MARK J. BENNETT 2672
Attorney General of Hawai'i

CARON M. INAGAKI 3835
RANDOLPH R. SLATON 1647
JOHN F. MOLAY 4994
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-1300
Facsimile: (808) 586-1369

Attorneys for the Defendants

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' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' "MOTION FOR CLASS CERTIFICATION"

Date: February 11, 2008

Time: 10:30 a.m.

Judge: Hon. Helen Gillmor

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I. INTRODUCTION

The Defendants respectfully request that this Court deny the Motion since the Plaintiffs lack standing to pursue injunctive relief for alleged problems that already have been resolved. In addition, the Plaintiffs have failed to meet all of the requirements for class certification under Rule 23(a), F.R.C.P., since the putative class cannot be determined and the impracticability of resolving any individual claims has been obviated by the ongoing actions of the State of Hawai'i, Department of Education ("DOE"). Further, even if there were common questions of law, the entitlement to any specific service under the McKinney-Vento Act ("MVA") depends on, and varies with, the particular facts and circumstances of each homeless child and the Plaintiffs may not be typical or representative of other potential class members. In addition, the Plaintiffs have failed to establish that the need for class certification falls under one of the three categories of Rule 23(b). Because of this, class nullification is required in this case.

Any class must be a class of children or their parents who currently are not obtaining benefits under the MVA to which they are entitled—not individuals who had problems in the past, nor homeless individuals who might have problems in the future. If the Plaintiffs' theory that "hundreds" or "thousands" of class members exist, then this Court presumably would

have to certify a class that comprises everyone in Hawai'i, since everyone in the future might become homeless. Rule 23 does not permit such speculation.

II. STATEMENT OF FACTS AND BACKGROUND

While the Complaint in this matter was filed in October 2007, the suit actually began "In May of 2007, [when] Mr. Durham joined Lawyers for Equal Justice to pursue a class action lawsuit on behalf of all homeless children in the State of Hawaii seeking access to a meaningful public education." *http://www.lejhawaii.org/staff.html.* Since that time, counsel have attempted to find plaintiffs for this suit. For instance, counsel met with Lokelani Correa in July 2007 (Correa Declaration, ¶ 11), Cindy Price (Price Dec., ¶ 10), and Esther Santos (Santos Dec. ¶ 15), and contacted Plaintiff Venise Lewis. (Lewis Dec., ¶ 11.) Ms. Lewis herself is an advocate for the homeless, who is involved in governmental affairs *http://www.co.honolulu.hi.us/refs/nco/nb24/07/24mar3min.htm*; Rules 201(b), and 803(b)(6, 8), F.R.E.; *U.S. ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich.. 2003),[1] and who ". . . lives near Ms. Greenwood."

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[1] As the Court noted in *Bova v. U.S. Bank, N.A.*, 446 F.Supp.2d 926, 931, n. 2 (S.D. Ill. 2006):

> The Court may of course judicially notice public records and government documents, including those available

http://www.nytimes.com/2006/12/05/us/05hawaii.html?_r=1&oref=slogin; Rule 902(6), F.R.E.

Despite having spent four months combing for problems and plaintiffs, the Plaintiffs have provided Declarations from only five families (three of whom are Plaintiffs), who had temporary problems in enrolling their children in DOE schools or have been or are not now satisfied with DOE provided transportation. Those five families do not provide the basis for certifying a class action. This is all that the Plaintiffs can show. The Plaintiffs' ream (or reams) of studies and exhibits do not prove that there are widespread, systemic problems with implement the MVA in Hawai'i. Speculations, estimates and guesses do not suffice for proof.

