

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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|--------------------------------|---|---------------------------|
| Olive Kaleuati, individually |) | CIVIL NO. 07-00504 HG LEK |
| and on behalf of the class of |) | |
| parents and/or guardians of |) | |
| homeless children in the State |) | |
| of Hawaii, <i>et al.</i> , |) | |
| |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | |
| |) | |
| JUDY TONDA, in her official |) | |
| capacities as the State |) | |
| Homeless Coordinator and the |) | |
| State Homeless Liaison for the |) | |
| Department of Education, State |) | |
| of Hawaii, <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

ORDER GRANTING PRELIMINARY INJUNCTION

Plaintiffs bring an action for violation of the McKinney-Vento Act, 42 U.S.C. §§ 11431, *et seq.*, and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because of Defendants' alleged failure to provide equal access to education for homeless children.

Plaintiffs move for preliminary injunctive relief as to violations of the McKinney-Vento Act, 42 U.S.C. §§ 11431, *et seq.*, to compel Defendants to remove barriers to the enrollment

and attendance of homeless children in public schools.

For the reasons set forth below, a preliminary injunction is **GRANTED** as to the issues of the Department of Education's identification of homeless school-aged children and youths, and the barrier to admission presented by the DOE's rules and policies regarding issuing exceptions to geographic attendance areas.

PROCEDURAL HISTORY

On October 2, 2007, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief. (Doc. 1.)

On November 6, 2007, Plaintiffs filed a Motion for Preliminary Injunction. (Doc. 25.)

On January 24, 2008, Defendants filed Defendants' Opposition To Plaintiffs' motion for preliminary injunction. (Doc. 88.)

On January 31, 2008, Plaintiffs filed a Reply. (Doc. 92.)

On February 11, 2008, the Motion for Preliminary Injunction came on for hearing on the issues of comparable transportation and barriers to public school admission for homeless students.

On February 11, 2008, the Court GRANTED Plaintiffs' Motion for Preliminary Injunction as to the issues of Defendants' alleged failure to allow homeless students to remain in their school of origin, and to Defendants' alleged failure to identify homeless children and youths, as required by the McKinney-Vento Act. (Doc. 105.) This is the written order memorializing the

basis and terms of the preliminary injunction.

BACKGROUND

Plaintiff children are the certified representatives of a class comprising all school aged children (as defined by Hawaii law) who were, are, or will be eligible to attend Hawaii public schools on or after October 2, 2005 and who (1) have lived, are living, or will live in Hawaii; and (2) during such period have been, are, or will be "homeless" as defined under the McKinney-Vento Act (42 U.S.C. § 11434a(2)) (the "Student Class").

Plaintiff parents and guardians are the certified representatives for the class of all parents and guardians of, or persons in a parental relationship to, the children in the Student Class (the "Guardian Class").

The Complaint alleges Plaintiff children have been denied various rights as provided for in the McKinney-Vento Act, 42 U.S.C. §§ 11431, *et seq.* ("McKinney-Vento Act") because of Defendants' violations of the Act.

A. The McKinney-Vento Act

In 1987 Congress enacted the McKinney-Vento Act to provide a broad range of services and "urgently needed assistance to protect and improve the lives and safety of the homeless [individuals and families]." Pub. L. No. 100-77, 101 Stat. 525 (codified at 42 U.S.C. § 11431 (1988)). In 2001, Congress re-authorized a portion of the McKinney-Vento Act as the

McKinney-Vento Homeless Education Assistance Improvements Act of 2001 ("the McKinney-Vento Act"). Pub. L. No. 107-110, Title X, § 1032, 115 Stat. 1989 (codified at 42 U.S.C. § 11301 et seq.). The re-authorization and amendments to the McKinney-Vento Act took effect in July, 2002.

Subtitle VII-B, 42 U.S.C. §§ 11431-11435, authorizes the Secretary of Education to grant funds to financially assist states in educating homeless children and youths. States accepting the funds are required to ensure that each child of a homeless individual has access to a free and appropriate public education. 42 U.S.C. § 11431(1). The purpose of the education portion of the Act is to "ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths." 42 U.S.C. § 11431 (2004). Congress stated that "[h]omelessness alone is not sufficient reason to separate students from the mainstream school environment." Id. "Homeless children and youths should have access to the education and other services" that are needed to meet "student academic achievement standards to which all students are held." Id.

