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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 PRELIMINARY INJUNCTION; DECLARATION OF SHANNA CARVALHO; SUPPLEMENTAL DECLARATION OF VENISE LEWIS; DECLARATION OF MARI VERMEER; DECLARATION OF WILLIAM DURHAM; DECLARATION OF LAURIE TEMPLE; EXHIBITS 1 – 12; CERTIFICATE OF SERVICE

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I. INTRODUCTION

Defendants' opposition brief and accompanying declarations demonstrate two things: (1) Defendants continue to violate the McKinney-Vento Act; and, worse yet, (2) despite months of litigation and years of notice by the United States Department of Education that they are violating with the Act, Defendants fail to understand their statutory obligations. It is clear that Defendants cannot and will not implement the McKinney-Vento Act as required absent an order from this Court.

Defendants' few arguments in their opposition papers are unavailing.

First, Defendants' mootness argument fails because Defendants have not met the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Even if Defendants have a "plan" – and, to date, they have offered no evidence of any actual plan – a plan to cease unlawful activity is not enough to moot this case. More importantly, however, the harm to the named Plaintiffs and unnamed class members *continues to this date*.

Second, Defendants argue that the Spending Clause and 20 U.S.C. § 7907(a) relieve them of their statutory obligations. However, 20 U.S.C. § 7907(a) is not part of the McKinney-Vento Act and, as such, has no bearing on the instant case.

Consequently, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Preliminary Injunction. Plaintiffs have demonstrated a substantial likelihood of success: there is overwhelming evidence that Defendants have violated, and continue to violate, the McKinney-Vento Act. The balance of hardships tips sharply in Plaintiffs' favor: Plaintiffs are homeless families being denied their educational rights, and the only burden on Defendants is to comply with the law (which they are already required by statute to do and for which they already receive hundreds of thousands of dollars annually from the federal government to implement).

II. A PRELIMINARY INJUNCTION IS NECESSARY AND WARRANTED IN THIS CASE

a. Plaintiffs Are Likely To Succeed on the Merits of Their McKinney-Vento Claim

Defendants' policies and practices *continue* to bar homeless children – including named Plaintiffs – from receiving the educational services to which they are entitled. The following are just a few examples of ongoing problems.

i. Failure to Enroll

In December 2007 – *after* Defendants' November 28, 2007 memorandum to staff – Defendants refused to allow a homeless child enroll in public school on the Big Island because the child lacked a social security card. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction (hereinafter, "Opp. to MPI"), Ex. A at 6; Declaration of Laurie Temple ("Temple Decl."), Ex. 1 at 6:15-7:6, 14:13–16:22. As a result, the child missed *three weeks* of school. *See* Temple Decl., Ex. 1 at 14:13–16:22.

On January 15, 2008 – *after* Defendants' January 4, 2008 memoranda to staff – 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.[1] Declaration of Shanna Carvalho ("Carvalho Decl.") ¶¶2-4; Opp. to MPI, Ex. B.

These are not isolated incidents. *See* Declaration of Mari Vermeer ("Vermeer Decl.") ¶¶7-8 ("[I]t is difficult to register youth for school…. Youth get bounced around."). Based on these accounts, it is likely that Defendants will continue to deny enrollment to homeless children. With the upcoming Nanakuli

[1] 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. *See* Declaration of William Durham, ¶¶2-5.

Beach Park closure, homeless children will likely face further denials of enrollment as they are forced to move into different school attendance areas. *See* Temple Decl., Ex. 2 at 1. These continuing denials of immediate enrollment demonstrate that Plaintiffs are likely to succeed on the merits.

ii. Failure to Allow Students to Stay in Their Home Schools

There is no dispute that Defendants' own Administrative Rules on Geographic Exceptions violate the Act. *See* Hawaii Administrative Rule ("HAR") § 8-13-1 ("[A]ll persons of school age are required to attend the school in the geographic area in which they reside. However, permission to attend another school may be granted by the department as provided in this chapter[.]"); § 8-13-3 ("No geographic exception or revocation of geographic exception shall be granted except in accordance with this chapter."); § 8-13-7 (listing application procedure for geographic exceptions and failing to contain any mention of homelessness as a basis for a geographic exception). Despite Defendants' assertions that homeless children do not need a geographic exception to attend their home school, the Administrative Rules actually *prohibit* children from attending a school outside their attendance area absent an exception. HAR §§ 8-13-1, 8-13-3. *See also* Temple Decl., Ex. 10 at 6:19-7:3, 7:24-10:23.

