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IN THE UNITED STATE DISTRICT COURT

FOR THE DISTRICT OF HAWAII

N.D., A.U., C.K., C.J., M.D., B.A.,
G.S., T.F., and J.K., disabled minors,
through their parents acting as guardians
ad litem,

Plaintiffs,

vs.

STATE OF HAWAII DEPARTMENT
OF EDUCATION,

Defendants.

Civil No. CV-09-00505 DAE/BMK

(Civil Rights Action)

FIRST AMENDED COMPLAINT FOR
DECLATORY AND INJUNCTIVE
RELIEF; SUMMONS

FIRST COMPLAINT FOR DECLATORY AND INJUNCTIVE RELIEF

1. This action seeks an injunction forbidding the Defendant State of Hawaii Department of Education (“DOE”) from violating the educational rights of disabled students above named as protected by the Individuals with Disabilities in Education Act (“IDEA”).

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter and the parties pursuant to the IDEA, 20 U.S.C. §§ 1401-1487, on grounds of federal question jurisdiction 28 U.S.C. § 1331 and on grounds of original jurisdiction 28 U.S.C. § 1343, which affords original jurisdiction of actions arising from federal questions under the Constitution or laws of the United States, including the IDEA. The Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over claims arising under state law, H.A.R. § 8-56-79 and Haw. Rev. Stat. Chapter 91.

3. Venue is proper in the District of Hawaii pursuant to 28 U.S.C. § 1391(b) because the events giving rise to Plaintiffs claims occurred in this District.

PARTIES

4. Plaintiff N. D. is a child suffering from autism and receives special education and related services from the DOE. N. D.’s IEP requires that he receives his education in a structured classroom setting, including 1830 minutes per week of

special education and 1830 minutes per week with a 1:1 aide. N. D.'s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit. N. D.'s IEP requires implementation in a general education classroom setting and includes opportunities for mainstreaming and inclusion with non-disabled peers in general education, at lunch and during recess, Physical Education, Computer and Library. Due to the nature of his disability, N. D. is entitled to extended school year services. When informed that his program would be changed unilaterally as a result of planned furloughs, N. D.'s filed for an impartial due process hearing on October 19, 2009 and invoked the protections of "stay-put" pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

5. Plaintiff A. U. is a child suffering from autism and receives special education and related services from the DOE. His May 29, 2009 IEP requires that he receive his education in a structured classroom setting, including 1830 minutes per week of special education and 2550 minutes per week with a 1:1 aide from 8:00 a.m. until 4:30 p.m. five days a week, regardless of the time he is dismissed from the special or general education classroom. A. U.'s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special education classroom setting and requires opportunities for mainstreaming and

inclusion with non-disabled peers in general education, at lunch, P.E. and during recess. Due to the nature of his disability, A. U. is entitled to extended school year services and receives 2 hours with a 1:1 aide on weekends. When informed that his program would be changed unilaterally as a result of planned furloughs, A. U.'s parents filed for an impartial due process hearing on October 19, 2009 and invoked the protections of “stay-put” pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

6. Plaintiff C. K. is a child suffering from autism and receives special education and related services from the DOE. His October 7, 2009 IEP requires that he receive his education in a structured classroom setting, including 210 minutes per day of special education and 1935 minutes per week with a 1:1 aide. C. K.'s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special education classroom setting and requires opportunities for mainstreaming and inclusion with non-disabled peers in general education, at breakfast and lunch, P.E. and during recess. Due to the nature of his disability, C. K. is entitled to extended school year services. When informed that his program would be changed unilaterally as a result of planned furloughs, C. K.'s parents filed for an impartial due process hearing on October 19, 2009 and invoked the

protections of “stay-put” pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

7. Plaintiff C. J. is a child suffering from autism and receives special education and related services from the DOE. His September 28, 2009 IEP requires that he receive his education in a structured classroom setting, including 1830 minutes per week of special education and 1980 minutes per week of support with two paraprofessionals, in school, 1:1. C. J.’s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special education classroom setting and requires opportunities for mainstreaming and inclusion with non-disabled peers in general education. Due to the nature of his disability, C. J. is entitled to extended school year services. When informed that his program would be changed unilaterally as a result of planned furloughs, C. J.’s parents filed for an impartial due process hearing on October 19, 2009 and invoked the protections of “stay-put” pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

