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CIVIL NO. 07-504 HG/LEK

[CIVIL RIGHTS ACTION]

[CLASS ACTION]

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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF CLASSES; CERTIFICATE OF WORD COUNT; CERTIFICATE OF SERVICE

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Defendants admit that the Department of Education ("DOE") has "systemic" problems with respect to the McKinney-Vento Act. *See* Declaration of Laurie A. Temple ("Temple Decl."),[1] Ex. 3 at 8:19-20.

Defendants do not dispute that they have failed to identify hundreds, if not thousands, of homeless children in Hawaii. *See* Plaintiffs' Supplemental Memorandum in Support of Certification of Classes (filed on January 14, 2008 and incorporated herein by reference); Declaration of Daniel Gluck ("Gluck Decl."), Ex. 3 at 3, Ex. 4 at 2, 4, 9.[2] Defendants admit that this is a problem. *See* Temple Decl., Ex. 9 at 486 (internal DOE document from June 2007: "I am concerned that there are many HCY [homeless children and youths] that are not being identified in schools and the community."). This failure to identify homeless children is a violation of the McKinney-Vento Act (specifically, 42 U.S.C. § 11432(g)(6)(A)(i)), and justifies class certification.

Defendants do not dispute that they have failed to provide comparable transportation for Hawaii's homeless children. Defendants' documents show that

[1] Unless otherwise noted, all of the declarations (including the Declaration of Laurie Temple and accompanying exhibits) cited in this memorandum are being filed concurrently as attachments to Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction.

[2] The Declaration of Daniel Gluck is attached to Plaintiffs' Supplemental Memorandum in Support of Motion for Certification of Classes, filed on January 14, 2008. Its CM/ECF number is 79-6. Exhibit 3 to this Declaration is CM/ECF number 79-9; exhibit 4 to this Declaration is CM/ECF numbers 79-10 and 79-11.

46 Oahu children applied for passes for TheBus in September 2007. Temple Decl., Ex. 4 at 4650. A pass for TheBus, however, is not comparable to transportation received by non-homeless children: unlike the private school bus provided by Defendants, TheBus is public, unsupervised, unreliable, and excessively time-consuming. Class certification would be justified based on these 46 children alone – let alone the hundreds of children on Oahu and the neighbor islands who receive no transportation assistance at all. *See* Temple Decl. Ex. 4 at 4651 ("Maui states that they do not have a transportation plan for homeless students to attend their school of origin – this is in direct violation of the Act[.]"). Plaintiffs Alice Greenwood, Daniel Hatchie, Venise Lewis, Raeana Lewis-Hashimoto, and Kauilani Lewis-Hashimoto continue to suffer from Defendants' unlawful practices. *See* Supplemental Declaration of Alice Greenwood ("Greenwood Supp. Decl.")[3] at ¶¶4-8; Supplemental Declaration of Venise Lewis ("Lewis Supp. Decl.") at ¶¶5-8. This is a violation of the McKinney-Vento Act (specifically, 42 U.S.C. § 11432(g)(4)(A)), and justifies class certification.

When Plaintiff Olivé Kaleuati and her children moved into the Waianae Civic Center ("WCC") homeless shelter in July 2007, the children were forced to transfer from Maili Elementary to Kamaile Elementary because WCC is outside

[3] Attached to Plaintiffs' Supplemental Memorandum in Support of Motion for Certification of Classes, filed on January 14, 2008; CM/ECF number 79-2.

Maili Elementary's geographic attendance area. *See* Declaration of Olivé Kaleuati ("O. Kaleuati Decl.)[4] at ¶¶6, 14. Ms. Kaleuati believes that she will be forced to move again in a few months, *id.* at ¶6, and current Hawaii Administrative Rules *require* her children to transfer to a new school if they move outside Kamaile Elementary's attendance area. HAR §§ 8-13-1 through 8-13-10. Approximately twenty other families were likewise forced to transfer their children to new schools when they moved into WCC from other schools' attendance areas. *See* Temple Decl. Ex. 10 at 8:15-24. This is a violation of the McKinney-Vento Act (specifically, 42 U.S.C. § 11432(g)(3)(A)), and once again, justifies class certification.

