IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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 HAWAI'I DEPARTMENT OF EDUCATION, Defendants.	Civil No. 09CV-00505 DAE/KSC MEMORANDUM IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR DECLARATORY AND TEMPORARY INJUNCTIVE RELIEF

MEMORANDUM IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR DECLARATORY AND TEMPORARY INJUNCTIVE RELIEF

I. INTRODUCTION.

This supplemental memorandum is submitted in support declaratory and injunctive relief available for violations of the Hawai'i Administrative Procedures Act ("HAPA"), now before the Court through the First Amended Complaint. Defendant, by adopting a rule that reduced the existing school calendar by 17 days has imposed on all public school children and their families a 163-day school year by without complying with notice, hearing and comment provisions of HAPA. The process followed by the Defendant arbitrarily adopted a

universally applied rule that cuts off 17 days in the existing school year as a cost savings measure. Through application of the new rule, Defendants unilaterally and without public notice, hearing and comment, violated HAPA. The rule creating the new 163-day school year is void. Plaintiffs seek a declaration that it is unlawful and mandating that 17 instructional days be restored to the public school calendar until and unless Defendant complies with the notice, hearing and comment provisions of HAPA, and the citizens of Hawai‘i have public input required by law concerning Defendant's adoption of this new rule.

II. FACTS

The facts are not disputed. Plaintiffs are children diagnosed with autism who special education and related services from the DOE. *See,* Exhibits 1-18 to Declaration of Carl M. Varady in support Plaintiffs' Motion for Temporary Injunctive Relief. The Plaintiffs Children's IEPs require that they receive special education in a structured classroom setting. All Plaintiffs attend public school. *Id.* The Plaintiffs' IEPs require that they receive education and related services in the least restrictive environment in order to receive an educational benefit. *Id.* Their IEPs require implementation in a general education classroom setting and includes opportunities for mainstreaming and inclusion with non-disabled peers in a general education setting. *Id.* Due to the nature of their disabilities, Plaintiffs' are entitled to extended school year services. *Id.* When informed that their programs would be

changed unilaterally as a result of planned rule adopting a 163-day school year, Plaintiff's parents filed request for impartial due process hearings prior to the first furlough day and invoked the protections of "stay-put" pursuant to 20 U.S.C. § 1415(j) until the hearing is concluded, including all appeals. *Id.*

These facts are not disputed. Nor is it disputed that on Friday, October 23, 2009, Defendant's new rule caused school closures and loss of the first of 17 instructional days that will be eliminated from the calendar under the new rule.

III. STANDARD OF REVIEW

This Court has set forth the relevant standards as follows:

Under the Declaratory Judgment Act, a federal court may declare the rights and obligations of any party under an arbitration agreement. The Declaratory Judgment Act is a procedural statute that provides a federal remedy for litigants seeking a judicial declaration of rights. It provides, in relevant part:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

Declaratory relief is appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will

terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Federal Sav. & Loan Asso. v. American Casualty Co.*, 873 F.2d 229, 231 (9th Cir. 1989) (*citing Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984)). The decision to grant declaratory relief lies within the discretion of the trial court. *United States v. State of Washington*, 759 F.2d 1353, 1356 (9th Cir. 1985) (*citing Zemel v. Rusk*, 381 U.S. 1, 19, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965)).

The standards for granting a temporary restraining order and a preliminary injunction are identical. In *Miller v. California Pacific Medical Ctr.,* 19 F.3d 449 (9th Cir. 1994), the Ninth Circuit set forth the standard for granting a preliminary injunction as follows:

> Traditionally we consider (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Id. at 456 (citing *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987)).

The standards for granting a temporary restraining order and a preliminary injunction have been briefed at length in Plaintiffs' prior memorandum. The arguments will not be reiterated here except to assert that they apply with equal

vigor to Plaintiffs' claims that Defendants' new rule shortening the school year is a violation of HAPA and should be enjoined. Plaintiffs assert that the HAPA violations meet the customary standards for injunctive relief: (1) a showing of likelihood of success on the merits; (2) irreparable injury to the plaintiff; (3) no irreparable injury to the defendant; and (4) issuance of the injunction being within the public interest. *See Topanga Press v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993)

A. The Judgment Will Serve a Useful Purpose in Clarifying and Settling the Legal Relations in Issue.

It is self-evident that adopting a rule that shortens the instructional days the public school year by 17 days. Is a matter of the utmost concern to the residents of Hawaii. The Court's assessment of whether the adoption of the 17-day limitation was accomplished by unlawful rule making, would be extremely useful in clarifying and settling the legal issues in the present case. This Court's judgment regarding Defendant's newly promulgated rule, would provide Plaintiffs, Defendant and Hawaii's residents, especially parents with children in public school, with an a ruling that, either way, would put to rest the issue of whether the new rule is lawful and enforceable, or unenforceable because it violates HAPA. The Declaratory Judgments Act and Rule 57 are expressly designed to resolve serious disputes such as this.