Under the McKinney-Vento Act, the local education agency is required to continue a homeless child's education in the school of origin ("home school") for the duration of homelessness, or

enroll the child in the appropriate public school within the attendance area of the student's temporary housing ("local school"). 42 U.S.C. § 11432(g)(3)(A)(i),(ii). Where a homeless child attends school is to be determined based on his or her best interest, which requires "to the extent feasible, keep[ing] a homeless child or youth in the school of origin, except when doing so is contrary to the wishes of the child's or youth's parent or guardian." Id. at § 11432(g)(3)(B)(I).

The McKinney-Vento Act further requires that each homeless child be provided with services comparable to those offered to other students who attend the selected school, including transportation, id. at 42 U.S.C. § 11432(g)(4), and to assist the parent or guardian of a homeless child in accessing transportation to the selected school. Id. at § 11432(g)(6)(A)(vii). The McKinney-Vento Act requires states accepting the funds to remove "laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and youths . . ." 42 U.S.C. § 11431(2).

Preliminary Injunction

The order GRANTS preliminary injunctive relief as to the first cause of action in the Complaint, the alleged violations of the McKinney-Vento Act, 42 U.S.C. § 11431, *et seq.*, to compel Defendants to act to remove barriers to the enrollment and

attendance of homeless children in public schools.

STANDARD FOR PRELIMINARY INJUNCTION

In the case of Earth Island Inst. v. U.S. Forest Serv., the Ninth Circuit has set out the criteria to be considered when there is an application to obtain a temporary restraining order or preliminary injunctive relief:

Under the "traditional" criteria, a plaintiff must show "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995). Alternatively, a court may grant the injunction if the plaintiff "demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." Id. (citations omitted) (emphasis in original). "These two alternatives represent 'extremes of a single continuum,' rather than two separate tests." Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). "Thus, the greater the relative hardship to [the party seeking the preliminary injunction,] the less probability of success must be shown." Id. (citation omitted) (alteration in original).

Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1297-98 (9th Cir. 2003); Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004). "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir.1992) (citing Caribbean Marine Servs., Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir.1988)).

A request for mandatory preliminary injunctive relief, requesting an order requiring the defendant to take affirmative action rather than simply maintaining the status quo, is disfavored and is subject to heightened scrutiny. Stanley v. University of Southern Cal., 13 F.3d 1313, 1320 (9th Cir. 1994); Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir. 1993). A request for mandatory preliminary injunction should be denied "unless the facts and law clearly favor the moving party." Dahl, 7 F.3d at 1403; see Stanley, 13 F.3d at 1320.

ANALYSIS

I. Likelihood Of Success On The Merits

The Department Of Education's Failure To Identify Homeless Students And Their Families

The McKinney-Vento Act requires Defendants to actively identify homeless children and youths and to provide notice to them of their rights provided pursuant to the Act. 42 U.S.C. § 11432(g)(6)(A)(i) and (iv).

The Department of Education's testimony, given by Judy Tonda, is that the current methods of identifying homeless students do not include directly asking enrolling students about their homeless status in order to avoid "stigmatizing" the child. The DOE's testimony given by Assistant Superintendent Daniel Hamada is also that, while reforms have been considered, reforms have not yet been implemented.

Plaintiffs have proffered statistical evidence of Defendants' ongoing failure to identify homeless students. In a June, 2007 Department of Education report entitled "Education for Homeless Children and Youth Program," statistical evidence is presented that 908 homeless children were identified in the public schools of Hawaii in the 2005-2006 school year. (Gluck Decl., Exh. 5 at App. 1-14, Doc. 79-11.) In comparison, the University of Hawaii's Center on the Family and the Aloha United Way authored a report entitled "Hawaii Kids Count." The Kids Count report identifies 2,800 children as being homeless in 2006. (Gluck Decl., Exh. 3 at 3, Doc. 79-8.) Judy Tonda testified that in the 2007-2008 school year, the Department of Education identified approximately 300 homeless students. Judy Tonda testified, however, that she received a report from the Homeless Management Information System identifying "a little over 2,000" homeless school-aged children and youths for 2007-2008.