8. Plaintiff M. D. is a child suffering from autism and receives special education and related services from the DOE. His July 2, 2009 IEP requires that he receive his education in a structured classroom setting, including 2025 minutes per week of special education with 1:1 instruction. M. D.’s IEP requires that he

receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special education classroom setting and requires opportunities for mainstreaming and inclusion with non-disabled peers and is currently included during breakfast, lunch and recess. Due to the nature of his disability, M. D. is entitled to extended school year services. When informed that his program would be changed unilaterally as a result of planned furloughs, M. D.'s parents filed for an impartial due process hearing on October 19, 2009 and invoked the protections of "stay-put" pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

9. Plaintiff B. A. is a child suffering from autism and receives special education and related services from the DOE. His September 15, 2009 IEP requires that he receive his education in a structured classroom setting, including 1725 minutes per week of special education and 1980 minutes per week with a 1:1 aide. B. A.'s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special education classroom setting and requires opportunities for mainstreaming and inclusion with non-disabled peers in general education, at lunch, P.E. and during recess. Due to the nature of his disability, B. A. is entitled to extended school year services. When informed that his program would be changed unilaterally as a result of planned furloughs, B. A.'s parents filed for an

impartial due process hearing on October 19, 2009 and invoked the protections of “stay-put” pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

10. Plaintiff G.S. is a child suffering from autism who receives special education and related services from the DOE. His October 2, 2009 IEP requires that he receive his education in a structured classroom setting, including 1830 minutes per week of special education and 1830 minutes per week with a 1:1 aide. G S.’s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special education classroom setting and requires opportunities for mainstreaming and inclusion with non-disabled peers in general education when possible. Due to the nature of his disability, G. S. is entitled to extended school year services and his IEP requires services after breaks longer than two calendar days excluding holidays and teacher work days. When informed that his program would be changed unilaterally as a result of planned furloughs, G. S.’s parents filed for an impartial due process hearing on October 20, 2009, and invoked the protections of “stay-put” pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

11. Plaintiff T.F. is a child suffering from autism and receives special education and related services from the DOE. His September 23, 2009 IEP

requires that he receive his education in a structured classroom setting, including 1825 minutes per week of special education and 1925 minutes per week with a 1:1 aide. T.F.'s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special education classroom setting and requires opportunities for mainstreaming and inclusion with non-disabled peers in general education, at breakfast, lunch and during recess. Due to the nature of his disability, T.F. is entitled to extended school year services. T.F.'s program requires he receive 90 minutes afterschool instruction in the classroom on Mondays, Wednesdays and Fridays. The furlough days will have a direct impact on these services. T.F.'s parent filed for an impartial due process hearing on October 20, 2009 and invoked the protections of "stay-put" pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals.

12. Plaintiff J.K. is a child suffering from autism and receives special education and related services from the DOE. His September 25, 2009 IEP requires that he receive his education in a structured classroom setting, including 1285 minutes of special education per week in the general education and special education setting and 2400 minutes per week with a 1:1 aide. J.K.'s IEP requires that he receive education and related services in the least restrictive environment in order to receive an educational benefit and requires implementation in a special

education classroom setting and requires opportunities for mainstreaming and inclusion with non-disabled peers when possible. Due to the nature of his disability, Child K. is entitled to extended school year services. The IEP requires that Jeremiah be provided with intensive services (paraprofessional/BISS), for breaks more than 2 consecutive days (ESY). J.K. filed for an impartial due process hearing on DATE and invoked the protections of “stay-put” pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals. Plaintiffs are similarly situated and present claims also shared by non-party disabled children whose special education programs have been unilaterally altered by the state. Because of the lack of time between the announced furloughs and the filing of this complaint, it was not possible to include the thousands of other disabled children affected by these unilateral changes. An emergency exists presenting irreparable harm in the form of the deprivation of the Plaintiffs' federally protected rights for which there is no adequate remedy at law and for which exhaustion of administrative remedies is not required. *E.g., G. v. Vashon Island School Dist* .337 F.3d 1115 (9th Cir. 2003); *Van Schoy v. San Luis Costal Unified School Dist.*, 353 F. Supp. 2d 1083 (C.D. Cal. 2005).

DEFENDANT

13. Defendant State of Hawaii, Department of Education is a body politic mandated by IDEA to provide special education and related service to Plaintiffs

and all other disabled children eligible for special education and related services under the IDEA .

