IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

OLIVÉ KALEUATI, individually and on behalf of the class of parents and/or guardians of homeless children in the State of Hawaii, *et al.*, 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, *et al.*, Defendants.	CIVIL NO. 07-504 HG/LEK [CIVIL RIGHTS ACTION] [CLASS ACTION] PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF CLASSES

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF CLASSES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

HAWAII ADMINISTRATIVE RULES (H.A.R.)

MISCELLANEOUS

I. INTRODUCTION

Defendants – the State officials responsible for Hawaii's public education system – have systemically denied homeless children equal access to education by failing to implement the requirements of Subtitle VII-B of the McKinney-Vento Act, 42 U.S.C §§ 11431-11435 (hereinafter "the McKinney-Vento Act" or "the Act") and by violating the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution. As a result of Defendants' violations, homeless children in Hawaii are:

- denied federally mandated transportation to get to and from public schools;
- forced to repeatedly change schools as they move from place to place; and
- turned away at the schoolhouse door because they cannot provide documents that the Hawaii Department of Education ("DOE") cannot lawfully require as a precondition to admission.

By this Motion, Plaintiffs request that the Court certify the following classes pursuant to Fed. R. Civ. P. ("Rule") 23(a) and 23(b)(2):

> The Student Class: 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: (a) 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 Guardian Class: All parents, guardians or persons in a parental relationship for children in Class A.

As set forth below, class-wide relief will ensure that Defendants comply with the McKinney-Vento Act and the United States Constitution and that Hawaii's homeless children are afforded the education to which they are entitled. This case squarely meets the criteria set forth by the federal rules for class certification. The proposed Classes easily meet the certification requirements of Rule 23(a):

- The Classes consist of hundreds (if not thousands) of persons statewide, including individuals whose identities are difficult to ascertain and who, therefore, cannot be practicably joined as parties.
- The claims of the named Plaintiffs and those of the proposed Classes arise from the same conduct, *i.e.,* Defendants' violations of the McKinney-Vento Act and their discrimination against homeless children.
- The claims of the named Plaintiffs are typical of all other members of the Classes, in that each has been wrongfully denied services under the Act and deprived of equal access to education.

- The named Plaintiffs, who are represented by able counsel with extensive experience in class actions and civil rights cases, are fully capable of adequately protecting the interests of the Classes.

This case also amply meets the criteria set forth in Rule 23(b)(2). Cases such as this — which seek injunctive relief to compel Defendants to come into compliance with the law — are presumptively appropriate for certification. Certification will allow Plaintiffs to secure a remedy that matches the scope of Defendants' violations.

Finally, the vast majority of the members of the Classes are without the means or knowledge to challenge the legal and constitutional violations to which they have been subjected. Class certification is the optimal means to obtain the broad injunctive relief required and to prevent this Court (and Defendants) from being exposed to a multiplicity of suits and the potential for inconsistent judgments.

Plaintiff's Motion should be granted, the proposed Classes certified and Plaintiffs counsel should be appointed as counsel for the Classes pursuant to Rule 23(g).

II. STATEMENT OF RELEVANT FACTS

Plaintiffs' Motion for Preliminary Injunction and the supporting papers, which are being filed concurrently herewith, set forth all of the relevant facts

necessary for resolution of both of these Motions. For brevity, only the facts relevant to this Motion are set forth below.[1]

A. Homelessness in Hawaii

The problem of persons experiencing homelessness or on the brink of homelessness is reaching crisis proportions in Hawaii. While the precise number of homeless people in Hawaii is difficult to ascertain, conservative counts estimate that there are over 5000 persons sleeping on beaches, parks, benches, and in cars and shelters every night. (Declaration of William H. Durham (hereinafter "Durham Decl.") Ex. 5 at 5, 8 (SMS, *City and County of Honolulu, Homeless Point-In-Time Count, 2007, Methodology and Results* (2007)), Ex. 6 at 11 (FAQ Hawaii, Inc., *2007 Point-In-Time Count* (2007)).) Moreover, the number of hidden homeless in Hawaii— the people of all ages who move from friend to friend and relative to relative while looking for affordable housing — is estimated to be approximately 100,000. (Durham Decl. Ex. 7 at 2 (SMS, *Housing Policy Study 2006: The Hidden Homeless and Households at Risk of Homelessness* (2007) (hereinafter "Housing Policy Study")).)

