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CIVIL NO. 07-504 HG/LEK
[CIVIL RIGHTS ACTION]
[CLASS ACTION]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

<p>OLIVÉ KALEUATI, individually and on behalf of the class of parents and/or guardians of homeless children in the State of Hawaii, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>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>,</p> <p style="text-align: center;">Defendants.</p>	<p>) Civil No. 07-504 HG/LEK)) [CIVIL RIGHTS ACTION])) [CLASS ACTION])) PLAINTIFFS’ SUPPLEMENTAL) MEMORANDUM IN SUPPORT OF) MOTION FOR CERTIFICATION) OF CLASSES; DECLARATION OF) DANIEL M. GLUCK, EXHIBITS 1-) 8; SUPPLEMENTAL) DECLARATION OF ALICE) GREENWOOD; DECLARATION) OF DANIEL HATCHIE;) DECLARATION OF KANANI) BULAWAN; DECLARATION OF) ESTHER SANTOS;) DECLARATION OF OLIVÉ) KALEUATI; CERTIFICATE OF) SERVICE)) Date: February 11, 2008) Time: 10:30 a.m.) Judge: Hon. Helen Gillmor</p>
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**PLAINTIFFS’ SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
MOTION FOR CERTIFICATION OF CLASSES**

Plaintiffs submit this supplemental memorandum in response to Defendants’ counsel’s representation at the January 4, 2008 status conference that the State of Hawaii Department of Education’s systemic failure to comply with the Stewart B. McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 1431-11435 (hereinafter

“the McKinney-Vento Act” or “the Act”), affects only a handful of individual children. This memorandum provides additional evidence as to the widespread nature of these problems and the thousands of homeless children in Hawaii who have been or are currently being denied equal access to public education because of the Defendants’ wholesale failure to implement the McKinney-Vento Act.

First, the Department of Education (hereinafter “DOE”) has failed to identify hundreds, if not thousands, of homeless children. DOE says it knows of 908 homeless school-age children, but numerous government reports show that there are thousands of homeless children in Hawaii. DOE’s failure to identify these homeless children, inform them of their rights, and provide them with appropriate services constitutes a violation of the McKinney-Vento Act.

Second, even if the 908 children identified by DOE represented every single homeless child in the state, class certification would still be appropriate because DOE is not complying with the Act with regard to those children. Among other things, DOE does not have a dispute resolution procedure, does not provide adequate transportation services, and does not allow geographic exceptions based on homelessness. DOE’s policies and procedures – or lack thereof – harm every one of these 908 students.

In sum, there is simply no basis for the DOE’s claim that class certification is not warranted here.

I. The Department of Education Has Failed To Identify Hundreds, if Not Thousands, Of Homeless Children

Statistics compiled by the State of Hawaii show that there are thousands of homeless children in Hawaii and that the number has been increasing year after year. The Homeless Programs Branch of the Department of Human Services served 12,091 homeless individuals in Fiscal Year (“FY”) 2003 and 15,563 homeless individuals in FY 2005; the number is expected to increase to 19,000 in FY 2008-2009. *See* Declaration of Daniel M. Gluck (hereinafter “Gluck Decl.”), Ex. 1 at 4 (Housing and Community Development Corp. of Hawaii, *2002-2003 Annual Report* (2003)); Ex. 2 at 1 (Dep’t of Human Services, Hawaii Public Housing Authority, Homeless Programs Branch, *FY 2007 Report to the Hawaii State Legislature* (2007)). Of these, *at least* 2,800 are children under 18. Gluck Decl., Ex. 3 at 3 (Hawaii Kids Count, *Kids Count in Hawaii* (2007)). In 2005-2006, nearly 1,500 homeless children between 6 and 17 years old received services from two government programs alone.¹ Gluck Decl., Ex. 4 at 2, 4, 9 (Univ. of Hawaii, Center on the Family, *Homeless Service Utilization Report*, (2007)).

¹ The University of Hawaii and the Hawaii Public Housing Authority served 1,514 children between 6 and 17 years old: 814 children used the Shelter Stipend Program and 700 used the Outreach Program. Gluck Decl. Ex. 4 at 4, 9. Approximately 7-9% of children used both these programs, such that the unduplicated number of children served is approximately 7-9% less than 1,514. *Id.* at 2. Nevertheless, the report’s authors also noted that “[t]he data *do not* represent all persons experiencing homelessness in Hawai‘i or all of the persons served by providers during the period of time covered in this report.... [T]he data in this report are an *undercount* of the homeless[.]” *Id.* at 2.