The Declaration of Kanani Kaaiawahia Bulawan, submitted by the Plaintiffs, notes that her shelter informs families who move into the shelter ". . . about the McKinney-Vento Act and that they can keep their children enrolled in their home school," thus proving that even if DOE did not always have an MVA poster posted, the families had the information, and, more important, helpful people, to take care of their children. While she states that in order to walk to the "city bus

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from reliable sources on the Internet. *See United States v. BioPort Corp.*, 270 F.Supp.2d 968, 971-72 (W.D.Mich.2003). *See also County of Santa Clara v. Astra USA, Inc.*, 401 F.Supp.2d 1022, 1024 (N.D.Cal.2005) . . . ; *Boone v. Menifee*, 387 F.Supp.2d 338, 343 n. 4 (S.D.N.Y.2005). . . .

stop," the children "must walk a long way along unpaved roads with no sidewalks and streetlamps. It is very dangerous," (Dec., ¶ 6), the DOE does not control the location of shelters, and there is no indication why parents cannot walk their children along a side road to the bus stop. She also acknowledges that Defendant Tonda ". . . provides city bus passes for most of these children," but objects because Defendant Tonda does not ". . . provide bus passes for their parents." (*id.*, ¶ 7.) This is a funding issue (*see* Declaration of Judy Tonda, submitted with the "Defendants' Memorandum in Opposition to the Plaintiffs' 'Motion for Preliminary Injunction,'" and incorporated herein by reference), and thus subject to the legislative determination of Congress, and a prioritization issue for DOE--*e.g.*, is it better to use funding for more tutors, or more posters, or bus passes for parents? The issue does not support class certification.

Other Declarations from a surrogate parent for foster children (Elaine Chu), or guardians ad litem (Bridget Morgan, Daniel Pollard), do not support the Plaintiffs' claims since the MVA does not apply to children in foster homes. *Cf.* 42 U.S.C. 1143a(2)(B)(i)("homeless" includes children ". . . awaiting foster care placement.") No standing and no relief is available for their claims.

One parent, Lokelani Correa, complains that "Traveling on the city bus is a hardship for my son. It is not as safe as the school bus and not as timely. It would be best if the school provided a bus for him." Correa Declaration, ¶ 7. Many

parents of non-homeless children experience the same situation, but, in any case, that situation does not support certification of a class.

Plaintiff Alice Greenwood is sophisticated in dealing with the government, ". . . frequently testify[ing] at the Legislature, the City Council and the Board of Education on homeless issues and other problems affecting [her] communities" (Greenwood Dec., ¶ 4), and is an active advocate for her community (*id.*, ¶ 43), and is a member of the State of Hawai'i Oahu Burial Council. *See, e.g., www.state.hi.us/dlnr/hpd/bcd/minutes/oa-minutes-07-09-12.pdf.* She worked for DOE as an Education Assistant and Substitute teacher (*id.*, ¶ 5), before she became "disabled because of a work-related injury . . . and [for unstated reasons] lost her benefits. . . ." She "'. . . takes it upon herself be something of a leader'" as another homeless person stated.

http://www.nytimes.com/2006/12/05/us/05hawaii.html?_r=1&oref=slogin

> Alice Greenwood . . . prefers to keep her adopted son in a Hawaiian language immersion program at Nanakuli Elementary School, even though it can take up to four hours a day to get him to school on the bus.
>
> * * *
>
> Now that they're living at the Wai'anae Civic Center and have a car that usually runs, she said, her son resists going to school on days when he knows it will take two hours to make the seven-mile journey to school. "He thinks, 'Here we go again' and fights when he has to catch the bus," she said.
>
> But she has the option to take him.

http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20071107/NEWS01/711070410/1001; Rule 902(6), F.R.E. That she might have had problems in the past, or chosen to maintain schooling that subjected her child to four hours of bus riding, does not prove continuing violations, nor numerosity, typicality or commonality—but precisely the opposite, that she has a unique situation that she has chosen to pursue.

Plaintiff Olive' Kaleuati states that her shelter is ". . . about a mile-and-a-half from Leihoku" Elementary School. (Kaleuati Dec., ¶ 7.) There is no indication why, if the DOE provided transportation system is so unacceptable that the children cannot walk that distance, or that that "problem" is typical of, or common to, the purported class. She acknowledges that Defendant Tonda provided parenting classes (*id.*, ¶ 27), but that she does not recall the Defendant Tonda discussed the MVA. Defendant Tonda, however, includes that as part of her parenting class. (Tonda Dec., ¶ 7.) Ms. Kaleuati, however, provides no support for the Plainitffs' claims of continuing problems that would support standing or relief, nor for any commonality or typicality.