It cannot be disputed that among the homeless are many families with school-age children who are qualified for and entitled to the protections of the

[1] Unless otherwise noted, all of the declarations, appendices and exhibits cited in this Motion are being filed concurrently as attachments to Plaintiffs' Motion for Preliminary Injunction.

McKinney-Vento Act. The DOE currently recognizes 908 homeless children as enrolled in school, 532 children living in shelters, 156 unsheltered children, 19 children living "doubled up," and 201 children whose primary nighttime residence is "unknown." (Durham Decl. Ex. 8 at 53-54 (U.S. Dep't of Education (hereinafter "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) (hereinafter "HI State Report")).

B. The McKinney-Vento Act

In 1987, recognizing the plight of homeless children, Congress enacted the McKinney-Vento Act, which establishes a grant of money to the States to provide assistance to homeless families and children. 42 U.S.C. §§11301, *et seq*. For this case, the relevant portion of the Act, Subtitle VII-B (codified as amended in 42 U.S.C. §§11431-11435), makes funds available for States to assist in the education of homeless children and requires that States receiving such funds "ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . as provided to other children and youths." 42 U.S.C. §11431(1).

The McKinney-Vento Act establishes specific requirements for the

treatment of homeless children in public schools. These "requirements are not optional and 'substantial compliance' or 'reasonable efforts' [are] insufficient under the Act." *Natational Law Ctr. on Homelessness and Poverty v. State of New York*, 224 F.R.D. 314, 319 (E.D.N.Y. 2004). Specifically, each educational agency that receives McKinney-Vento funding:[2]

- "shall immediately enroll the homeless child or youth, even if the child or youth is unable to produce records normally required for enrollment . . . ." (42 U.S.C. §11432(g)(3)(C)(i));
- "shall coordinate . . . with local social services agencies, and other agencies or programs providing services to homeless children and youth and their families. . . ." (42 U.S.C. §11432(g)(5)(A)(i));
- "shall ensure that homeless children and youths enroll in, and have a full and equal opportunity to succeed in, schools of that local educational agency." (42 U.S.C. §11432(g)(6)(A)(ii));
- "shall . . . provide[] services comparable to services offered to other students in the school . . . including the following: (A) Transportation services" (42 U.S.C. §11432(g)(4)(A));
- "shall review and revise any policies that may act as barriers to the enrollment of homeless children and youths in schools . . . ." (42 U.S.C. §11432(g)(7)(A)); and
- must permit a homeless child to continue to attend school in the child's school of origin,[3] or one near the homeless student's

[2] In every state except Hawaii, the McKinney-Vento Act directly imposes obligations on both state and local educational agencies. (Durham Decl. Ex. 9 (Nat'l Center for Education Statistics, *Digest of Education Statistics: 2006* (2007)) (hereinafter "Education Statistics")).) In Hawaii, the only state composed of a single school district, there are no local agencies. (*Id.*) Thus, pursuant to the McKinney-Vento Act, all obligations in Hawaii are borne by the state agency, the DOE.

[3] In this Memorandum, the "school of origin" is referred to as the "home school."

current temporary residence, at the parent's option. (42 U.S.C. §11432(g)(3)(A)).

In short, the McKinney-Vento Act obligates the States to identify and dismantle obstacles and barriers to school enrollment and attendance to ensure a homeless child's access to education.