The Department of Education, however, identified only 908 of these homeless children in FY 2005. Gluck Decl., Ex. 5 at App. 1-14 (Nat’l Center for Homeless Education, *Education for Homeless Children and Youth Program, Title VII-B of the McKinney-Vento Homeless Assistance Act As Amended by the No Child Left Behind Act of 2001 Analysis of 2005-2006 Federal Data Collection and Three-Year Comparison* (2007)). Worse, while the number of homeless individuals in Hawaii rose dramatically between 2003 and 2005, the number of homeless children identified by DOE inexplicably *decreased* over the same period of time. *Id.*

In that same vein, a study commissioned by the State of Hawaii indicates that 96,648 homeless people are living “doubled up,”² yet DOE has identified only 19 school-age children who are living doubled-up. Gluck Decl., Ex. 6 at 54 (USDOE, *Consolidated State Performance Report for State Formula Grant Programs under the Elementary and Secondary Education Act as amended by the No Child Left Behind Act of 2001*, OMB 1810-0614 (2006)); Ex. 7 at 5, 8 (SMS, *Housing Policy Study 2006: The Hidden Homeless and Households at Risk for Homelessness* (2007)). In short, DOE has completely failed to meet its obligations under the Act. *See, e.g.*, 42 U.S.C. § 11432(g)(6) (“Each local educational agency liaison for homeless children and youths . . . shall ensure that -- (i) homeless

² These individuals are considered “homeless” for purposes of the McKinney-Vento Act. 42 U.S.C. § 11434a.

children and youths are identified by school personnel and through coordination activities with other entities and agencies[.]”).

DOE has failed and continues to fail to identify homeless children. As such, these children are not receiving services (such as transportation assistance) under the McKinney-Vento Act. The numerosity requirement of Federal Rule of Civil Procedure 23(a) is easily met by this factor alone.

II. The Department of Education Is Currently Denying Services to the 908 Students it Has Identified

Even if the 908 students identified by DOE represented every single homeless child in Hawaii, the numerosity requirement would still be satisfied because DOE continues to deny services to these 908 children.

A. DOE Fails to Provide Homeless Children With Transportation

DOE is required to provide homeless children with transportation services comparable with those received by non-homeless students. DOE continues to violate this requirement of the McKinney-Vento Act, and this failure affects the hundreds of children identified by DOE as homeless (in addition to the hundreds or thousands DOE has not yet identified).

Non-homeless students who live more than one mile from their school are entitled to, and receive, chartered bus service from their home to and from school. Hawaii Administrative Rules (“HAR”) §§ 8-27-1 to 8-27-10. The buses are

supervised by an employee or contractor of DOE and are subject to DOE safety regulations. HAR §§ 8-28-1 to 8-28-6.

Homeless students who live more than one mile from their school do not get the same service. On Oahu, for example, those lucky enough to receive any assistance at all get a monthly pass for TheBus. Naturally, parents and guardians of young children are not willing to send these young children on TheBus by themselves. Plaintiff Alice Greenwood, for example, spends six and a half hours *every day* taking her son, Makalii, to and from school. Supplemental Declaration of Alice Greenwood (hereinafter “Greenwood Supp. Decl.”) at ¶ 6-7. Ms. Greenwood is only able to accompany her son on the bus because she has a disability and receives a free bus pass from the City and County of Honolulu. *Id.* at ¶ 6. If she were unable to obtain a free pass and unable to devote most of her days to riding TheBus, the DOE would apparently expect seven-year-old Makalii to ride TheBus for an hour and a half on two different buses each way by himself. *Id.* at ¶ 7; Declaration of Daniel Hatchie at ¶ 4.³ Furthermore, TheBus is often late – sometimes by an hour or more – causing Makalii to miss school time. Greenwood Supp. Decl. at ¶ 8. When this happens, school personnel chastise Makalii and, as a result, Makalii does not like going to school because he is afraid of being yelled at and afraid of being kicked out. *Id.*

³ Also attached to Pls. Mot. For Prelim. Inj, filed Nov. 6, 2007.

