recently attended:	
1. Name of school	_____
School address	_____
School phone #	_____
Principal's Name	_____
2. Name of school	_____
School address	_____
School phone #	_____
Principal's Name	_____

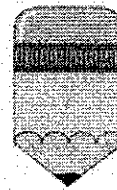
When you move to a new location, remember to

- Try to plan your move at a time that will be the least disruptive to your child's education, such as at the end of the school year.
- Inform your child's school of your plans to move.
- Discuss with your school district's liaison for homeless education the feasibility of keeping your child in the current school even if you move out of the school zone.
- Enroll your child in school as soon as possible.
- Contact the school district's liaison for homeless education in the new district.
- Call the NCHE Helpline if you need help in locating the district liaison.

When moving again

- Tell the school office that you are moving.
- Allow your child to say good-bye to friends and teachers.
- Ask for a copy of your child's school records (IEP, shots, etc.). If you can't get a copy, ask the principal for a letter that summarizes your child's stay at the school. The letter should tell
 - Whether your child has had the required shots
 - What grade your child is in
 - Any important medical information
 - If your child has been referred to or enrolled in any special programs
 - Any standardized test score results

Keep IMPORTANT School Papers Here

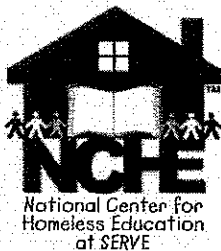


Know Your Child's Rights Under the McKinney-Vento Act

- Your child has a right to go to school no matter where you live or how long you have lived there.
- You do not have to have or need to provide a permanent address in order to enroll your children in school. Schools cannot require proof of residency that might prevent or delay school enrollment.
- Lack of school records cannot prevent a student who is covered by the McKinney-Vento Act from enrolling in the new school. School officials must help in getting your child's records from the last school your child attended.
- If you become homeless, your children have the right to stay in the school they last attended if this is in their best interest and is reasonable or transfer to the school in the district/attendance zone where you currently are staying. The school district must provide transportation to the school of origin if needed.
- Whatever the choice, your child has the right to transportation equal to that of other students.

Your children may be eligible for services through the McKinney-Vento Act if they lack a fixed, regular, and adequate nighttime residence, including:

- Sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; living in emergency or transitional shelters; being abandoned in hospitals; or awaiting foster care placement;
- Having a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;
- Living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
- Migratory children (as such term is defined in section 1309 of the Elementary and Secondary Education Act of 1965) who qualify as homeless for the purposes of this subtitle because the children are living in any of the circumstances described above.



What is the NCHE?

The National Center for Homeless Education helps parents, schools, and community members by giving important information about rights and resources. Please feel free to call us at our toll-free number listed below.

1-800-308-2145

? ? Questions for Parents ? ? to Ask at School

Children can be encouraged by your interest in their day at school, their homework, and the papers they bring home. They also benefit when you take time to ask questions or visit their school. Children who are eligible under McKinney-Vento may receive special services.

Here are some questions for you to ask at your child's school:

I understand my child is entitled to stay in the same school (if feasible), so how do I arrange transportation?

If my child has to change schools, whom should we notify to have the records transferred quickly?

Whom can we contact about a preschool program?

What tutoring services are available for my child?

If my child needs special education services, whom can I talk to?

What special classes are available to develop my child's talent and address his or her needs?

In what sports, music, or other activities can my child participate?

How can my child receive free meals at school?

Where are free school supplies available?

What help is available for my child to go on class field trips if we are unable to pay?



SERVE Cente.
at the University of North Carolina
at Greensboro

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FOR THE DISTRICT OF HAWAII

O.K., et al.

Plaintiffs,

vs.

JUDY TONDA, et al.,

Defendants.