After months of litigation, it appears that Defendants still do not understand the Act's requirements with respect to allowing students to attend schools outside

of their geographic attendance area. Defendant Tonda, for example, declares that "if the Kaleuatis' [sic] were living on one of the leeward beaches and receiving assistance from [Waianae Community Outreach], they would not be eligible for Dole Middle School." Tonda Decl. ¶7. Again, this is a clear misstatement of the Act. Regardless of where a homeless child lives, that child has a right to continue attending her or his home school. 42 U.S.C. § 11432(g)(3)(A). Contrary to Defendant Tonda's statement, even if a homeless family resides in a Waianae shelter, the children would be entitled to attend a home school in Honolulu. Ms. Tonda's apparent failure to understand this basic statutory requirement further demonstrates that Defendants are unlikely to comply with the Act absent an injunction.

iii. Failure to Establish Dispute Resolution Procedures

There is no dispute that Defendants have failed – and continue to fail – to comply with 42 U.S.C. 11432(g)(3)(E): "If a dispute arises over school selection or enrollment in a school ... the child, youth, parent, or guardian *shall be referred to the local educational agency liaison* ... who shall carry out the dispute resolution process[.]" (Emphasis added.) Defendants contend that they are complying with the Act's dispute resolution requirements because any aggrieved parent can "appeal the enrollment determination decision to the Complex Area Superintendent." Opp. to MPI at 14. Despite Defendants' counsel's admission

that Defendants "don't have a fabulous mechanism for solving" problems, Temple Decl., Ex. 3 at 19:20-20:3, and despite clear statutory language, Defendants do not understand their statutory obligations. Aggrieved homeless families need not go straight to the Complex Area Superintendents with disputes – instead, they are supposed to be referred to the local liaisons. Defendants' continued failure to implement this basic statutory mandate demonstrates that Plaintiffs continue to be harmed by Defendants and that Plaintiffs are likely to succeed on the merits.

iv. Failure to Provide Comparable Transportation

Defendants expect seven year old Plaintiff Daniel Hatchie ("Makalii") to ride TheBus unsupervised for an hour and a half each way to get to and from school. *See* MPI Opp., Declaration of Judy Tonda ("Tonda Decl."), ¶3 (DOE does not provide parents with bus passes due to cost); Supplemental Declaration of Alice Greenwood ("A. Greenwood Supp. Decl."),[2] ¶¶6-7. Makalii's mother spends over six hours taking him to and from school every day. A. Greenwood Supp. Decl., ¶7. Furthermore, she has to pay for TheBus out of her own pocket for the first few days of every month because Defendants do not get the bus pass to her on time. *Id.* at ¶¶4-5.

[2] Attached to Plaintiffs' Supplemental Memorandum in Support of Motion for Certification of Classes, filed January 14, 2008 (CM/ECF no. 79-2).

Venise Lewis and her children have to wake up at 4:00 a.m., leave their lodging by 5:00 a.m., and take two buses to get to school. Supplemental Declaration of Venise Lewis ("V. Lewis Supp. Decl.) at ¶5.

These are not isolated incidents. *See* Vermeer Decl., ¶¶5-6 ("Youth in our Emergency Shelters take the city bus from the shelter to their school, no matter how far the trip…. Transportation through the DOE can be complicated and can take about 2 weeks to put into place.").