BACKGROUND

14. Hawaii provides public school education to its children under a unitary educational system. Hawaii Revised Statutes (“HRS”) Chapter 302A. Disabled students are eligible to receive those educational services. As a result of the nature of their disabilities, the Plaintiff children additionally are all eligible for and receive special education and related services under IDEA through IEPs negotiated with the DOE. The Plaintiff children are all entitled to the protections of the IDEA and are guaranteed a legal right to a Free, Appropriate Public Education (“FAPE”) in the Least Restrictive Environment (“LRE”) as well as important procedural protections.

15. The IDEA confers upon disabled students an enforceable substantive right to public education in participating States and conditions federal financial assistance upon a State’s compliance with the substantive and procedural goals of the Act. *See Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

16. The primary vehicle for implementing Congress’ goals is the IEP, which the IDEA mandates for each disabled child.

17. IEPs are negotiated at meetings between the parents of a child with a disability, not less than one regular education teacher of such child (if the child is or may be participating in the regular education environment), not less than one special education teacher of such child, a representative of the local school district, and, whenever appropriate, the disabled child. The IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. 20 U.S.C. § 1414(d).

18. If the parents do not agree with changes in services proposed by schools, they may request a due process hearing to prevent such changes from occurring pursuant to 20 U.S.C. § 1415. Such a request triggers "stay-put" provisions of IDEA.

19. "Stay-put" is one of the most important procedural protections for parents and disabled children under the IDEA. "Stay-put" is triggered in the event that a parent disagrees about the appropriateness of the special education program recommended for their child by the school. If they do so and initiate any procedure outlined in the procedural safeguards (e.g. Mediation, a Due Process Complaint, and appeals to state or federal court); the student must remain in the program, placement and related services last agreed upon, and the school must maintain the

special education and related services described in the last agreed upon placement.
20 U.S.C. § 1415(j); H.A.R. § 8-56-79.

20. “Stay-put” is particularly important where it is invoked in cases such as this when, without parental agreement, the school district attempts to unilaterally alter the program and services for the child set forth in the IEP and move the child from a less restrictive program and/or environment to a more restrictive program and/or environment against the parents’ wishes.

21. The language of 20 U.S.C. § 1415(j) is unequivocal and provides that “during the pendency of any proceedings conducted pursuant to [the IDEA], unless the State or local agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child ... until all such proceedings have been completed.”

22. Similarly, H.A.R. § 8-56-79 provides that "during the pendency of any administrative or judicial proceeding regarding a complaint under section 8-56-72, unless the department and the parent of the student agree otherwise, the student involved in the complaint shall remain in the current educational placement." *Citing*, 34 C.F.R. § 300.514(a).

23. The § 1415(j) provision, also referred to as the “pendency” provision, may also be found in the Department of Education Regulations:

[D]uring the pendency of any administrative or judicial proceeding regarding a complaint under [the Act], unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

34 C.F.R. § 300.514(a).

24. The Plaintiffs' parents were notified through the media that the DOE would institute a plan to furlough teachers and other DOE paraprofessionals on 17 Fridays for the remainder of the 2009-2010 school year, thereby suspending the Plaintiff Children's education by approximately twenty percent (20%).

25. All of the Plaintiffs' IEPs were in place for this school year prior to October 15, 2009. These IEPs had been negotiated with the mutual understanding by the parents and Defendant that the IEPs would be implemented in the school year set by DOE's calendar consisting of 180 instructional days.

26. On or about October 19th to 21st, 2009, the parents of the Plaintiff Children were informed by their respective school principals that the services set forth in Plaintiffs' IEPs would not be implemented on Friday, October 23, 2009, and on ensuing Fridays, all of which had been scheduled instructional days at their schools on the 2009-2010 school year calendar when the IEPs were negotiated.

27. The Plaintiff Parents did not agree to the unilateral change in their children's educational program, placement and related services as provided in their IEPs.

28. The DOE's furlough program violates the rights of children who are currently under the "stay-put" provision of the IDEA, 20 U.S.C. § 1415(j) and H.A.R. § 8-56-79, by failing to maintain the Plaintiff Children's then-current program, placement and related services under the relevant IEP through the 2009-10 school year.

29. All of the Plaintiff Children's' parents have rejected the unilateral changes in the Plaintiff Children's program, placement and related services and informed their school's principals that they are invoking "stay-put."

30. The Plaintiff Children's parents received no prior written notice of the DOE's proposed change to the Plaintiff children's program, placement and related services prior to the filing for an administrative due process hearing and invoking the protections of "stay-put" on October 19, 2009, the week of the first proposed unilateral change in program and placement on October 23, 2009.