If the named Plaintiffs wish to dispute the lack of services, they will be forced to go directly to the Complex Area Superintendent – instead of through the Homeless Liaison, as required by the Act. *See* Defendants' Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction at 14. All homeless families in Hawaii are affected by this provision, which violates the McKinney-Vento Act at 42 U.S.C. § 11432(g)(3)(E).

In short, Defendants' existing policies violate the McKinney-Vento Act and continue to threaten harm to named Plaintiffs and thousands of unnamed class members.

[4] Attached to Plaintiffs' Motion for Preliminary Injunction, filed on November 6, 2007; CM/ECF number 36.

I. PLAINTIFFS HAVE MET THE REQUIREMENTS OF RULE 23

Plaintiffs have met each of the requirements of Rule 23(a)(1)-(4) and Rule 23(b)(2), and Plaintiffs respectfully request that the Court certify two classes:

> 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: (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 "Guardian Class": All parents, guardians or persons in a parental relationship for children in the Student Class.

a. 23(a)(1): Numerosity

The number of school-aged homeless children statewide is unknown and probably unknowable, given the fluidity of the population and the risks of forced relocation by government action. *See* Temple Decl., Ex. 2 at 1; Gluck Decl., Ex. 4 at 2. Nevertheless, counts conducted by public agencies show approximately 2,800 children under 18 statewide, but only 908 identified homeless children in public schools. *See* Gluck Decl., Ex. 3 at 3; Ex. 5 at App. 1-14.[5] Defendants do not dispute these numbers.

The numerosity test turns on the practicability of joining all potential plaintiffs in a single action, looking at sheer numbers of potential plaintiffs (with 40 members being presumptively large enough to warrant class certification) and

[5] CM/ECF number 79-12.

characteristics of the class, such as the difficulty of locating affected persons and the existence of unknown future members. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319-1320 (9th Cir. 1964), *vacated on other grounds*, 459 U.S. 810 (1982); *Amone v. Aveiro*, 226 F.R.D. 667, 684 (D. Haw. 2005); Newburg and Conte, 1 Newberg on Class Actions § 3.6 (4th ed. 2002).

Plaintiffs' counsel cannot possibly join every homeless family being denied services under the Act. First, as just discussed, the sheer numbers are simply too large. Second, homeless individuals are transient. *See* O. Kaleuati Decl. at ¶ 6; Lewis Supp. Decl. at ¶¶ 3-4. Maintaining client contact is particularly difficult with homeless individuals because they often lack telephones, addresses (to receive U.S. Mail), fax machines, e-mail addresses, and regular schedules that allow for communication with counsel. Furthermore, because of the social stigma of homelessness, many would-be plaintiffs may not want to get involved at all. Joinder of all potential class members is therefore impracticable not only because of the sheer size of the classes, but also because of these issues facing homeless individuals.

Defendants' arguments against numerosity are without merit. Defendants first attack numerosity by claiming that the 908 identified students are not proper class members: because they have been identified and enrolled, Defendants argue, these children are receiving all the services to which they are entitled under the

Act. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Certification of Classes ("Opp. to Class Cert.") at 19. This clearly demonstrates Defendants' failure to understand their statutory obligations. The McKinney-Vento Act requires more from Defendants than simply allowing children to enroll at some public school. The Act requires Defendants to provide transportation services, dispute resolution procedures, *immediate* enrollment, and a host of other services. Defendants' failure to provide these services affects all homeless children in Hawaii – regardless of whether they have been identified by DOE.

Defendants next challenge numerosity by claiming that Plaintiffs "cannot identify the size of the class in any reliable manner." *See* Opp. to Class Cert. at 11. This argument fails for three reasons. First, under Federal Rule of Evidence 803(8), the reports of public offices and agencies described above (which relate to Defendants' activities and which entail factual findings from their investigations) are admissible evidence on this issue. Those reports stand unrebutted and provide the reliability Defendants claim is lacking. Second, the contours of the classes are set by the McKinney-Vento Act. The Act applies to "homeless children and youths," and the Act provides clear definitions of those terms in 42 U.S.C. § 11434a. Third, Defendants overstate the need for precision. Plaintiffs need not define the exact boundaries of the class to be entitled to class certification. *See Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, 246 F.R.D.