III. STANDARD OF REVIEW

Class actions serve two primary purposes: 1) the promotion of judicial economy by avoiding multiple suits, and 2) the protection of rights of persons who might not be able to present claims on an individual basis. *See, e.g., Crown, Cork*

& Seal, Co. v. Parking, 462 U.S. 345, 349, 103 S.Ct. 2392, 2395, 76 L.Ed.2d 628 (1983); *Turrett v. Jetblue Airways,* 2003 WL 22843134, Slip Op. at p. 1 (C.D. Cal. 2003). Accordingly class actions ". . . may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *See General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

The Plaintiffs who seek class certification bear the burden of establishing the prerequisites under Rule 23. *Id.* at 184. *See also Williams v. Agilent Technologies,* 2004 WL 2780811 (N.D. Cal. 2004). *See also Zinser v. Accufix Research Institute, Inc.,* 253 F.3d 1180, 1186 (9th Cir. 2001). Failure to carry this burden as to any one of the requirements precludes maintenance of the complaint as a class action. *See Rutledge v. Electric Hose & Rubber, Co.,* 511 F.2d 668, 673 (9th Cir. 1975).

As the Ninth Circuit Court of Appeals stated in *Jordan v. Los Angeles County*, 669 F.2d 1311, 1318 (9th Cir. 1982):

> The decision to grant or deny class certification is within the trial court's discretion and will be reversed on appeal only if the court abused its discretion, *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977), or if the court applied impermissible legal standards or criteria, *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1380 (5th Cir. 1974).

There are four requirements under Rule 23(a) which must be met, characterized by the Court as the requirements of numerosity, commonality,

typicality and adequate representation of the potential class. *Id.* at 186. After satisfying each of these requirements, the Plaintiffs must next clearly demonstrate that the case falls into one of three categories under Rule 23(b). The first category is that the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications resulting in incompatible standards of conduct for the party opposing the class, or the adjudications of the members of the class would be dispositive of the other non-members of the adjudications or substantially impair or impede their ability to protect their interests. Rule 23(b)(1), F.R.C.P.

The second category under Rule 23(b) is that the party opposing the class has acted or refused to act on grounds applicable to the class, thus allowing the Court to make appropriate injunctive or declaratory relief on behalf of the entire class. Rule 23(b)(2), F.R.C.P. The final category is that the Court finds that common questions of law or fact predominate over any individual issues involving class members and that a class action is superior to other available methods for the fair and efficient resolution of the controversy. Rule 23(b)(3), F.R.C.P.

The Plaintiffs cannot satisfy the requirements of Rule 23, thus making class certification totally inappropriate.

IV. MOOTNESS DEPRIEVES THE PLAINTIFFS OF STANDING AND THIS COURT OF JURISDICTION

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, *3-*4 (S.D.N.Y. 2007)(emphasis added), the Court reviewed the issues of standing and mootness as appliced to class actions. The Court noted:

> Article III to the U.S. Constitution limits the jurisdiction of the federal courts to "actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). . . . If there is no justiciable case or controversy, the court lacks subject matter jurisdiction and has no authority to act. *See, e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980).
>
> . . . [I]n order to represent a class, the named plaintiff must personally have standing to litigate his own claim. [Citations omitted.] Thus, if Jobie O. lacks standing, this Court lacks subject matter jurisdiction to entertain the class relief requested in this action. . . .
>
> * * *
>
> 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.] <u>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.</u> [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.

Based on the Declaration of Judy Tonda, and the testimony to be offered from Assistant Superintendant Daniel Hamada, the Plaintiffs' concerns have been resolved within the scope of the MVA. None of the exceptions set forth above is applicable since the DOE continually has tried to meet the MVA; the alleged claims are not transitory since they allegedly continued for some time; and it is highly unlikely that a child ever would have another problem since his or her parent knows how to resolve the problems. Thus they have no claims that would provide standing or jurisdiction to this Court.