C. Defendants' Inadequate Implementation of the McKinney-Vento Act and Violations of Federal Law

Like every other state, Hawaii receives federal funds under the McKinney-Vento Act. (Durham Decl. Ex. 10 at C-102 (USDOE, *School Improvement Programs, Fiscal Year 2008 Budget Request* (2007)).) In 2006, the DOE received $224,638. *Id.* By accepting these funds, as it has for years, the DOE must comply with the mandatory provisions of the McKinney-Vento Act — a fact that DOE policies explicitly recognize. (Durham Decl. Ex. 11 (Dep't of Education, *Proof of Residence, McKinney-Vento, at* http://doe.k12.hi.us/mckinneyventoact.htm (last modified October 29, 2007)) (describing the Education for Homeless Children and Youth Program).)

Over one year ago, the federal government notified Defendants they were violating the McKinney-Vento Act. (Durham Decl. Ex. 1 at 27-28 (U.S. Dep't of Education Student Achievement and School Accountability Programs, *Hawaii Department of Education Monitoring Report,* (April 17-21, 2006).) During the week of April 17-21, 2006, a team from USDOE's Student Achievement and

School Accountability Programs office monitored and evaluated the DOE's compliance with the McKinney-Vento Act. (*Id.* at 1.) The USDOE identified at least three of Defendants' failures and set forth an action plan for each. (*Id.* at 27-28.) Specifically the USDOE found that:

> **Finding (1):** The [USDOE] team finds that the [DOE]'s Geographical Exception form that homeless families are required to fill out in order to enroll in school is a barrier to immediate enrollment.
>
> [. . .]
>
> Citation: Section 722(g)(1)(I) of the ESEA requires that the State educational agency has developed, and shall review and revise, policies to remove barriers to the enrollment and retention of homeless children and youths in schools in the State. Additionally, section 722(g)(C)(3) requires immediate enrollment of a homeless child or youth, even if the child or youth is unable to produce records normally required for enrollment, such as proof of residency, or other documentation.
>
> Further action required: [USDOE] requires that the [DOE] review and revise its requirement for Geographical Exception for identified homeless families as a pre-condition for enrollment and align all enrollment requirements with the McKinney-Vento Act, as reauthorized under NCLB.
>
> **Finding (2):** The [USDOE] team observed that the [DOE] State Coordinator, who also serves as the liaison, has not provided posters and materials on the educational rights of homeless children and youth to local schools on a regular basis.
>
> Citation: Section 722(g)(6)(v) of the ESEA(v) requires public notice of the educational rights of homeless children and youth is disseminated where such children and youth receive services under this Act, such as schools, family shelters, and soup kitchens.

> Further action required: [USDOE] requires that the [DOE] demonstrate how it will provide a regular schedule of disseminating information on the educational rights of homeless children and youth to all schools and other appropriate venues.
>
> **Finding:** The [USDOE] team found that the [DOE] does not have a process to independently monitor the McKinney-Vento program as the State coordinator and State liaison are the same individual and is an employee of the [DOE].
>
> Citation: Section 722(g)(2) of the ESEA requires the State to ensure that LEAs comply with the requirements of the McKinney-Vento ESEA. Section 80.40 of the EDGAR further requires that the State, as the grantee, is to be responsible for monitoring grant and subgrant-supported activities and to assure compliance with applicable Federal requirements.
>
> Further action required: The [DOE] must submit to [USDOE] a plan for the independent monitoring of the McKinney-Vento program.