621, 629 (C.D. Cal. 2007) ("[T]he contours of the class need not be so clear that every potential member may be identified at the time of class certification."); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 559 (N.D. Cal. 2007) ("Plaintiffs do not need to state the exact number of potential class members, nor is a specific number of class members required for numerosity. Rather, whether joinder is impracticable depends on the facts and circumstances of each case." (Citations omitted.)).

In sum, Plaintiffs have satisfied the requirements of Rule 23(a)(1).

b. 23(a)(2): Commonality

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. "The commonality test is qualitative rather than quantitative–one significant issue common to the class may be sufficient to warrant certification." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir. 2007).

The McKinney-Vento Act requires DOE to "develop[], and review and revise, policies to remove barriers to the enrollment and retention of homeless children and youths in schools in the State." 42 U.S.C. § 11432(g)(1)(I). Each member of each class is adversely affected by Defendants' failure to comply with this statutory obligation.

Defendants' policies and procedures regarding transportation, enrollment, outreach, dispute resolution, and so on likewise affect all homeless students and their parents/guardians. There are, to be sure, individual differences between and among the members of the class: some have been identified, and some have not; some wish to attend their home school, and some wish to transfer; some need transportation assistance, and some do not. These individual differences are not only allowed by the Rule, they are *expected* by the Rule. *See Jordan*, 669 F.2d at 1320. Furthermore, some of Defendants' policies *do* have universal application: *all* members of the classes are affected by Defendants' failure to have a statutorily acceptable dispute resolution procedure. *All* members of the classes are affected by Defendants' failure to revise their Administrative Rules. And *all* members of the classes are affected by Defendants' persistent pattern of imposing barriers to the education of homeless children, despite their statutory obligations. *See* 42 U.S.C. § 11432(g)(1)(I).

In sum, Plaintiffs share a common interest in full and effective implementation of the McKinney-Vento Act and they have met the requirements of 23(a)(2).

c. 23(a)(3): Typicality

"Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not

be substantially identical. Some degree of individuality is to be expected in all cases, but that specificity does not necessarily defeat typicality." *Dukes*, 509 F.3d at 1184 (citations and internal quotation signals omitted). *See also Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 734 (9th Cir. 2007) ("Under Rule 23(a)(3), it is not necessary that all class members suffer the same injury as the class representative."). *See also Gen. Tel. Co. of Sw. 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' claims are typical of those in the class. Plaintiffs Daniel Hatchie, Raeana Lewis-Hashimoto, and Kauilani Lewis-Hashimoto are being denied comparable transportation, as are untold numbers of class members; this failure harms not only the members of the children class, but also members of the parent class. *See* Greenwood Supp. Decl., ¶¶7-8; Lewis Supp. Decl., ¶¶5-8 Plaintiffs Kaleuati Kaleuati, III and Klayton Kaleuati were denied the right to remain in their home school; because they might move again in the near future, they (and untold numbers of class members) are at risk of another forced transfer. *See* O. Kaleuati Decl., ¶¶6, 14. Named Plaintiffs, like unnamed class members, are

being harmed by Defendants' unlawful Administrative Rules and dispute resolution policy.

These claims satisfy the typicality requirement of Rule 23(a)(3): the claims all result from Defendants' statewide policies and practices that violate the McKinney-Vento Act. Regardless of their specific factual situations, Defendants' failures to meet their constitutional and statutory obligations form the common core of all class members' claims. These failures will be resolved when Defendants implement policies and procedures that comply with the Act.

In sum, Plaintiffs have met the requirements of 23(a)(3).

d. 23(a)(4): Adequacy of Representation

Defendants do not dispute adequacy of counsel, nor do they dispute the named Plaintiffs' willingness or competence to serve as class representatives. Defendants' only dispute as to 23(a)(4) is that the named Plaintiffs' claims are moot and that the named Plaintiffs lack standing. As discussed in Section II, *infra*, Defendants are wrong on both counts.[6]

As set forth in Plaintiffs' Motion for Certification of Classes, Plaintiffs have satisfied the requirements of 23(a)(4).