CIVIL NO. 07-00504 HG-LEK

DECLARATION OF LINDA
RIVERA IN SUPPORT OF
DEFENDANTS' OPPOSITION
TO MOTION FOR
PRELIMINARY INJUNCTION

DECLARATION OF LINDA RIVERA IN SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

LINDA RIVERA, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I make this Declaration based on my personal knowledge and if called to testify I could and would do so competently as follows:

2. I am currently the Office Clerk at Leihoku Elementary School.
3. On July 26, 2007 Ms. Olive Kaleuati (the mother of Klayton and Kaleuati Kaleuati) came into the office of Leihoku Elementary School.
4. At that time she informed me that that she was now living in the Kamaile School district but wanted her children to continue at Leihoku Elementary School.
5. She did not tell me that her family was homeless, or provide any information from which I would have known she and her family were homeless.
6. She did not ask about transportation from the WCC shelter to Leihoku Elementary School.
7. She did not tell me that she and her family had relocated to the WCC shelter.
8. Based on the information she had provided to me, I told her that because they were now living outside of the Leihoku Elementary School area, she needed to request a Geographic Exception.
9. I gave her the Geographic Request Form (CHP 13-1).
10. She completed the form and submitted it to me. She did not provide me any additional information than what is on the form or set forth above.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Waianae, Hawaii, January 17, 2008.


LINDA RIVERA

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CIVIL NO. 07-00504 HG-LEK

DECLARATION OF
MAHEALANI ENOS IN
SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION

DECLARATION OF MAHEALANI ENOS IN SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

MAHEALANI ENOS, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I make this Declaration based on my personal knowledge and if called to testify I could and would do so competently as follows:

2. I am currently a Classroom Teacher at Nanakuli Elementary School.

3. I have met with Ms. Greenwood on three separate occasions.

4. The requested conferences had nothing to do with Makalii's attendance.

5. The purpose of these conferences was to discuss Makalii's current lack of progress and to offer extra tutoring by myself during my personal time after-school, twice a week, for the last two weeks of the first quarter.

6. I did not state to Ms. Greenwood that Makalii's lack (not decline) of progress was due to absences.

7. There was no mention at any of these conferences of any disabilities delaying or preventing transportation. Neither absences nor transportation was the reason for these conferences.

8. Since Makalii has been my student the previous year I have been fully aware of this family's homeless situation from the first day of school because Ms. Greenwood informed me of their situation.

9. During the previous school year I had personally provided Makalii transportation home on one occasion (after asking for and receiving permission to do so).

10. I was also willing to offer transportation home from tutoring I was offering, if needed. Knowing of their homeless situation, I wanted to make sure that

transportation would not be a problem for herself and Makalii since I was offering the tutoring after school hours.

11. I did not get a chance to offer this transportation due to the fact the Ms. Greenwood stated that transportation for after-school tutoring was not a problem.

12. I asked Ms. Greenwood if transportation would be a problem. She replied that it would not be a problem and that she had transportation. I asked again to reaffirm that transportation would not be a problem for her. Again she replied that it was not a problem.

13. I have never requested a conference with Ms. Greenwood due to concerns regarding Makalii's attendance either this school year (2007-08) or the previous school year (2006-07).

14. I have never sent out any attendance notices due to my knowledge and empathy for this family's homeless situation.

15. I have never made any comments or threats to Ms. Greenwood on reporting absences and/or tardiness to the counselors.

16. I have never told Ms Greenwood that transportation was her responsibility.

17. At no time did I inform her that she was "in jeopardy."

18. The only comment I made about absences to Ms. Greenwood was she should try to bring Makalii as much as possible, because it does affect his progress if he misses school.

19. I had always considered the parent-teacher relationship on all levels to have been positive and cooperative.

20. Having full knowledge of their homeless situation, I have in fact tried to provide extra support for Makalii and Ms. Greenwood by providing the following accommodations: Transportation home (on one occasion); free after-school tutoring/on the teacher's personal time; home flashcards/notebook; no attendance notices; and although homework is assigned, there is no penalty for not returning homework.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Nanakuli, Hawaii, January 18, 2008.