(*Id.*)

Since issuance of this failing report card, Defendants have taken no action to address the USDOE's findings. Instead, Defendants continue to enforce policies, practices, rules, regulations and customs that facially violate the McKinney-Vento Act and result in the denial of equal access to public education by homeless students. These include, among other things:

(1) The Geographic Exception procedure, which does not allow an exception on the basis of homelessness (Durham Decl. Ex. 2 (DOE, *Geographic Exception Request Form CHP 13-1* (Revised July 10, 2006)).); *see also* H.A.R. §§8-13-1 through 8-13-10;

(2) Department of Health rules requiring health examinations and immunizations *prior* to attendance in school and which fail to provide for provisional attendance of homeless students who lack immunization or health examination records (Durham Decl. Ex. 12 (DOE, *Important Notice to Parents, School Health Requirements, at* http://doe.k12.hi.us/register/register/schoolhealthreqts.htm; *see also* H.A.R. §11-157-6.2;

(3) Limitations on the provision of free transportation that are based on geographic region and fail to address homelessness (Durham Decl. Ex. 3 (DOE, *Honolulu Mass Transit School Transportation Subsidy Application* (2006) (hereinafter "Bus Pass Application")); *see also* H.A.R. §8-27-5.

III. ARGUMENT

A. The Plaintiff Classes Should Be Certified In This Action Under Rules 23 (a) and 23(b)(2)

In deciding motions for class certification, the Court must apply Rule 23 liberally and flexibly. *See Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). The allegations of the Complaint — which must be taken as true at the class certification stage, *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), *cert. denied*, 492 U.S. 816 (1976) — vividly illustrate the appropriateness of the class action vehicle in this case and the need for class-wide relief.

B. Class Actions Are Typically Used to Resolve Civil Rights Claims

"Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 (1981). Class actions allow individuals to collectively redress a wrong:

> Equity has long recognized that there is a need for a course which would redress wrongs otherwise unremediable because the individual claims involved were too small, or the claimants too widely dispersed. Moreover, early in the development of our civil procedures it became apparent that judicial efficiency demanded the elimination of multiple suits arising from the same facts and questions of law. Hence, the wise and necessary procedure was created by which a few representatives of a class could sue on behalf of others similarly situated, and be granted a judgment that would bind all.

Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968).

The Supreme Court has recognized that "civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of class actions. *Amchen Prods. v. Windsor,* 521 U.S. 591, 614 (1997). Indeed, Rule 23(b)(2) is "designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg") § 4:11 (4th ed. 2002). Thus, courts routinely certify classes where the government has violated the rights of a large group of people. Indeed, in a nearly identical case challenging a county's failure to implement the McKinney-Vento Act, the United States District Court for the District of Maryland certified

similar classes of homeless children and their parents. *See Bullock v. Maryland,* 210 F.R.D. 556 (D. Md. 2002). The same should occur here. Hundreds or possibly thousands of homeless students and their parents are being denied their federal statutory and constitutional rights due to the policies, practices, rules and regulations (or lack thereof) of the Defendants. The system-wide relief that is necessary to ensure that all homeless students and their families receive the services to which they are entitled can only be achieved through class-wide relief.

C. The Classes Satisfy the Requirements of Rule 23(a)

For this case to proceed as a class action, it must meet the four requirements of Rule 23(a) and those of at least one subsection of Rule 23(b). *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002). The elements of Rule 23(a) are as follows:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The proposed Classes satisfy each of these criteria.

1. The Facts of This Case Demonstrate That Joinder Is Impractical

To satisfy the "numerosity" requirement of Rule 23(a)(1), the proposed class must be "so numerous that joinder of all members is "impractical."

"Impracticability" does not mean "impossibility," but only the difficulty or inconvenience of joining all members of the class. *Harris v. Palm Springs Alpine Estates Inc.*, 329 F.2d 909, 913-914 (9th Cir. 1964). Impracticability of joinder may be based on size alone. *Stewart v. Abraham,* 275 F.3d 220, 226-27 (3d Cir. 2001), *cert. denied,* 536 U.S. 958 (2002). The numerosity requirement is presumptively satisfied where the class includes approximately 40 members. *Id. See also Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), *cert. denied*, 515 U.S. 1122 (1995); Newberg, § 3:6.