[6] Even if they were correct, however, the appropriate response would be to allow Plaintiffs' time to substitute other representatives, not denial of class certification. See Section II.C(ii), *infra*.

e. The Proposed Classes Satisfy Rule 23(b)(2)

Defendants' practices and policies are generally applicable to the class. Plaintiffs seek injunctive relief for the class as a whole. This is precisely the situation envisioned under Rule 23(b)(2), as explained in the Advisory Committee Notes:

> 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…. Illustrative 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.

Rule Advisory Committee Notes, 39 F.R.D. 69, 102 (1966).

Despite Defendants' assertions to the contrary, Plaintiffs have demonstrated that other members of the proposed classes have experienced similar problems under similar circumstances. Several shelter directors have stated that Defendants' failures to comply with the McKinney-Vento Act are widespread. *See, e.g.*, Declaration of Mari Vermeer at ¶¶3-8; Declaration of Esther Santos at ¶6;[7] Declaration of Kanani Bulawan at ¶17;[8] Temple Decl., Ex. 1 at 10:3-12:15, Ex. 10 at 8:15-24. Non-plaintiff individuals have stated

[7] Attached to Plaintiffs' Motion for Preliminary Injunction, filed on November 6, 2007; CM/ECF number 43.

[8] Attached to Plaintiffs' Motion for Preliminary Injunction, filed on November 6, 2007; CM/ECF number 29.

that they, too, have suffered from Defendants' unlawful activities. *See* Declaration of Shanna Carvalho ("Carvalho Decl.") at ¶5; Declaration of Cindy Price at ¶¶4-8.[9]

The requested injunctive relief will satisfy all class members' claims. In sum, Plaintiffs have met the requirements of 23(b)(2). *See Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1193 (9th Cir. 2007) ("[T]he district court acted within its broad discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly.").

II. PLAINTIFFS HAD STANDING; PLAINTIFFS' CLAIMS ARE NOT MOOT

a. Plaintiffs Had (and Continue to Have) Standing

Defendants contend that, because the named Plaintiff children are enrolled in school, they lack standing. This is patently incorrect: the McKinney-Vento Act requires more from the Defendants than *eventually* enrolling children in *some* public school.

As the Ninth Circuit has explained:

> In order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining "some direct injury as a result of the challenged statute or official conduct." *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct.

[9] Attached to Plaintiffs' Motion for Preliminary Injunction, filed on November 6, 2007; CM/ECF number 42.

> 669, 38 L.Ed.2d 674 (1974). The harm suffered by a plaintiff must constitute "actual injury." [*Lewis v. Casey*, 518 U.S. 343, 348-49 (1996).] Moreover, where, as here, a plaintiff seeks prospective injunctive relief, he must demonstrate "that he is realistically threatened by a *repetition* of [the violation]." [*City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)] (emphasis added)[.]

Armstrong v. Davis, 275 F.3d 849, 860-61 (9th Cir. 2001) (some alterations in original and some added). *See also Am. Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1016 (9th Cir. 2006) ("[S]tanding is evaluated by the facts that existed when the complaint was filed[.]").

It is undeniable that, at the time of filing, named Plaintiffs were suffering *ongoing* harm. It is also clear that this harm *continues today*: Defendants are not providing named Plaintiffs (or the thousands of unnamed class members) with comparable transportation. It is indisputable that Defendants' dispute resolution procedures fail to comply with statutory requirements, thus affecting the rights of each of the named Plaintiffs and the thousands of unnamed class members to receive the services to which they are entitled under the Act.