Defendants, however, seem unwilling to recognize that *they* have caused this hardship, instead believing that these homeless families are at fault for wanting to keep their children in a stable school environment: "[Ms. Greenwood] might have had problems in the past, or *chosen to maintain schooling* that subjected her child to four hours of bus riding, does not prove continuing violations ... but ... that she has a unique situation that she has *chosen to pursue*."[3] Defendants' Memorandum

[3] Defendants' responses to Plaintiffs' transportation woes are similarly troubling. Ms. Kaleuati and her family, for example, reside at the WCC shelter, a mile and a half from Leihoku Elementary School. Declaration of Olivé Kaleuati ("O. Kaleuati Decl.) at ¶7 (attached to Plaintiffs' Motion for Preliminary Injunction, filed November 6, 2007; CM/ECF No. 36). She went into the school to try to arrange transportation for her children (who had been attending Leihoku for two years), but ended up being kicked out of the school altogether. *Id.* at ¶¶8-14. Not only should she have been permitted to keep her young children in their home school, but also she should have been offered transportation for the children. DOE's response to this violation of the Act, however, is particularly callous: "There is no indication why, if the DOE provided transportation system is so
(footnote continued on next page)

in Opposition to Plaintiffs' Motion for Certification of Classes (hereinafter "Opp. to Class Cert.") at 6 (emphases added). This transportation is not "comparable" to the supervised transportation provided for non-homeless children attending their home schools.

Alice Greenwood's son and Venise Lewis's daughters, however, are among the lucky homeless children in Hawaii – they at least receive *some* form of transportation assistance. It appears that homeless children on neighbor islands receive *nothing* should they wish to continue attending their home school. Temple Decl., Ex. 4 at 4651 (e-mail, dated October 12, 2007, from DOE employee: "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, which requires a transportation plan to be in place.");[4] Temple Decl., Ex. 1 at 9:24-10:2, 24:23-

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unacceptable that the children cannot walk that distance[.]" Opp. to Class Cert. at 6.

In her declaration, Kanani Bulawan describes the walk from the Barbers Point shelter to the bus stop: "children must leave the shelter at approximately 5:00am. To get to the city bus stop, they must walk a long way along unpaved roads with no sidewalks and no streetlamps. It is very dangerous." Defendants' response is telling: "there is no indication why parents cannot walk their children along a side road to the bus stop." Opp. to Class Cert. at 4. Defendants' disregard for *their* obligations – and Defendants' attempt to place blame on homeless parents – is unlawful and unjust.

[4] This e-mail appears to contain comments from two different individuals; the person responding writes that "accommodations were made in Maui to transport
(footnote continued on next page)

25:10; Declaration of Esther Santos ("Santos Decl.") at ¶6.[5] There is nothing in Defendants' briefs or declarations to suggest that Defendants have even begun to address this issue.

Defendants' failure to provide transportation comparable to that of non-homeless children violates the McKinney-Vento Act and demonstrates that Plaintiffs are likely to succeed on the merits.

v. Failure to Conduct Appropriate Outreach & Education

Defendants claim that they are satisfying McKinney-Vento's outreach requirements because they have identified approximately twenty-one homeless shelters as "partners" with DOE's McKinney-Vento program. *See* MPI Opp., Ex. B at 2. Even their "partners," however, are unaware of the Act. Vermeer Decl. ¶9 (Deputy Director of Placement Services for Hale Kipa: "we have never received any information from the DOE about the McKinney-Vento Act or the services for which our children are eligible."); MPI Opp., Ex. B at 2; Temple Decl., Ex. 11.

Furthermore, Defendants have not identified any methods of conducting outreach to unsheltered children or "hidden homeless," nor have they struck up a "partnership" with *any* domestic violence shelter in the State of Hawaii – even

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homeless students in the past," despite the lack of a transportation plan. Temple Decl., Ex. 4 at 4651.

[5] Attached to Plaintiffs' Motion for Preliminary Injunction (CM/ECF no. 43).

though residents of domestic violence shelters are considered "homeless" for purposes of the McKinney-Vento Act and Defendants are required to conduct outreach services to them. *See* Temple Decl., Ex. 5 (listing domestic violence shelters); 42 U.S.C. §§ 11432(g)(1)(B), 11434a(2)(b)(1).