The proposed classes are sufficiently large to meet the numerosity requirement, in that the class members number in the hundreds or even thousands. Though the total number of homeless children in Hawaii is difficult to ascertain, the DOE recognizes 908 homeless students currently in school. (Durham Decl. Ex. 8 at 54 (HI State Report).) The DOE report likely underestimates the actual number of homeless students as it does not include the much larger group of children who are part of Hawaii's 96,648 "hidden homeless" — many of whom would likely fall within the definition of "homeless" in the McKinney-Vento Act. (Durham Decl. Ex. 7 at 2 (Housing Policy Study).) The number of class members thus far exceeds the 40 persons necessary to create a presumption that joinder is impractical. Moreover, numerosity is also supported where, as here, the action concerns a "request[] for injunctive relief which would involve future class

members." *Newberg* § 3:6 .

In addition to size of the class, courts look at other indicia of impracticability, including the difficulty of locating affected persons, the existence of unknown future members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319-1320 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810; Newberg, § 3:6.

In addition to numerosity, the characteristics of the proposed Classes show additional indicia that joinder is impractical, if not impossible. First, the class consists of a physically transient community whose geographical location and housing status frequently changes. As such, the identity and locations of homeless children are difficult to ascertain. *Cf. Jordan,* 669 F.2d at 1320 (the joinder of unknown individuals is inherently impracticable). Second, potential class members include children who are presently housed, but will become homeless in the near future. Thousands in Hawaii are at risk of becoming homeless and it is impossible to ascertain who in the future will need the services required by the McKinney-Vento Act. Third, class members have a limited financial ability to pursue individual claims and are unlikely to even know that they have rights to these services, given the failures of the Defendants to conduct adequate outreach. Fourth, many families may be unwilling to come forward and pursue their claims

because of the social stigma associated with homelessness. Finally, the plaintiffs' seek only injunctive and declaratory relief, which will define the rights of all class members. Accordingly, the proposed classes meet Rule 23(a)(1)'s numerosity requirement by virtue of both the number of potential class members and additional factors that make joinder impracticable.

2. Rule 23(a)(2) Is Satisfied Because There Are Questions of Law or Fact Common to the Classes

Plaintiffs also satisfy the requirements of Rule 23(a)(2) that "there are questions of law or fact common to the class." "[I]n a civil-rights suit, [the] commonality [requirement] is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong*, 275 F.3d at 868 (certifying class of disabled inmates challenging defendant prison system's failure to institute policies and practices to comply with the ADA) (citing *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985), *modified by* 796 F.2d 309 (9th Cir. 1986)). Commonality is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Jordan*, 669 F.2d at 1320 (quotation and citation omitted). "Courts generally give the commonality requirement a permissive application, and it is usually found to be satisfied." *Hum v. Dericks*, 162 F.R.D. 628, 638 (D. Haw. 1995). "All that is required is a common issue of law *or* fact." *Blackie*, 524 F.2d at 904 (emphasis in original); *Berry v. Baca*, 226

F.R.D. 398, 404 (C.D. Cal. 2005) ("a single common issue of law or fact is sufficient to satisfy the commonality requirement").

Here, there can be no question as to the existence of common issues of both law and fact. The named Plaintiffs, homeless students and their parents and/or guardians, present a common question as to whether the Defendants' policies, practices, rules, regulations and customs violate the Act and the federal Constitution. With respect to the Act, Congress specifically conferred several rights directly upon the student. These include the right of the child to: (1) continue attending the school home school in any case where the child becomes homeless during the academic year (42 U.S.C. §§ 11432(g)(3)(A)(i) and 11432(g)(3)(B)(i)); (2) receive transportation to and from the home school (42 U.S.C. § 11432(g)(4)(A)); and (3) immediate enrollment in the home school in the absence of records and during the time in which disputes are ending (42 U.S.C. § 11432(g)(3)(C) and (E)). Additionally, the Act specifically confers several rights directly upon the parent or guardian of a homeless child. These include the right for the parent or guardian: (1) to choose whether their children attend either the home school or the local school (42 U.S.C. § 11432(g)(3)(B)(i)); (2) to be notified of and participate in any appeal should the local educational agency decide to send the child to a school other than the one of the parent or guardian's choosing (42 U.S.C. § 11432(g)(3)(B)(ii), § 11432(g)(3)(E)); and (3) to be fully notified and

assisted with the provision of transportation to the home school (42 U.S.C. § 11432(g)(6)(A)(v)).