It is also apparent that Plaintiffs are threatened with future harm: Plaintiffs' injuries are likely to recur because their injuries stem from Defendants' written policies. *See Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001) (a plaintiff can "demonstrate that such injury is likely to recur ... [by] show[ing] that the defendant had, at the time of the injury, a written policy, and that the injury 'stems

from' that policy…. [W]here the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the immediate future." (Citations omitted.)). Defendants' Administrative Rules, HAR §§ 8-13-1 to 8-13-10, for example, *prohibit* homeless children from attending schools outside their geographic attendance areas. Furthermore, DOE's internal policies regarding transportation violate the Act by failing to provide any accommodation other than a bus pass. *See* Temple Decl., Ex. 12 at 4647 ("[C]urrently there is only one choice of transportation – City bus pass.").

These written policies harmed Plaintiff Olivé Kaleuati and her family by forcing Klayton and Kaleuati to transfer from Maili Elementary to Kamaile Elementary. *See* O. Kaleuati Decl. ¶20. These written policies threaten to cause her harm in the near future: she believes that she will move out of the WCC shelter in July, 2007, *id.* at ¶6, and may be required to transfer if she moves outside of Kamaile Elementary's geographic attendance area. HAR §§8-13-1 through 8-13-10. Similarly, Venise Lewis and her family have left WCC and could be subjected to these unlawful Administrative Rules. *See* Lewis Supp. Decl. ¶¶3-4. Defendants' Administrative Rules on Student Health Records also violate the McKinney-Vento Act and continue to harm unnamed class members.[10]

[10] Department of Health Administrative Rules violate the Act's requirements regarding immunization records. See HAR § 11-157-3.1(b) ("Each school and post-secondary school principal or administrator shall ensure that his or her school only admits students who comply with this chapter."); HAR § 11-157-6.2

In short, the fact that the named Plaintiff children are enrolled in school does not deprive them of standing.

b. Plaintiffs' Claims Are Not Moot

Defendants' final argument is that Plaintiffs' claims are completely and forever resolved, such that this case is moot. Again, this argument is without merit.

As discussed *supra*, enrollment alone does not satisfy Defendants' statutory obligations; Plaintiffs' claims are not moot because harm to Plaintiffs is ongoing.

Furthermore, Defendants' purported "improvements" and "plans" to comply with the McKinney-Vento Act are insufficient to moot this case. As discussed in Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction (filed on January 31, 2008 and incorporated by reference herein), Defendants bear a "heavy burden" of demonstrating mootness and cannot do so simply by stating an intention to comply in some manner (as yet not fully disclosed) at some as yet undetermined future date. *See Friends of the Earth, v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (defendant must demonstrate that "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged

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("A student who does not have evidence of all of the required immunizations or a report of physical examination may attend school provisionally *upon submitting written evidence* from a practitioner or the department stating that the student is in the process of receiving required immunizations or physical examination." (Emphasis added.)).

violation" (internal quotations and citations omitted) (emphasis added)). The "heavy burden of persuading" the Court that the "challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Friends of the Earth*, 528 U.S. at 189 (emphasis added).

Defendants have not submitted *any* evidence to suggest that these problems are actually fixed, only that they intend to fix them at some point in the future. Indeed, even with their as-yet undisclosed "plans," Defendants admit the probability that there will be ongoing problems. *See* Temple Decl., Ex. 3 at 11 (statement by Defendants' counsel that, even with systemic changes, "we don't argue that there may not be failures occasionally here and there."). This simply is not good enough. *See, e.g.*, *New York Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 327 (2d Cir. 2003) (letter describing changes that had been made to comply with environmental law, along with changes that would be made in the future, was insufficient to moot case); *Nat'l Fed'n of Blind v. Target Corp.*, No. C 06-1802 MHP, 2007 WL 2846462 (N.D. Cal. Oct. 02, 2007) (ruling that defendant's improvements, which failed to address all of the plaintiffs' complaints, did not render the case moot).

Moreover, Defendants' voluntary adoption of a new policy does not moot plaintiffs' claims for injunctive relief. As explained above, the DOE bears a "formidable" burden; it must be "*absolutely clear* that the allegedly wrongful

behavior could not reasonably be expected to recur." Defendants have made no such showing.

c. Even if Plaintiffs' claims are moot, class certification is still appropriate.

i. If "Enrollment" is the Only Harm, Then This Claim is Inherently Transitory and Class Certification is Appropriate

Assuming *arguendo* that Plaintiffs are harmed *only* by a failure to enroll (and not by the myriad other violations of the Act), class certification is nevertheless appropriate because of the transitory nature of a failure-to-enroll claim.