MAHEALANI ENOS

NJAF CAYETANO
INOR



PAUL G. LAMARQUE, Ph.D.
SUPERINTENDENT

**STATE OF HAWAII
DEPARTMENT OF EDUCATION**
P. O. Box 2300
HONOLULU, HAWAII 96804

vision of Learner, Teacher, and School Support

March 30, 2000

**TO: District Superintendents, Principals, Registrars, and Elementary
School Administrative Services Assistants**

FROM: Diana K. Oshiro, Assistant Superintendent

SUBJECT: ENROLLMENT OF ABANDONED CHILDREN

Because of a concern raised in the Legislature, this is a clarification of school enrollment procedures for children who are abandoned by their parents or legal guardians. These children are living with grandparents, relatives, or family friends because **their parents' whereabouts are unknown or their parents are both incarcerated or their homeless parents have temporarily placed them with relatives or friends.** These children are protected by the Stewart B. McKinney Act for homeless children. As such, the children should be allowed to enroll in the school in the attendance area in which they are actually living. A geographic exception request is not necessary for these children.

Please call Judy Tonda, Homeless Concerns Resource Teacher, at 394-1384 or Joanne Swearingen, Educational Specialist, at 733-9895 if you have any questions.

DKO:JS:jks

c: Superintendent
Assistant Superintendents
Superintendent's Branch Directors

EXHIBIT "A"

SPMS SEP 15

BENJAMIN J. CAYETANO
GOVERNOR



PAUL G. LEMAHIEU, P
SUPERINTENDENT

9/21 - Certificated S:

STATE OF HAWAII
DEPARTMENT OF EDUCATION

P.O. BOX 2380
HONOLULU, HAWAII 96804

OFFICE OF THE SUPERINTENDENT

September 10, 2001

TO: District Superintendents and Principals
FROM: Paul G. LeMahieu, Ph.D.
Superintendent of Education
SUBJECT: SCHOOL ATTENDANCE PROCEDURES

Attached is a copy of the revised School Attendance Procedures to be implemented by all schools. Since July 1, 1999, all elementary and secondary schools have been expected to adhere to the procedures outlined for taking and reporting daily attendance using the Mac/Win School programs, without school-level variations.

The following revisions have been made in the Procedures for further clarification:

- Page 1: "Definitions - 'Absent'" An example is given for schools choosing to use "unexcused absence."
- Page 1: "Definitions - 'Authorized school activity'" "School-related" was added to clarify employment that would be an authorized school activity.
- Page 3: "Suspension" Although suspensions are considered absences for Average Daily Attendance (ADA) purposes, they will be reported separately on individual school reports (School Status and Improvement Report).
- Page 6-7: "Homeless Students" The memorandum dated March 30, 2000 from Assistant Superintendent Diana Oshiro is incorporated to clarify that the Stewart B. McKinney Act for homeless children also covers students abandoned by their parents or legal guardians. A geographic exception is not necessary for these children.
- Page 7: "No-Show Student" For ADA purposes, "no show" students should be marked absent from the first day of school through the enrollment count date, after which they are exited out as "054-no show" on the Vax.
- Page 11: Under Mac/Win School Implementation Instructions, it is noted that: 1) Each school should determine a time that marks a point when half the school day is over. This time should be used to determine the appropriate attendance codes for students and should be adjusted for early release days; 2) Late arrivals should be marked Tardy on attendance for that day. This Tardy code will be counted as a Present attendance value for Average Daily Attendance calculations; and 3) For schools choosing to do so, "unexcused absence" and "unexcused tardy" have been added to the Period and Daily Attendance Codes.

District Superintendents and Principals
Page 2
September 10, 2001

Schools requiring Mac School or Win School training assistance should refer to the SY 2001-2002 training schedule or contact the IRM Help Desk at 692-7290. Thank you for your cooperation.