To make matters worse, Ms. Greenwood has to pay out of pocket for her son to take the bus for the first few days of every month because DOE does not give her the bus pass on time. For example, in December of 2007, DOE did not give Ms. Greenwood a bus pass until December 5th, forcing Ms. Greenwood to pay for Makalii to take the bus five times. *Id.* at ¶¶ 4-5. As of January 8th, 2008, Ms. Greenwood had still not received a January bus pass. *Id.* at ¶ 4.

Transportation, even with the assistance of a solitary bus pass, is a burden that few families can bear. Many homeless families ultimately transfer their children to a school closer to where they are staying because the transportation burden is so high, despite the fact that their children's former school may have been the only constant in their children's lives. For example, in the last year, approximately 165 families who moved from the Waianae coast to Hope for a New Beginning Shelter at Barbers Point were forced to transfer their children to new schools because DOE did not provide chartered bus transportation and the children could not endure the treacherous walk, multiple bus changes, and hours spent on TheBus required to get to their old schools. Declaration of Kanani Bulawan at ¶ 5-17.⁴ Once the children transferred to the local schools nearest Barbers Point, the DOE provided them with a school bus that picked them up at the shelter. *Id.* at ¶ 5.

⁴ Also attached to Pls. Mot. For Prelim. Inj., filed Nov. 6, 2007.

At Ka Hale a Ke Ola shelter on Maui, Children's Services Case Manager Esther Santos has assisted hundreds of homeless children over the past few years who were forced to transfer schools because they lacked transportation.

Declaration of Esther Santos at ¶ 6.⁵ From August to October of 2007 alone, Ms. Santos assisted 16 homeless children who were forced to transfer schools because they moved into the shelter and out of their former school's attendance area and had no transportation to their former school. *Id* at ¶ 7.

The numerosity requirement of Rule 23(a) is met by this situation alone.

B. DOE Has No Dispute Resolution Process for Resolving McKinney-Vento Complaints

Defendants have no dispute resolution process to allow homeless children and their parents to assert their rights under the McKinney-Vento Act. This failure affects every school-aged homeless child and family in Hawaii, whether identified or unidentified by the DOE, as each child and parent lacks a forum or procedure to assert their rights under the McKinney-Vento Act in this respect. The numerosity requirement of Rule 23(a) is met by this situation alone.

C. DOE's Administrative Rules Violate the McKinney-Vento Act

Hawaii Administrative Rules §§ 8-13-1 through 8-13-10 allow students to apply for "geographic exceptions" to attend schools outside their geographic attendance area. These Rules do not allow for homeless students to continue

⁵ Also attached to Pls. Mot. For Prelim. Inj., filed Nov. 6, 2007.

attending their home schools when they change residences in search of shelter – despite the fact that the U.S. DOE found more than a year ago that the Hawaii DOE was violating the McKinney-Vento Act. Gluck Decl., Ex. 8 at 27-28 (USDOE, Student Achievement and School Accountability Programs, *Hawaii Department of Education Monitoring Report* (April 17-21, 2006)). This unlawful rule affected 16 homeless children at *one* shelter on Maui alone in a three-month period. Declaration of Esther Santos at ¶ 7.

Because the policy applies to every single homeless child in Hawaii, thousands of homeless children have been or will be affected. Even if the DOE is currently taking steps to comply with the Act, the Administrative Rules are still “on the books.” At best, these Rules cause confusion among DOE personnel and homeless families, and at worst, these Rules are still being used to force homeless children to choose between finding shelter and getting an education. *See* Declaration of Olivé Kaleuati at ¶¶ 7-14.⁶ So long as these Rules are in effect, DOE is violating the McKinney-Vento Act. The numerosity requirement of Rule 23(a) is satisfied by this factor alone.

III. Thousands of Potential Class Members Make Class Certification Appropriate In This Case

There are thousands of homeless children, whether identified or unidentified by DOE, who have not received the services they are entitled to under the

⁶ Also attached to Pls. Mot. For Prelim. Inj., filed Nov. 6, 2007.

McKinney-Vento Act. This group of homeless children, along with future unknown homeless children who will be denied services if DOE is allowed to persist in its non-compliance with the McKinney-Vento Act, cannot practicably participate in this lawsuit through joinder procedures. Class certification is the only method to resolve this and future claims.

DATED: January 14, 2008, Honolulu, Hawaii.

/s/ Daniel M. Gluck

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