> The Act was intended by Congress as a means for parties in such controversies as that between this interstate carrier and the Utah Commission to settle their legal responsibilities and powers without the necessity and risk of violation of the rights of one by the other. The controversy here is clear and definite. A decision would settle the issue that creates the uncertainty as to the parties' rights. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227. The Act intended operations to be conducted in the light of knowledge rather than the darkness of ignorance. S. Rep. No. 1005, 73d Cong., 2d Sess.

Public Service Com. v. Wycoff Co., 344 U.S. 237, 250 (U.S. 1952)

The Ninth Circuit noted, that, if the case-or-controversy requirements of Article III are met, the Court has discretion to hear the matter and that discretion is not without limits.

> If the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate. This determination is discretionary, for the Declaratory Judgment Act is "deliberately cast in terms of permissive, rather than mandatory, authority." *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 250, 97 L. Ed. 291, 73 S. Ct. 236 (1952) (J. Reed, concurring). The Act "gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112, 7 L. Ed. 2d 604, 82 S. Ct. 580 (1962). Of course, this discretion is not unfettered. "[A] District Court cannot decline to entertain such an action as a matter of whim or personal disinclination." *Id.* Prudential guidance for retention of the district court's authority is found in *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942), and its progeny.

Government Emples. Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998)(upholding propriety of declaratory relief).

B. Plaintiffs Will Prevail on the Merits of their Claims Against Defendant.

1. Defendants New Rule Violates the Hawaii Administrative Procedures Act on Both Procedural and Substantive Grounds

Plaintiffs challenge Defendant's new rule pursuant to Haw. Rev. Stat. § 91-7, which 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). 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). Here, Defendant's newly adopted rule limiting the school year to 163 days (1) qualifies as a "rule" under Haw. Rev. Stat. § 91-1; and (2) are invalid on procedural grounds for failing to comply with the notice and comment procedures required by Haw. Rev. Stat. § 91-3.

Defendant's new limitation on the number of instructional days that comprise the 2009-2010 school year, meet the definition of a "rule" under Haw. Rev. Stat. § 91-l. 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). 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).

Here, Defendant's new rule does just that; it delineates the future rights of public school students to instructional school days in Hawai'i.[1] The fact that the Defendant pronounced its "rule" through news conferences and press releases has no bearing on whether it was required to follow Chapter 91. The Hawai'i Supreme Court has routinely invalidated agency action for failure to comply with Chapter 91 rule making procedures even when the rules were characterized by the agency as something other than rule making. *See, e.g., Hawaii Prince Hotel Waikiki Corp.*

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1 Under Haw. Rev. Stat. §302A-1132 all school age children must attend either a public or private school unless exempted. School age children are children who will be at least six (6) years old and who will not be eighteen years by January 1, of any school year. This section states that any parent or guardian having the responsibility for the care of the child must ensure that the child attend school unless exempted by law.

Furthermore, Haw. Rev. Stat. § 302A-1135 H.R.S. provides that a parent or guardian who does not enforce the child's regular school attendance may be guilty of a petty misdemeanor. The penalty for a petty misdemeanor is a fine of up to $1,000 (H.R.S 706-640) or jail time up to thirty (30) days (H.R.S. 706-663).

v. City & County of Honolulu, 89 Haw. 381, 393, 974 P.2d 21,33 (1999) (City and County's appraiser's unwritten methodology for determining imparted value of golf courses was a "rule"); *Vega v. National Union Fire Ins. Co. of Pittsburgh, PA, Inc*., 67 Hawai-i 146, 155,682 P.2d 73, 78 (1984) (Insurance Commissioner's requirement that all no-fault policies contain a specific endorsement was a "rule").

Chapter 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. Haw. Rev. Stat. § 91-3. "The express legislative objective of the HAPA rulemaking procedures is to provide for public participation in the rulemaking process, by allowing any interested person to petition for a change in the rules as well as to participate in a public hearing." *State v. Rowley*, 70 Haw. 135, 138, 764 P.2d 1233, 1235 (1988) (holding rule invalid for failure to comply with H.R.S. § 91-3). Because Defendant completely failed to comply with the requirements of Chapter 91, its new rule limiting the number of instructional days to 163 regarding are invalid and unenforceable under Haw. Rev. Stat. § 91-7.

V. CONCLUSION.

Based upon the foregoing, Plaintiffs respectfully request that this Court grant their Amended Motion for Declaratory and Temporary Restraining Order.

DATED: Honolulu, Hawai‘i, October 25, 2000.

/s/ Carl M. Varady
STANLEY E. LEVIN
CARL M. VARADY
SUSAN K. DORSEY

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that the foregoing document was served through the court's CM/ECF system on the date indicated below addressed to:

Mark J. Bennett
Holly T. Shikada
holly.t.shikada@hawaii.gov
Cheryl.H.Oeda@hawaii.gov

Christine M. Denton
christine.m.denton@hawaii.gov
gina.m.lum@hawaii.gov
jorge.r.cadiz@hawaii.gov

Joanna B.K.F. Yeh
Joanna.B.Yeh@hawaii.gov
Danell.Lewis@hawaii.gov
Jorge.R.Cadiz@hawaii.gov

DATED: Honolulu, Hawai'i, October 25, 2009.

/s/ Carl M. Varady
CARL M. VARADY