PLeM:JS:jks

Attachment

c: Assistant Superintendents
Superintendent's Branch Directors
Division of Learner, Teacher, and
School Support

Approval Section - Signed by Patricia Hamamoto/LILI/HIDOE on 07/20/2006 03:10:53 PM, according to

Linda Lingle
Governor

PATRICIA HAMAMOTO
Superintendent

STATE OF HAWAII
DEPARTMENT OF EDUCATION

DATE: 07/20/2006

MEMO TO: Complex Area Superintendents and Principals Priority: none

CC: Assistant Superintendents
Superintendent's Branch Directors
Charter Schools Administrative Office
Office of Curriculum, Instruction and Student Support

FROM: Patricia Hamamoto, Superintendent
Office of the Superintendent

SUBJECT: School Attendance Procedures

Attached is a copy of the revised School Attendance Procedures to be implemented by all schools. Since July 1999, all elementary and secondary schools are expected to adhere to the procedures outlined for taking and reporting daily attendance using the Mac/Win School programs without school-level variations.

The following revisions have been made in the Procedures for further clarification:

- Page 1: Definitions - "Absent" - An example is given for schools choosing to use "unexcused absence."
- Page 2: Definitions - "Authorized school activity" - "School-related" was added to clarify employment that would be an authorized school activity.
- Page 4: "Suspension" - Although suspensions are considered absences for Average Daily Attendance (ADA) purposes, they will be reported separately on individual school reports (School Status and Improvement Report).
- Page 6: 3. Schools will notify parents or guardians when absences or tardies occur, except that notification is required for five (5) absences from school or class.
- Page 8: "Homeless Students" - The memorandum dated March 30, 2000 from the Assistant Superintendent is incorporated to clarify that the Stewart B. McKinney Act for homeless children also covers students abandoned by their parents or legal guardians. A geographic exception is not necessary for these children.
- Page 9: "No-Show Student" - For ADA purposes, "no-show students" should be marked absent from the first day of school through the enrollment count date, after which they are exited as "054-no show" on the VAX.
- Page 13: Under Mac/Win School Implementation Instructions, it is noted that:

- (1) Each school should determine a time that marks a point when half the school day is over. This time should be used to determine the appropriate attendance codes for students and should be adjusted for early release days.
- (2) Late arrivals should be marked "Tardy" on attendance for that day. This Tardy code will be counted as a "Present" attendance value for Average Daily Attendance calculations.
- (3) For schools choosing to do so, "unexcused absence" and "unexcused tardy" have been added to the Period and Daily Attendance Codes.

If you have any questions, please contact Mr. Russell Yamauchi, Educational Specialist, Student Support Section, at 735-6222. Ms. Jan Fukada, Information Specialist, Information Resource Management Branch (IRMB) may be contacted for assistance with attendance software and data entry at the IRMB Help Desk at 692-7290.

Thank you for your cooperation.

PH:RY:ap

Attachment



072006.SAP.Attach.doc

McKinney-Vento Homeless Education Act

Due to a recent law suit filed against the Department of Education on behalf of homeless families, it has come to my attention that there may be homeless youth and families who are not aware of or receiving rights to which they may be entitled under the McKinney-Vento Homeless Education Act. It is essential that all schools and their staff be knowledgeable of, and sensitive to, the educational rights of public school students under this Act. Consequently, I am requiring principals to review their current school's practices with all staff to insure that we are registering and assisting our homeless families.

As you know, the Federal McKinney-Vento Homeless Education Act provides that homeless students have a right to:

- 1) **IMMEDIATE ENROLLMENT** without requiring records that are normally required for enrollment, such as academic records, medical records or proof of residency.
- 2) Continue attending, if feasible, the school they are currently in ("school of origin") or another school near where they are currently residing. Most important, **NO GEOGRAPHIC EXCEPTION IS REQUIRED** for enrollment.
- 3) Receive transportation to their school of origin. If the student is attending school in the geographical area in which they are residing, they are entitled to the same transportation services as other students attending that school.
- 4) Receive the same special programs and services (including transportation), if needed, as is provided to all other children served in those programs.
- 5) Access/engage in the Department's official complaint-appeal procedure if the parent disagrees with any feasibility determination made regarding enrollment. The official complaint-appeal procedure asks the parent to appeal the enrollment determination decision to the Complex Area Superintendent; if this is still not satisfactorily resolved, the next level of appeal is to the State Superintendent.