V. PLAINTIFFS FAIL TO MEET THE REQUIREMENTS OF RULE 23

On a motion for class certification, the court must conduct a "rigorous analysis" into whether the requirements of Rule 23 are met. The moving party bears the burden of establishing the elements necessary for class certification: the four requirements of Rule 23(a) and one of the several requirements of Rule 23(b).

Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365 (4th Cir. 2004); *In re Relafen Antitrust Litigation*, 218 F.R.D. 337, 341-342 (D. Mass. 2003).

We discuss each of the requirements in turn.

Rule 23(a)(1). The class must be "so numerous that joinder of all members is impracticable." The Defendants challenge the Complaint on this ground since the Plaintiffs cannot identify the size of the class in any reliable manner. That a child is homeless does not mean that a child has not received everything that DOE is to provide under MVA. Thus, class nullification rather than class certification is warranted in this case.

To satisfy the requirement of numerosity under Rule 23(a)(1), the potential class "must be so numerous that joinder of all members is impracticable." Rule 23(a)(1), F.R.C.P.. *See Daly v. Harris*, 209 F.R.D. 180, 185 (D. Haw. 2002). In *Daly,* the proposed class was estimated by the Plaintiffs to be "in excess of 350,000 and as many as 4,000,000." *Id., at 186. See also Morelock Enterprises Inc., v. Weyerhauser*, 2004 WL 2995726 (D.Ore. 2004) (proposed class of several hundred members met numerosity requirement); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D.Cal. 2004) (numerosity requirement satisfied with 15,000 putative class members).

The Defendants agree that there is no precise numerical threshold to meet the requirements of Rule 23(a)(1). Here, however, the Plaintiffs cannot point

reliably to any more than five families with apparently fewer than ten children, and the U.S. Supreme Court has opined that a putative class of fifteen members is too small for class certification. *General Tel. Co. v. EEOC* , 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). One treatise has opined that classes numbering greater than 41 individuals satisfy the numerosity requirement. *See* 5 MOORE'S FEDERAL PRACTICE § 23.22[1][b] (3d ed.2004).

On the other hand, the Defendants suggest that this Court should apply the same standard applied in decisions that have held that the class must be of such substantial proportions that the impracticability requirement is satisfied by the sheer numbers alone. *See In re American Medical Systems, Inc.,* 75 F.3d 1069 (6th Cir. 1996)*; JBDL Corp v. Wyeth-Ayerst Laboratories, Inc.,* 225 F.R.D. 208, 2003 WL 2384477 (S.D. Ohio 2003) *(*numerosity requirement met for class of nation-wide purchasers of prescription estrogen which numbered in the thousands and spread across the country geographically).

The Defendants further contend that the Rule requires not only that sufficient numbers of the class be established, but that the number of potential class members demonstrate clearly that joinder of individual members is "impracticable" to resolve the litigation. In this case, the Defendants submit that not only is the number of potential class members not known at all, but that joinder

in this litigation has been obviated since the DOE already has addressed the concerns raised on behalf of any potential class members.

Because of this, Plaintiff cannot meet the numerosity requirement of the Rule. First, the number of homeless children who are not receiving services is unknown—the Plaintiffs variously guess, estimate or speculate, "hundreds" or "thousands," as they say. Second, children who are known are receiving the services to which they are entitled and thus do not have any claim. It is clear that even as to these potential class members, the number of qualified disabled residents is estimated to be small, even under the most liberal extrapolation methods. As to these vacated residents, the Plaintiffs cannot rely on mere speculation in estimating the class size and mere conclusory allegations are not enough to satisfy the Rule. *See Daly v. Harris*, *supra,* 209 F.R.D. at 186 (citing *Gray-Mapp v. Sherman*, 100 F.2d 810, 814 (N.D.Ill. 1999)). A court may make common sense assumptions to either support or reject a finding that joinder would be impracticable. *See Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 608 (N.D.Cal. 2004).