Homeless foster children – and those children awaiting foster placement – are also not receiving the services to which they are entitled. In her declaration, Defendant Tonda states that "The MVA does not apply to foster children." Tonda Decl. ¶7. This is a clear misstatement of the McKinney-Vento Act. *All* children deemed "homeless" under the expansive definition in the MVA – regardless of whether they are in the foster care system – are entitled to MVA services. 42 U.S.C. 11434(a)(2). The declarations of Elaine Chu, Bridget Morgan, and Daniel Pollard[6] discuss foster children *who meet the definition of "homeless"* under the Act because the children were awaiting foster placement or were in emergency shelters. Each of these children is entitled to services under the Act, yet Tonda dismisses their claims outright.

Worse still is Defendants' refusal to acknowledge that thousands of homeless children are not receiving *any* services under the McKinney-Vento Act. Tonda, who has worked with the homeless for eleven years, declares that: "To the

[6] Attached to Plaintiffs' Motion for Preliminary Injunction, CM/ECF nos. 30 (Chu), 40 (Morgan), and 41 (Pollard).

best of my knowledge, there are no large numbers of homeless children whose problems have not been addressed." Tonda Decl., ¶12. This is precisely the point: Defendants do not know about these children because they have failed to conduct appropriate outreach. As discussed in Plaintiffs' Supplemental Memorandum in Support of Class Certification (filed on January 14, 2008 and incorporated herein by reference), Defendants have identified only 908 homeless children, while unrebutted government reports show the actual number is far higher. The Defendants have offered no evidence of any outreach to unsheltered children, hidden homeless children, or children in domestic violence shelters. DOE's own statement in an internal DOE document from June, 2007 is telling: "I am concerned that there are many HCY [homeless children and youths] that are not being identified in schools and the community." Temple Decl., Ex. 9 at 486. Defendants' inaction virtually guarantees that there are indeed large numbers of homeless children still being denied services.

Defendants' response to Plaintiffs' allegations regarding outreach are particularly instructive in demonstrating the need for this Court to intervene. Tonda states that she was never *asked* to make a presentation to Esther Santos' staff. Tonda Decl. ¶11. But *Defendants* are given federal money to *do* outreach – they are not supposed to be sitting idle waiting for an invitation from shelter staff

(who, in many cases, do not even know that the McKinney-Vento Act exists). *See* Santos Decl., ¶31; Temple Decl., Ex. 1 at 10:3-15.

Additionally, Defendants continue to actively disseminate misinformation about registration requirements. Defendants' websites continue to list registration requirements without explaining the MVA guidelines for homeless children. *See*, *e.g.*, Temple Decl., Ex. 6 (listing immunization requirements without indicating that homeless children may enroll without records); Ex. 7 (same).

vi. Failure to Coordinate

The Act provides that "[l]ocal educational agency liaisons for homeless children and youths shall, as a part of their duties, coordinate and collaborate with ... community and school personnel responsible for the provision of education and related services to homeless children and youths." 42 U.S.C. § 11432(g)(6)(C). Tonda states that "Ms. Kaleuati and I have been working together for approximately two years.... [A]fter reviewing my data for 2004 – 2005, I found that the Kaleuatis' [sic] were listed as one of the Waianae Community Outreach ('WCO') clients[.]" Tonda Decl. ¶ 7. Yet Linda Rivera, the Office Clerk at Leihoku Elementary School (where Ms. Kaleuati's children were denied enrollment), claims that she had no idea that Ms. Kaleuati was homeless. Opp. to MPI, Declaration of Linda Rivera ¶5. Clearly, Defendants had no system in place

to coordinate with school personnel, and there is no evidence to suggest that a system exists today.