LINDA LINGLE
GOVERNOR

PATRICIA HAMAMOTO
SUPERINTENDENT



STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

MOANALUA ELEMENTARY SCHOOL
Date Rec'd 1/14/08
Princ VP
Copy / Distribute:
 Coun
 GLC
 HdCust
 Tech
 Post
 File
 Faculty
 Staff

OFFICE OF CURRICULUM, INSTRUCTION AND STUDENT SUPPORT

January 4, 2008

TO: Complex Area Superintendents and Principals
FROM: *D. Hamada*
Daniel Hamada, Assistant Superintendent
SUBJECT: McKinney-Vento Program and Homeless Shelter Partnerships

As a follow up to the Superintendent's memo dated November 20, 2007, McKinney-Vento Homeless Education Assistance Act, Information for Parents Posters, we are including a list of statewide homeless shelters that have a partnership with our McKinney-Vento program. Included is the name of the shelter on each island, its address, telephone number, and contact information. Please refer to this information as part of your school's registration procedure, especially as it relates to any address provided by a family, as not all families will identify themselves as McKinney-Vento eligible.

If you have any questions or need further information about compliance with the McKinney-Vento Homeless Education Assistance Act, please contact Judy Tonda of the Homeless Concerns Office at (808) 394-1394.

DH:SK:at

Attachment

c: Superintendent
Assistant Superintendents
Superintendent's Office Directors
Charter School Administrative Office

EXHIBIT "B"

(OVER)