Here, the Plaintiffs have proffered no facts to satisfy the numerosity requirement of the Rule, but, instead, have relied on mere speculation and conclusory allegations in their Motion and in the Complaint to meet the numerosity requirement of the Rule. On this basis alone, the Court would be within its

discretion to deny the Motion. Mere speculation about the number of class members is not sufficient to satisfy the numerosity requirement. *See* 7 FEDERAL PRACTICE AND PROCEDURE § 1762 (3d ed.1995). The plaintiff "must proffer evidence of the number of members in the purported class, or at least a reasonable estimate of that number." 5 MOORE'S FEDERAL PRACTICE § 23.22[3] (3d ed.2004).

Rule 23(a)(2). The requirements of "commonality" and "typicality" of Rule 23(a)(2) and (3) require that there exist questions of law and fact common to the class and hat the Plaintiffs' claims be typical as the rest of the class. Rules 23(a)(2) and (3), F.R.C.P. *See Daly v. Harris, supra,* 209 F.R.D. at 187-188. This Court has noted that the commonality requirement of the Rule has been applied less rigorously because class suits for injunctive or declaratory relief by their very nature often present common questions. *Id.,* at 187 (citing 7A FEDERAL PRACTICE AND PROCDURE §1763 (1986)). At the same time, however, when unique defenses could become the focus of the pending litigation because of facts peculiar to each particular plaintiff, typicality is lacking. *Id.* (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)).

Regardless of what problems the Plaintiffs allege that they experienced, there is no indication that members of the class have had, or more probably than not would have in the future, nor that the circumstances in which the problems

have arisen or might arise are similar to those of the Plaintiffs. Accordingly, the Plaintiffs do not satisfy this requirement.

Rule 23(a)(3). The claims of the representative parties must be typical of the claims of the class. The Plaintiffs fail to meet the requirement of typicality because their claims are not typical of other class members and thus do not meet the requirements of the Rule. *See Amone v. Aveiro,* 226 F.R.D. 677, 685 (D. Haw. 2005) (". . . where the claims of the named representative would be subject to unique defenses which could become the focus of the litigation because of facts peculiar to that particular plaintiff, typicality is lacking."). Even without this problem, The Plaintiffs' claims are not typical of the class they propose, which, at most, has an inchoate claim, a claim *a fortiori* wholly different from the Plaintiffs' claims.

Questions of fact peculiar to each child negate the proposition that class certification will adjudicate each member's claim in the most efficacious manner. As noted in the Declaration of Judy Tonda, each child's needs are considered on a case by case basis. There is no "one size fits all" solution to any child's needs, and thus there cannot be anything typical about a claim or solution. The Plaintiffs' mere assertions that their claims are typical of those similarly situated, implying that a blanket remedy can be effectuated, is wrong. To the contrary, the Plaintiffs'

case is not representative of those who may be similarly situated and does not meet the typicality requirement of Rule 23(a)(3).

Finally, the DOE already has developed and begun implementing a plan to resolve whatever deficiencies might have existed, as Mr. Hamada will testify.

Rule 23(a)(4). The representative parties must fairly and adequately protect the interests of the class. The Plaintiffs do not meet this requirement either. They have not shown that they have claims in common with other homeless parents or children The Plaintiffs apparently have no continuing problems. As stated by the court in *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)(citations omitted):

> While it is settled that the mere existence of individualized factual questions with respect to the class representative's claim will not bar class certification . . . class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation. . . . Regardless of whether the issue is framed in terms of the typicality of the representative's claims . . . or the adequacy of its representation . . . there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it. . . .

See also Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.1992); *Amone v. Aveiro*, 226 F.R.D. 677, 685 (D. Haw. 2005); *Daly v. Harris*, *supra,* 209 F.R.D. at 188; *Sheehan v. Grove Farm Co., Inc.*, 114 Haw. 376, 386, 163 P.3d 179, 191 (Haw. App. 2005).