Defendants correctly admit that their problems are "systemic." Temple Decl., Ex. 3 at 8:19-20. Tragically, these systemic problems have deprived and will continue to deprive thousands of children in Hawaii equal access to education, and they will not abate absent a Court order.

b. The Balance of Hardships Tips in Plaintiffs' Favor

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Homeless children are especially vulnerable and need a solid educational foundation to help break the cycle of poverty. *Any* denial of education – even a single day – causes irreparable harm.

Defendants argue that they will be harmed because of the cost of compliance with the MVA. This argument is without merit. First, Defendants have received hundreds of thousands of dollars annually to comply with the Act. Second, the more egregious violations cost virtually *nothing* to remedy: there is no evidence of *any* cost in allowing a child to enroll immediately (without waiting three weeks for a social security card), or allowing a child to continue attending her home school instead of attending a different DOE school, or amending the Hawaii Administrative Rules. In sum, the potential for irreparable harm to Plaintiffs

(contrasted with the "harm" to Defendants of having to comply with federal law) demonstrates that the balance tips sharply in Plaintiffs' favor.

c. The Public Interest Weighs in Plaintiffs' Favor

Finally, where, as here, the public interest is involved, the Court must also examine whether that public interest favors the plaintiff. *Malama Makua v. Rumsfeld*, 163 F.Supp.2d 1202, 1215 (D. Haw. 2001). Again, for homeless children, *any* denial of education – even a single day – harms the public interest. Conversely, the only "harm" to Defendants is the cost of complying with a federal statute – something they already agreed to do and for which the federal government already provides funding.

III. PLAINTIFFS HAD STANDING AND THEIR CLAIMS ARE NOT MOOT

As an initial matter, Defendants appear to confuse standing and mootness. Standing is measured at the time of filing and is Plaintiffs' burden; mootness is measured by post-filing events and is Defendants' burden. *See Am. Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1016 (9th Cir. 2006) ("Whereas standing is evaluated by the facts that existed when the complaint was filed, mootness inquiries, however, require courts to look to changing circumstances that arise after the complaint is filed." (Internal quotation signals and brackets omitted.)). As discussed below, Plaintiffs had standing at the time of filing, and Plaintiffs' claims are not moot.

a. At the Time of Filing, Plaintiffs Had Standing to Assert Claims for Injunctive Relief

Standing is determined based on the facts at the time of filing. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). To satisfy Article III standing, a plaintiff must show she has "personally ... suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant that can be fairly traced to the defendant's challenged conduct, and which is likely to be redressed by a favorable decision." *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985) (internal citations omitted). A plaintiff seeking injunctive relief must show that she "can reasonably expect to encounter the same injury in the future." 13 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 3531.2 (2d ed. 1984) (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983)); *LaDuke*, 762 F.2d at 1324 (plaintiff must show a "likelihood of similar injury in the future"); *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001).

At the time of filing the complaint, all Plaintiffs were being denied services under the McKinney-Vento Act, as Plaintiffs have detailed in their prior filings. They were – and still are – being denied a host of other services. *See, e.g.*, MPI Opp., Exs. A, B; O. Kaleuati Decl. ¶6. In short, each of the named Plaintiffs had standing at the time of filing.

b. Plaintiffs' Claims Are Not Moot

The burden of demonstrating that events subsequent to the filing of the complaint have mooted a claim rests on the party asserting mootness. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (quoting *United States v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)) (alteration in original)); *see also Mujahid v. Daniels*, 413 F.3d 991, 994 (9th Cir. 2005); *Demery v. Arpaio*, 378 F.3d 1020, 1025-26, (9th Cir. 2004); *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001).

The Ninth Circuit explained the organizing principle that governs mootness determinations: "Once a defendant has engaged in conduct the plaintiff contends is unlawful and the courts have devoted resources to determining the dispute, there is Article III jurisdiction to decide the case as long as 'the parties [do not] plainly lack a continuing interest[.]'" *Demery*, 378 F.3d at 1026 (quoting *Friends of the Earth*, 528 U.S. at 192). Consequently, "a party moving for dismissal on mootness grounds bears a heavy burden," *id.* at 1025, and must demonstrate that "by virtue of an intervening event, [the court] cannot grant any effectual relief whatever in favor of the appellant." *Mujahid*, 413 F.3d at 994 (citation and quotation omitted).