The common legal issues in this action concern Defendants' system-wide failure to implement and comply with the McKinney-Vento Act as applied to both proposed classes — homeless students and their parents and/or guardians. As set forth in supporting declarations, no one from the schools or the DOE ever told any of the named Plaintiffs about their rights under the McKinney-Vento Act. (Declaration of Olivé Kaleuati at ¶ 8-14, 23 ("O. Kaleuati Decl."); Declaration of Venise Lewis at ¶ 10 ("V. Lewis Decl.); Declaration of Alice Greenwood at ¶¶ 21-22, 40 ("Greenwood Decl.).) None of the named Plaintiffs have ever seen DOE materials regarding their McKinney-Vento rights. (O. Kaleuati Decl. at ¶ 26; V. Lewis Decl. at ¶ 6; Greenwood Decl. at ¶ 40.) Each of the named Plaintiffs faced situations where their McKinney-Vento rights were violated by line-workers at the school and higher-ups in the administration. (O. Kaleuati Decl. at ¶¶ 8-14, 23-25; V. Lewis Decl. at ¶¶ 10-11, 15; Greenwood Decl. at ¶¶ 21, 22, 38.) Furthermore, as illustrated by the accounts from other Declarants, including homeless and surrogate parents of school-age children, social service providers and guardians ad litem, named Plaintiffs' experiences are typical of the situations faced by all homeless families in Hawaii. (Declaration of Cindy Price at ¶¶ 9-10; Declaration of Lokelani Correa at ¶¶ 9-10; Declaration of Esther Santos at ¶¶ 6, 33; Decl. of

Daniel Pollard at ¶¶ 12-13; Declaration of Bridget Morgan at ¶¶ 29-30; Declaration of Elaine Chu at ¶¶ 24-26.)

In sum, Defendants' violations of the McKinney-Vento Act and their categorical mistreatment of homeless children and their parents and/or guardians forms the core of this action, thus the commonality requirement is satisfied. The questions of law in this action, as well as many core facts, are common across the proposed classes and include, *inter alia*, the following:

- whether the Defendant's policies, practices, rules, and regulations (or lack thereof) violate the McKinney-Vento Act rights of the proposed class members and their rights under the United States Constitution;
- whether the Defendants' various policies regarding geographical exemption, transportation, proof of residency and proof of immunization constitute unlawful barriers to accessing a public education for homeless children in violation of the McKinney-Vento Act;
- whether Defendants have violated the McKinney-Vento Act's requirements to provide adequate public notice of educational rights where homeless children and families receive services;
- whether Defendants have violated the McKinney-Vento Act's requirements to provide technical assistance to local schools to ensure

compliance.

This list of common questions constitutes the heart of the claims that the Defendants have engaged in a persistent and repeated pattern of imposing barriers to the education of homeless children, despite their constitutional and statutory obligations to do otherwise. These underlying factual and legal questions are "substantially related to the resolution of the litigation." *Jordan*, 669 F.2d at 1320. Accordingly, the proposed classes satisfy the commonality requirement.

Moreover, the fact that there may be some individual issues of fact or law, *e.g.,* different children and/or their parents or guardians being denied different services under the Act, does not mean that commonality does not exist. Rather, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998). It is enough for the purposes of Rule 23(a)(2) that "the defendants have acted in a uniform manner with respect to the class." *International Molders & Allied Workers' Local Union No. 164 v. Nelson,* 102 F.R.D. 457, 462 (N.D. Cal. 1983).