The Department of Education's decision not to take appropriate steps to identify homeless children and notify them of their rights under the McKinney-Vento Act makes the likelihood of success on the merits a strong possibility.

II. Irreparable Injury

Failure To Allow Students To Remain In The School Of Origin

Pursuant to the McKinney-Vento Act, homeless students who move from one location to another have the right to continue to

attend school at their original school. 42 U.S.C. § 11432(g)(3)(A). Plaintiffs allege that the Hawaii Administrative Rules ("HAR") violate Plaintiffs' rights pursuant to the Act.

The Administrative Rules on Geographic Exceptions require "all persons of school age to attend the school in the geographic area in which they reside. However, permission to attend another school may be granted by the department as provided in this chapter[.]" Hawaii Administrative Rule ("HAR") § 8-13-1; see also § 8-13-3 ("No geographic exception or revocation of geographic exception shall be granted except in accordance with this chapter."); § 8-13-7 (listing application procedure for geographic exceptions and failing to contain any mention of homelessness as a basis for a geographic exception). The geographic exception form does not contain any information about the different treatment of the homeless. The rules and the form for geographic exception violate the rights of homeless students under the McKinney-Vento Act. HAR §§ 8-13-1, 8-13-3. For example, Defendant Tonda stated in his declaration that "if the Kaleuatis' [sic] were living on one of the leeward beaches and receiving assistance from [Waianae Community Outreach], they would not be eligible for Dole Middle School." (Tonda Decl. ¶7) Pursuant to the Act, a homeless child has the right to continue to attend their school of origin, if feasible, regardless of where the child finds shelter. 42 U.S.C. § 11432(g)(3). The

hardship on the homeless student, in the form of constant changes of school as they move, seeking shelter, tips the balance in favor of Plaintiffs. Plaintiffs have made a sufficient showing of irreparable injury.

III. Balance Of Hardship

Plaintiffs primary contention is that Defendants' policies and procedures violate their rights under the McKinney-Vento Act.

In contrast, Defendants assert they will be harmed because of the cost of compliance with the McKinney-Vento Act. Defendants proffer generalized statements but no evidence of cost in allowing a homeless student to continue to attend their school of origin once the child has moved outside the geographic attendance area. Defendants cannot use cost as a reason not to amend the Hawaii Administrative Rules to comply with federal law. The balance of harm tips sharply in Plaintiffs' favor, and a preliminary injunction is warranted.

IV. Public Interest

Where the educational rights of homeless children are involved, there is a public interest to be considered in issuing a preliminary injunction. Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992) ("In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff.").

A delay or denial of the educational rights of homeless

children under the McKinney-Vento Act harms the individual children and society as a whole when its citizens do not receive a basic education. Defendants' harm is limited to the cost of complying with the McKinney-Vento Act for which Defendants receive federal funding. The public interest in the education of homeless children outweighs the harm to Defendants.

Given these allegations of irreparable injury to a legal right, and given that Plaintiffs have a strong likelihood of success on the merits, there are ample grounds for issuance of a preliminary injunction.

CONCLUSION

Plaintiffs have standing to sue, and have made a sufficient showing of a likelihood of success on the merits of their claims, and of the possibility of irreparable injury.

FOR THE FOREGOING REASONS,

The Court **GRANTS** a Preliminary Injunction as to the issues of identification of homeless student-aged children and youths, and removal of barriers to the McKinney-Vento Act's requirement that homeless students be permitted, to the extent feasible, to continue attending their school of origin.

I. Pending the trial of this matter and further order of this Court, Defendants shall:

A. Take action to ensure that homeless children are promptly identified as such and provided their rights under the McKinney-Vento Act ("MVA"). Specifically, Defendants shall, after consultation with Plaintiffs' counsel:

1. Develop a protocol for use by all personnel involved in the enrollment process (including but not limited to front-office school staff) to identify those families who are "homeless" within the meaning of the MVA. In meeting the requirements of this section, Defendants shall:

a. Develop a series of questions to determine MVA eligibility for all individuals seeking to enroll in or receive transportation to/from school. Defendants may, but need not, use the list of MVA eligibility questions prepared by the National Center for Homeless Education, available at http://www.serve.org/nche/downloads/briefs/det_elig.pdf (Exhibit A, attached);

b. By **March 15, 2008**, present the Court with a plan for implementing this protocol; and

c. By **April 30, 2008**, fully implement this protocol (as it may be modified upon review by the Court).