Rule 23(b). In addition to satisfy all four requirements of Rule 23(a), which the Plaintiffs fail to do, they also must meet one requirement of Rule 23(b), which requires a plaintiff to establish both predominance of common issues and superiority of the class action. The Plaintiffs also have failed to meet the second requirement for class certification under Rule 23, which is that the case fall under one of three categories under Rule 23(b). Rule 23(b), F.R.C.P. For this analysis, the Court should assess the allegations of the Complaint and other material sufficient to form a reasonable judgment on each requirement of the rule, consider the nature and range of proof necessary to establish those allegations, determine the best future course of the litigation and then determine if the requirements have been met by the Plaintiffs. *Daly v. Harris, supra*, 209 F.R.D. at 185 (citing *Blackie v. Barrack,* 524 F.2d, 891, 900-901 (9th Cir. 1975)).

Thus, class certification will be granted only if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(b)(1). Rule 23(b)(1) does not help the Plaintiffs since class nullification would neither create or result in DOE changing any policies, training or assistance that already exists. Clearly, the standards for assistance to homeless children are established in the MVA with which DOE must comply. More important, since December 2007, new procedures, additional outreach and prompt dispute resolution methods have been instituted. The Plaintiffs' own cases are perfect examples. While each might have had a problem, each problem has been rectified. What this means is that Defendants have committed themselves towards working with each child in regard to that child's particular needs to resolve the entire matter and certainly to obviate the need for any further adjudication by any party.

Rule 23(b)(1)(A). "Rule 23(b)(1)(A) directs the court to consider whether individual actions would have an adverse effect on the party opposing the class." 7A FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1773, at 10 (2005). A party

seeking certification under this rule must first establish that there is a realistic possibility that separate actions involving the same subject matter will be brought in the absence of a class action. The risk of separate actions must be substantial, and not merely hypothetical or speculative, and certification is denied if separate adjudications are unlikely. 5 MOORE'S FEDERAL PRACTICE § 23.41[2] (3d ed.). *Accord, In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1544 - 1545 (11th Cir. 1987); *Eisen v. Carlisle and Jacquelin*, 391 F.2d 555, 564 (2nd Cir. 1968), *rev'd on other grounds*, 417 U.S. 156 (1974); *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 500 (D.Md. 1998); *Eliasen v. Green Bay & W. R. Co.*, 93 F.R.D. 408, 412 (D.C.Wis. 1982), *aff'd*, 705 F.2d 461 (7th Cir. 1983). Since the Plaintiffs only could find five families in four months, it is highly unlikely that additional, separate suits would be brought by others.

Rule 23(b)(1)(B). This rule focuses on the effect of individual adjudication on absent class members. A party seeking to invoke this rule must show more than a possible *stare decisis* effect from individual adjudication. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1078 (11th Cir. 2000) ("Moreover, the possibility that an individual suit 'will have either precedential or *stare decisis* effect on later [suits] is not sufficient' for (b)(1)(B) class certification. *In re Dennis Greenman Sec. Litig.*, 829 F.2d at 1546."); *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 500 -501 (D.Md. 1998). "The most common example of the type of action to

which Rule 23(b)(1)(B) is applicable is one in which the class members have claims against a fund that may prove insufficient to satisfy all of them." 7A FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1774, at 30 (2005). Clearly that is not the situation with the Plaintiffs' claims, and thus the Plaintiffs do not meet Rule 23(b)(1)(B).

Rule 23(b)(2). In the instant case, the Plaintiffs generally rely on Rule 23(b)(2), which applies where:

> . . . the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The Plaintiffs do not meet the requirements of this section because "an action seeking a declaration concerning defendant's conduct that appears designed simply to lay the basis for a damage award rather than injunctive relief would not qualify under Rule 23(b)(2)." 7A FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1775, at 59-60 (2005). *Accord,* Rule Advisory Committee Notes, 39 F.R.D. 69, 102 (1966).