Finally, claims for injunctive relief such as the claims advanced in the present action "by their very nature present common questions..." *Amone v. Aveiro*, 226 F.R.D. 677, 684 (D. Haw. 2005) (quoting *Daly v. Harris*, 209 F.R.D

180, 186 (D. Haw. 2002)). Commonality is therefore satisfied.

3. Rule 23(a)(3) Is Satisfied Because the Claims or Defenses of the Representative Parties Are Typical of the Classes

The third requirement for certification is that the claims of the named plaintiffs be typical of those of the class as a whole. The "typicality" requirement is satisfied if "the claim[s of the named plaintiffs] arise from the same event *or practice or course of conduct* that gives rise to the claims of the class members, and if [the claims are] based on the same legal theory." Newberg, § 3:15 (emphasis added). The Ninth Circuit interprets the typicality requirement permissively and requires only that the named plaintiffs' injuries be similar and not identical to those of the other class members. *Armstrong*, 275 F.3d at 868. As long as the named representative's claim arises from the same event, practice, or course of conduct that forms the basis of the class claims, and is based upon the same legal theory, varying factual differences between the claims or defenses of the class and the class representative will not render the named representative's claim atypical. *Jordan*, 669 F.2d at 1321; *Armstrong*, 275 F.3d at 869.

The requirements of typicality and commonality overlap and typicality is met in the instant case for many of the reasons discussed above. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class

action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence").

The named Plaintiffs share the same legal theories and seek to redress the same injuries of the proposed student and parent/guardian class. The named Plaintiffs' claims are based on the "same course of injurious conduct" – namely, the Defendants' practices that fail to implement the federal rights and protections of homeless children and their parents contained in the McKinney-Vento Act. *Amone*, 226 F.R.D at 686. Further, the named Plaintiffs' claims are not antagonistic to other members as all class members, homeless children and their parents, will similarly benefit from the requested relief. This alignment of the interests of the named Plaintiffs and the classes by common injury and common relief is in accord with the purposes of the typicality provision. *See Jordan*, 669 F.2d at 1321.

Finally, the McKinney-Vento Act, by its very terms, creates two classes of persons, "homeless children," and "parents of homeless children," who are entitled to its protections and are co-extensive with the proposed class. Because the Defendants' policies, patterns, and practices that violate the McKinney-Vento Act are applied generally across the state, the members of the proposed classes will have each suffered the same essential harms as the named Plaintiffs. For these

reasons, the typicality requirement is satisfied.

4. Rule 23(a)(4) Is Satisfied Because the Named Plaintiffs Will Fairly and Adequately Represent the Interests of the Members of the Classes and Plaintiffs

Rule 23(a)(4) requires that the named plaintiffs be adequate representatives of the class, in that: (1) named representatives must appear able to prosecute the action vigorously through qualified counsel; and (2) representatives must not have antagonistic or conflicting interests with the unnamed members of the class. *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir. 1978). *See also Hanlon,* 150 F.3d at 1020. Plaintiffs meet both factors.

Plaintiffs seek to appoint the named Plaintiffs as representatives of the proposed Classes, and all satisfy both adequacy requirements. As to the first requirement, Plaintiffs have retained experienced and qualified counsel.[4] Plaintiffs' counsel has experience in class actions, civil rights and constitutional law in federal court. (Declaration of Paul Alston at ¶¶ 4-5 (attached hereto) (hereinafter "Alston Decl."); Declaration of Lois Perrin at ¶¶ 2-3 (attached hereto) (hereinafter "Perrin Decl."); Declaration of Gavin Thornton at ¶ 5 (attached hereto) (hereinafter "Thornton Decl.").) Further, Plaintiffs' attorneys are veteran advocates for public interest causes and have significant experience working with indigent populations and children. (Alston Decl. at ¶ 4(c), (f); Perrin Decl. at ¶¶

[4] Pursuant to Rule 23(g), Plaintiffs also seek appointment of their counsel as counsel for the classes.