McKinney-Vento, Shelter Addresses Statewide
SY 07-08

Complex Area	Island	Shelter	Address	City - State - Zip	Phone - Fax	Director/Contact
South Hill	Hawaii	Beyond Shelter	110 Ululani Street #8	Hilo, HI 96720	808-933-6013 fax 808-935-3794	Kate Nawahine - Director
South Hill	Hawaii	Kihleipua Shelter	115 Kapiolani Street Mailing: P.O. Box 1376	Hilo, HI 96720	808-933-6051 fax 808-934-0904	Kate Nawahine - Director
West Hawaii	Hawaii	Ka Hale O Kawaihae Kauai Economic Opportunities (KEO)	Site: 64-3440 Kawaihae Road	Kamuela, HI 96743	808-882-8057 fax 808-882-1636	Patrick Hurney - Director Pauahi Kalai - Contact
Kauai	Kauai		2804 Wehe Road	Lihue, HI 96766	808-245-4077 x228	Stephanie Fernandes - Director
Kauai	Kauai	Manaolana	2808 Wehe Road	Lihue, HI 96766	(no phone or fax as yet. Call/fax to KEO [above])	Thomas Mikasoba, Director
Central Maui	Maui	Ka Hale A Ke Ola Resource Ctr.	670 Waiiale Road	Wailuku, HI 96793	808-242-7600	Becky Woods - Director Esther Santos - Contact
Central Maui	Maui	Family Life Center	95 S. Kane Street	Kahului, HI 96732	808-877-0880	Maude Cummings - Director
Maui	Maui	Na Hale O Waiha'e	15 Ipu Aumakua Lane	Lahaina, HI 96761	808-662-0076 x226 fax 808-662-0074	Aloha Kanitho - Director Shelley Watson - Contact
Honolulu	Oahu	Vancouver House	2019 Vancouver Drive	Honolulu, HI 96822	947-7181 fax 944-3976	Lisa Herring(Sabug) - Director
Honolulu/Leeward	Oahu	Hale Kipa-Honolulu/Ewa	Office 2146 Damon Street	Honolulu, HI 96822	988-2249 fax 945-9007	Jackie Kelley-Uyeoka
Honolulu-MR	Oahu	Institute for Human Services	546 Kaaahi St.	Honolulu, HI 96817	845-7052 fax 845-7190	Connie Mitchell - Director Jeannette Gustikien - Contact
Honolulu-MR	Oahu	Loliana Hale	565 Quinn Lane #217	Honolulu, HI 96813	522-0541 fax 522-0539	Pearl Yamashiro - Director
Honolulu-MR	Oahu	Next Step Shelter	Pier 1, Kakaako	Honolulu, HI 96813	HS 522-0397 fax 522-9564 WHC 922-4790 fax 922-153	Utui Langi - Director HS Savina Goo - Contact WHC
Leeward	Oahu	Hope For A New Beginning	Onelawena	Kapolei, HI 96707	682-4673 fax 682-4670	Sophina Placencia - Director Ka'ui Kapu - Contact
Leeward	Oahu	Lighthouse Outreach Center	Barber's Pt. Bldg. 50, Belleau Woods	Waipahu, HI 96797	680-0823	Bill Hummel - Director
Leeward	Oahu	Mailliland Transitional	94-230 Leokane Street	Waipahu, HI 96797		Theresa Joseph - Director Fanchon Keamou - Contact
Leeward	Oahu	Ohana Ola O Kahumana	87-190 Maillila Street Mailing: P.O. Box 35	Waianae, HI 96792	696-4885 fax 696-7131	Dana Newman - Director
Leeward	Oahu	Onemalu	Site 1: 86-433 Kuwale Road	Waianae, HI 96792	696-4095 fax 696-5589	Pearl Gomes - Contact
Leeward	Oahu	Walanae Civic Center	Barbers Pt. Bldg. 48 Belleau Woods Paliolu Kai'aulu	Kapolei, HI 96707	682-3869 fax 682-3839	Nalani Tomei - Director Damarle Capal - Contact
Leeward	Oahu	Family Promise of Hawaii	85-638 Farrington Highway	Waianae, HI 96792	696-6779 fax 696-6711	Cathie Alana - Director Rita Martin - Contact
Windward	Oahu	Weinberg Village Waimanalo	69 No. Kainalu Dr.	Kailua, HI 96734	261-7478	Kent Anderson - Director Christie McPherson - Contact
Windward	Oahu	Weinberg Village Waimanalo	41-490 Saddle City Road	Waimanalo, HI 96795	259-6658 fax 259-5303	Holly Holowach - Director

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

O.K., et al.,

Plaintiffs,

vs.

JUDY TONDA, et al.,

Defendants.

CIVIL NO. 07-00504 HG-LEK

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the undersigned date the Defendants' Opposition to Plaintiffs' "Motion For A Preliminary Injunction"; Declaration of Judy Tonda, Exhibit 1; Declaration of Linda Rivera in Support of Defendants' Opposition to Motion For Preliminary Injunction; Declaration of Mahealani Enos in Support of Defendants' Opposition to Motion for Preliminary Injunction; Exhibit "A" - "B" was served via electronically to the following parties at their last known e-mail address as follows:

WILLIAM H. DURHAM, ESQ.
GAVIN K. THORNTON, ESQ.
LAWYERS FOR EQUAL JUSTICE
P.O. BOX 37952
Honolulu, Hawai'i 96837
E-Mail: whd.lej@gmail.com
Gavin.thornton@gmail.com

LOIS K. PERRIN, ESQ.
DANIEL M. GLUCK, ESQ.
LAURIE A. TEMPLE, ESQ.
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sph@ahfi.com

Attorneys for Plaintiffs

DATED: Honolulu, Hawai'i, January 24, 2008.

/s/ Randolph R. Slaton
RANDOLPH R. SLATON
CARON M. INAGAKI
JOHN F. MOLAY
Deputy Attorneys General

ATTORNEY FOR DEFENDANTS