**FIRST CAUSE OF ACTION BASED ON A VIOLATION OF THE
"STAY-PUT" PROVISION OF THE IDEA AND STATE LAW**

31. Plaintiffs reallege and incorporate the allegations in the paragraphs above.

32. The Defendant violated the procedural safeguards of the IDEA 20 U.S.C. § 1415(j) and H.A.R. § 8-56-79 which prohibit unilateral modification of the Plaintiff Children's program, placement and related services set forth in their IEPs.

33. The DOE's proposed furlough program violates the rights of the Plaintiff Children who are protected by the procedural rights of the IDEA and are currently under the "stay-put" provision of the IDEA, 20 U.S.C. § 1415(j) and H.A.R. § 8-56-79, by failing to maintain the students' current program, placement and related services set forth under the relevant IEPs for the 2009-10 school year.

**SECOND CAUSE OF ACTION BASED ON A VIOLATION OF THE
CHAPTER 91, HAWAII ADMINISTRATIVE PROCEDURES ACT**

34. Plaintiffs reallege and incorporate the allegations in the paragraphs above.

35. Defendants' furlough program is procedurally and substantively unlawful under the Hawai'i Administrative Procedures Act ("HAPA").

36. Haw. Rev. Stat. § 91-7, provides that "[a]ny interested person may obtain a judicial declaration as to the validity of an agency rule ... by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business." Haw. Rev. Stat. § 91-7(a).

37. Under Haw. Rev. Stat. § 91-7(b), the Court must "declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures." Haw. Rev. Stat. § 91-7(b).

38. Here, Defendants' new rule shortens the school year from 180 to 163 instructional days by furloughs. The shortening of the school year for all public

school children in Hawaii (1) qualifies as a "rule" under Haw. Rev. Stat. § 91-1; (2) and is invalid on procedural grounds for failing to comply with the notice and comment procedures required by Haw. Rev. Stat. § 91-3.

39. Defendants' new rule shortening the school year for all Hawaii children is a "rule" under Hawaii law, even though not formally promulgated through a rule making process, under Haw. Rev. Stat. § 91-1.

40. Specifically, Haw. Rev. Stat. § 91-1(4) provides, in part, that:

"Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda. Haw. Rev. Stat. § 91-1(4).

41. The new rule determines that children attending Hawaii's public schools will have 17 less instructional days than had been set for the 2009-2010 school year. All Hawaii public schools are covered by the new rule.

42. The essence of a "rule" is that it "delineate[s] the future rights of the entire class of unnamed individuals within the agency's jurisdiction." *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 486, 522 P.2d 1255, 1261 (1974).

43. Haw. Rev. Stat. Chap. 91, requires State agencies to comply with the following procedures (among others) "prior to the adoption of any rule authorized by law: (1) thirty days' notice for public hearing; (2) an opportunity for "all

interested persons ... to submit data, views, or arguments, orally or in writing," all of which the agency must "fully consider"; and (3) submission of the rule for approval by the governor.

44. Because DOE completely failed to comply with the requirements of Chapter 91, its new rule shortening the number of instructional days in the 2009-2010 school year, reducing them by 17, is invalid and unenforceable under Haw. Rev. Stat. § 91-7.

45. If Defendants are not enjoined from enforcing their rule, Plaintiffs will suffer immediate and irreparable harm, for which they have no adequate remedy at law.

WHEREFORE, Plaintiffs request that this Court:

1. Assume jurisdiction over this case;
2. Issue declaratory relief that Defendant has violated Plaintiffs' rights under the IDEA, 20 U.S.C. § 1401-1487, H.A.R. § 8-56-79 and Haw. Rev. Stat. § 91-7;
3. Immediately enjoin Defendant from continuing to violate Plaintiffs' rights under 20 U.S.C. § 1401-1487, H.A.R. § 8-56-79 and Haw. Rev. Stat. § 91-7;
4. Order Defendant to provide the program, placement and related services set forth as required by the Plaintiff Children's IEPs, including on Friday,

October 23, 2009 and all subsequent Fridays implicated by the proposed “furlough Friday” plan during the 2009-2010 school year;

5. Award Plaintiffs reasonable costs, litigation expenses, and attorneys’ fees pursuant to 20 U.S.C. § 1415(e)(4)(B) and Haw. Rev. Stat. Chapter 91.

6. Award Plaintiffs such additional relief as may be just, proper and equitable;

DATED: Honolulu, Hawaii, October 23, 2009.

/s/ Carl M. Varady

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