2(b)-(c), 3; Thornton Decl. at ¶¶ 4-5; Durham Decl. at ¶¶ 1, 5-6.) Furthermore, Counsel are well-qualified and have adequate resources to conduct the present litigation. (Alston Decl. at ¶ 6; Perrin Decl. at ¶¶ 4-6; Thornton Decl. at ¶¶ 3, 5; Durham Decl. at ¶¶ 2, 4.)

Plaintiffs also satisfy the second criterion under Rule 23(a)(4) since their interests coincide with the general interests of each Class. The focus under the second prong of Rule 23(a)(4) is whether there is an actual or potential conflict between the claims of the representatives and the claims of the Classes. *See, e.g., Hanlon,* 150 F.3d at 1020. As in other cases where plaintiffs sought agency compliance with statutory and constitutional requirements, the key interests of the Plaintiffs are "co-extensive with the class members' interests." *Jordan*, 669 F.2d at 1323; *Amone*, 226 F.R.D at 686. As set forth above, the named Plaintiffs have suffered the same kinds of injuries as those of the class as a whole and it is in their interest to vigorously prosecute the action against Defendants. (O. Kaleauti Decl. at ¶¶ 28-30; V. Lewis Decl. at ¶¶ 18-20; A. Greenwood Decl. at ¶¶ 42-44.) Their claims are precisely co-extensive with those of the Classes, and they seek no recovery in addition to the equitable relief sought on behalf of every Class member. (*Id.*) There is no actual or potential conflict between the Classes and named Plaintiffs. (*Id.*) Each of the named Plaintiffs is willing and able to serve as a representative of the Classes. (*Id.*) As such, named Plaintiffs satisfy both aspects

of Rule 23(a)(4).

D. The Classes Satisfy the Criteria of Rule 23(b)(2)

In addition to satisfying the prerequisites of Rule 23(a), Plaintiffs must demonstrate that the proposed classes qualify under one of three standards set forth in Rule 23(b). Plaintiffs request certification under Rule 23(b)(2), which provides that an action may be maintained 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."

First, certification under Rule 23(b)(2) is appropriate where class members have been injured by conduct based on policies and practices of the defendants that are applicable to the entire class. *See Marisol*, 126 F.3d at 378 (certification of suit against child welfare system proper under 23(b)(2), where its deficiencies "stem from central and systemic failures."). As noted above, Defendants' failure to comply with the McKinney-Vento Act and its unconstitutional practices have caused class-wide harm. The misconduct at issue here is properly redressed though a Rule 23(b)(2) class action.

Second, the 23(b)(2) standard is met where, as here, Defendants have engaged in a pattern of discriminatory conduct against the Classes. *See* Advisory Committee Note to Subdivision (b)(2) (1966) ("Illustrative are various

actions...where a party is charged with discriminatory conduct against the class, usually one whose members are incapable of specific enumeration.").

Third, actions for injunctive relief almost automatically satisfy the requirements of Rule 23(b)(2), because the purpose of the section as well as declaratory and injunctive relief is to settle the legality of a Defendant's actions towards the class as a whole. *See id.* ("This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole is appropriate… [i]llustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.") *See also Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1195 (9th Cir. 2001), *amended by*, 253 F.3d 1180 (9th Cir. 2001) (indicating that the dispositive question for (b)(2) analysis is the relief sought).

Given this lenient standard and the other indicia of a Rule 23(b)(2) class set forth above, the present action seeking declaratory and injunctive relief to remedy system-wide abuses that potentially impact all homeless children in Hawaii clearly falls within this provision. As a result, this Motion should be granted and the proposed Classes certified.

IV. CONCLUSION

For the reasons stated herein, this case should be certified as a class action suit under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, on behalf of the proposed Classes and appoint Plaintiffs' counsel as counsel for the classes.

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Respectfully submitted,

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