On January 15, 2008, a woman living in a homeless shelter on the Big Island was told by Waimea Elementary School staff that she would not be allowed to enroll her children until she produced school transcripts from the children's former school on Oahu – even though she informed school staff that she and her family were homeless.[11] *See* Carvalho Decl. ¶¶2-4. She has since been able to enroll her children.[12]

[11] Only after speaking with Plaintiffs' attorney, learning of her rights under the McKinney-Vento Act, and going to the school to assert her rights was she permitted to enroll her children. Declaration of William Durham, ¶¶ 2-5.

[12] The existence of individuals like Ms. Carvalho is precisely the reason why Plaintiffs have requested class certification. But for Mr. Durham's fortunate timing – being physically present at the Kawaihae Shelter on the very day that Ms. Carvalho tried to enroll her children – Ms. Carvalho's children might still be sitting at the shelter, waiting to enroll until they received their transcripts from their former schools on Oahu.

Claims like these are inherently transitory – as soon as Plaintiffs' counsel finds out about these problems, Plaintiffs' counsel makes every effort to get the child(ren) in school as soon as possible. *See* Declaration of William Durham ¶¶2-5. Once enrolled, according to Defendants, their claim would be moot.

The Supreme Court has specifically allowed for class certification in precisely this situation – keeping the named plaintiffs as class representatives. As the Court explained in *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991):

> That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction…. [S]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. In such cases, the "relation back" doctrine is properly invoked to preserve the merits of the case for judicial resolution.

(Citations and internal quotation signals omitted.) *See also Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975) ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review."). Consequently, if the Court believes that Plaintiffs' only claim is for failure to

enroll, Plaintiffs nevertheless request that the Court grant Plaintiffs' Motion for Certification of Classes.

ii. If Named Plaintiffs' Claims are Moot, or if Named Plaintiffs Are Not Appropriate For Any Other Reason, Plaintiffs Request Leave to Join Substitute Representatives

If the Court finds that the named Plaintiffs cannot proceed for mootness or any other reason, Plaintiffs respectfully request that the Court grant leave to substitute named Plaintiffs. *See, e.g.*, *Kremens v. Bartley*, 431 U.S. 119, 135 (1977) (ordering substitution of named plaintiffs where named plaintiffs' claims were moot); *In re Thornburgh***,** 869 F.2d 1503, 1509 (D.C. Cir. 1989) ("a court may respond to the pre-certification mooting of a class representative's claims by permitting substitution of a new class representative."); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litigation*, 375 B.R. 719, 729 (S.D.N.Y. 2007) ("[I]n order to protect absent class members, where the claims of a lead plaintiff become moot at the pre-certification stage, courts not only may, but *should*, respond to the pre-certification mooting of a class representative's claims by permitting substitution of a new class representative." (Citations and internal quotation signals omitted.)); *see also* 1 Newberg on Class Actions § 2:26 (4th ed. 2006) ("When mootness of the named plaintiff's claims occurs, intervention by absentee members is freely allowed in order to substitute them as class representatives.").

III. CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Certification of Classes.

DATED: January 31, 2008, Honolulu, Hawaii.

/s/ Daniel M. Gluck

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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] CERTIFICATION OF WORD COUNT PURSUANT TO LOCAL RULE 7.5(e)

CERTIFICATION OF WORD COUNT PURSUANT TO LOCAL RULE 7.5(e)

I, DANIEL M. GLUCK, attorney for Plaintiffs, hereby certify that the foregoing Reply Memorandum in Support of Plaintiffs' Motion for Certification of Classes with the word limit pursuant to Local Rule 7.5(c). According to the word count function of the Microsoft Word processing system that was used to produce this document, the Memorandum (excluding the caption and including headings, footnotes and quotations) contains 4042 words.

DATED: January 31, 2008, Honolulu, Hawaii.

/s/ Daniel M. Gluck

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