2. Revise all relevant enrollment forms, including but not limited to the DOE enrollment form and geographic exception

form, to identify those families who are "homeless" within the meaning of the MVA and inform them of their rights under the MVA. In meeting the requirements of this section, Defendants shall:

a. Revise all registration forms so that the school official completing the forms is required to:

(1) Determine whether the individual seeking to enroll qualifies as "homeless" under the MVA, using the protocol identified in I(A)(1), *supra*;

(2) Inform any child identified as "homeless" and her/his parents of their rights under the MVA, including but not limited to:

(a) The right to immediate enrollment;

(b) The right to immediate, provisional attendance pending receipt of required documentation, such as a proof of address, birth certificate, social security card, immunization records, and/or school records;

(c) The right to stay in the school of origin;

(d) The right to participate in school meal programs;

(e) The right to full participation in school activities; and

(f) The right to contact the appropriate homeless liaison with any questions; and

(3) Provide the individual(s) seeking enrollment with contact information (including a toll-free phone number) for the appropriate homeless liaison.

b. By **March 15, 2008**, present the Court with a plan for meeting the requirements of this section; and

c. By **April 30, 2008**, cease using old enrollment forms and begin using the newly revised forms (as they may be modified upon review by the Court).

3. Revise all computer registration software used to enroll students to require inquiry into the status of the students and their families in order to identify those families who are "homeless" within the meaning of the MVA, and to require the user to inform homeless students and their families of their rights under the MVA. In meeting the requirements of this section, Defendants shall:

a. Develop software that prompts the user to:

(1) Inquire as to whether the enrolling student is "homeless" under the MVA;

(2) Record a student's status as being eligible for MVA services in the school/DOE database(s);

(3) Inform the homeless student and her or his parents or guardians of their rights under the MVA;

(4) Enroll the child immediately, notwithstanding the absence of documentation (such as proof of

address, birth certificate, social security card, immunization records, and/or school records);

(5) Enroll the child immediately if any question exists as to the child's eligibility to attend that school;

(6) Contact the appropriate homeless liaison with any questions; and

(7) Provide the individual(s) seeking enrollment with contact information, including a toll-free telephone number, for the appropriate homeless liaison; and

b. Develop a method for requiring regular inquiry into the current status of a student previously identified as homeless, so that a child identified as "homeless" at the end of one school year is automatically provided services at the beginning of the following school year if the child is still homeless;

c. By **March 15, 2008**, present the Court with a plan to meet the requirements of this section; and

d. By **April 30, 2008**, fully implement the requirements of this section.

4. Review and, where necessary, revise all relevant Administrative Rules to remove barriers to the MVA's requirement that homeless students be permitted to continue attending their school of origin. In meeting the requirements of this section,

Defendants shall:

a. Review and revise Hawaii Administrative Rules Title 8, Chapter 13 Geographical Exceptions;

b. By **March 15, 2008**, present the Court with a plan for meeting the requirements of this section; and

c. By **July 1, 2008**, fully implement the requirements of this section.

II. Slight and unavoidable delays in enrollment due to overcrowding shall not be deemed a violation of this Order; nevertheless, Defendants shall be responsible for providing alternative and compensatory educational services for any school time missed due to overcrowding.

III. Nothing in this Order shall preclude a Registered Nurse, Doctor, or other health official from conducting a health screening, providing necessary immunizations, or taking other steps to protect the health of any homeless child and the health of other students and/or school personnel. Any delay in enrollment due to concerns shall be as brief as possible and shall only be justified if deemed medically necessary by medical

personnel (including but not limited to a Registered Nurse or Doctor).

IV. No bond shall be required pursuant to Fed. R. Civ. P. 65(c).

IT IS SO ORDERED.

DATED: February 19, 2008, Honolulu, Hawaii.



/s/ Helen Gillmor

Chief United States District Judge

KALEUATI, et al. v. TONDA, et al., Civ No. 07-504 HG-LEK; ORDER GRANTING PRELIMINARY INJUNCTION