Defendants have not met this burden for two reasons.

i. Defendants' Alleged Intentions to Comply with the McKinney-Vento Act Do Not Moot Plaintiffs' Claims

Defendants seem to believe that they can avoid injunctive relief by promising they will eventually comply with the McKinney-Vento Act at some undetermined point in the future. Defendants state the following: "[a] number of positions ... *will* be added to the DOE," Opp. to MPI at 11 (emphasis added); the DOE is "*currently* formulating other changes to its procedures, policies, and practices," *id.* at 12 (emphasis added); "DOE *intends* to clarify its procedures, policies and practices," *id.* at 13 (emphasis added); and "[t]he DOE ... *has begun* developing a plan" to provide transportation services, *id.* at 13 (emphasis added). *See also* Temple Decl., Ex. 8 at 3 (listing an October 2007 plan to hire resource teachers for Hawaii and Maui because "[o]ne HDOE Homeless Concerns RT is insufficient to cover the needs of the entire state").

Where an assertion of mootness is based on defendants' voluntary cessation of a challenged practice the test for mootness is especially "stringent" and defendant bears a "formidable" burden. *Friends of the Earth*, 528 U.S. at 189-90. First, it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. at 190 (citation omitted) (emphasis added). Second, the defendant must demonstrate that "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (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. Temple Decl., Ex. 1 at 11:2-4 (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).

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.

Defendants admit that the instant lawsuit is the reason for their current compliance efforts. Opp. to MPI, Ex. A at 6. Absent an injunction, Defendants will continue to violate the McKinney-Vento Act and will continue to harm both the named Plaintiffs and the thousands of unnamed class members.

ii. Defendants Have Not Stopped Violating the Act

Although the minor Plaintiffs are currently enrolled in school, that says nothing about whether they (much less their absent fellow class members) are receiving all the services due under the Act. Furthermore, Plaintiffs' homelessness may well lead them to face similar problems with enrollment in the near future. *See* O. Kaleuati Decl. ¶6 ("Right now my family is staying at the Waianae Civic Center.... I think we are only allowed to stay here for a year. We moved here in July 2007."); V. Lewis Supp. Decl. ¶3 ("I moved out of the WCC shelter before Christmas.... Right now, my daughters and I are going back and forth to different houses."). Because the harm (and threatened harm) to Plaintiffs is ongoing, this case is not moot.

IV. DEFENDANTS' SPENDING CLAUSE ARGUMENT HAS NO LEGAL BASIS

Defendants' final argument is that the Spending Clause permits the State of Hawaii to take the federal money under the MVA and then ignore their duties. Defendants base their argument on 20 U.S.C. § 7907(a), part of the No Child Left Behind Act. This is a completely different statute than the one at issue in this case.

There is no comparable provision in the McKinney-Vento Act. Even if this Court were to accept the rationale of *School District of Pontiac v. Sec'y of Educ.*, No. 05-2708, ___ F.3d ___, 2008 WL 60187 (6th Cir. Jan. 7, 2008), that court's reasoning has no bearing on this case.

V. CONCLUSION

Defendants are not complying with the Act and, evidently, will not do so absent a court order. Plaintiffs respectfully request that this Court issue an injunction requiring Defendants to comply with their statutory obligations under the McKinney-Vento Act.[7]

[7] The parties have agreed that, following the evidentiary hearing, they will lodge separate proposed orders (including findings of fact and conclusions of law) for the Court's convenience. Plaintiffs' counsel intends to submit a proposed order outlining the specific relief requested by this Motion prior to the hearing on February 11.

DATED: Honolulu, Hawaii, January 31, 2008.

/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 Preliminary Injunction complies with the word count 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 4478 words.

DATED: Honolulu, Hawaii, January 31, 2008.

Respectfully submitted,

/s/ Daniel M. Gluck

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