This rule does benefit the Plaintiffs since they cannot show that the unknown and uncounted members of the putative class have experienced the same problems under similar circumstances as the Plaintiffs. As to what may be characterized as the non-movant's conduct making injunctive relief appropriate category under

Rule 23(b)(2), the Defendants submit that they have attempted to resolve this case by way of negotiation, by devoting more personnel to implementing the MVA, by providing new means of resolving any disputes and by having addressed each Plaintiff's concerns.

Rule 23(b)(3). Turning to the category of superiority and predominance under Rule 23(b)(3), the Defendants contend that a class action is not superior to the remedial measures already implemented or being undertaken by DOE. For a plaintiff to satisfy the predominance inquiry, it in not enough to establish that common questions of law or fact merely exist, as under Rule 23(a)(2). The predominance inquiry under Rule 23(b) is much more rigorous. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (the predominance question "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.") The Plaintiffs' burden under Rule 23(b)(3) is not merely to show that some common issues exist, but rather to place substantial evidence in the record that common issues predominate, *see Washington Mutual Bank, FA v. Superior Court,* 24 Cal.4th 906, 913, 15 P.3d 1071, 1076 (Cal. 2001), and due to the unique nature of each child, they cannot provide that kind of evidence.

This means that "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover

following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.'' *Id.*, 24 Cal.4th at 913-914, 103 15 P.3d at 1076 (citation omitted). "[N]ecessarily individualized inquiries are best suited to a case-by-case determination." *Davoll v. Webb*, 160 F.R.D. 142, 146 (D.Colo. 1995), *aff'd* 194 F.3d 1116 (10th Cir. 1999). The necessity for an "individualized inquiry," which the Defendants suggest is required by the nature of each child's situation, prevents class certification.

In addition to a predominance of common questions, the proponent must also demonstrate that the class action is the superior method of adjudication of the controversy. *See Valentino v. Carter-Wallace. Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996) (the party seeking certification needs to make a "showing [as to] why the class mechanism is superior to alternative methods of adjudication"). In this regard, the Court must consider other issues, such as:

> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 616, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Since the Plaintiffs' concerns have been addressed, there is no reason to believe that any claims remain to be resolved, much less that a class action is a superior means to address whatever lingering claims might be alleged.

VI. CONCLUSION

The only class of persons that the Plaintiffs can hope to represent by having class certification granted would comprise an unknown number of unknown persons who might claim that services have been denied, or unknown persons who might claim in the future that unidentified services have not been provided in the future. The individual factual questions about what services, if any, a particular child might be entitled demonstrate why a class action is not a suitable vehicle for resolution of any differences that might arise. Clearly, this would amount to nothing more than rank speculation regarding hypothetical claims and would be totally contrary to the express wording as well as the intent of Rule 23 in justifying the need for a class action forum. Class certification was never intended to encompass or apply to such a speculative class of persons.

The main point, however, is that Defendants are in the process of reconciling any discrepancies in the implementation of the MVA. Class certification will add nothing to the process already taking place; conversely, class nullification will take

away nothing from the remedial steps already being undertaken, and to be undertaken, by Defendants.

Based on these arguments, the Defendants request that the Motion be denied.

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 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' Memorandum in Opposition to Plaintiffs' "Motion for Class Certification", 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.
ACLU OF HAWAI'I FOUNDATION
P.O. BOX 3410
Honolulu, Hawai'i 96801

E-Mail: lperrin@acluhawaii.org
dgluck@acluhawaii.org
lt@acluhawaii.org

PAUL ALSTON, ESQ.
ROMAN F. AMAGUIN, ESQ.
STEPHEN M. TANNENBAUM, ESQ.
SHELLIE PARK-HOAPILI, ESQ.
ALSTON HUNT FLOYD & ING
Attorneys at Law, a Law Corporation
American Savings Bank Tower
1001 Bishop Street, 18th Floor
Honolulu, Hawai'i 96813
E-Mail: palston@ahfi.com
ramaguin@ahfi.com
stannenbaum@ahfi.com
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