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FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

MAY - 4 1993

9 1 o'clock and 15 min. 1993  
JAMES A. M. CONNOLLY, CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

JENNIFER FELIX, by her  
Mother and Next Friend,  
FRANKIE SERVETTI-COLEMAN;  
DAMIEN CHENAULT, by his  
Mother and Next Friend,  
DEBORAH CHENAULT; DAVID  
HUGHES, by his Mother and  
Next Friend, AGNES HUGHES;  
CHRISTOPHER MINEBURG, by  
his Mother and Next Friend,  
ANGELA K.M. MEYER; J.W., by  
his Mother and Next Friend,  
M.B.; H.S., by her Mother  
and Next Friend, R.S.;  
K.A.F., by his Mother and  
Next Friend, R.A.;  
individually and on behalf  
of those similarly situated;  
HALE KIPA; HAWAII ADVOCATES  
FOR CHILDREN AND YOUTH;  
THE MENTAL HEALTH  
ASSOCIATION IN HAWAII;  
THE LEARNING DISABILITIES  
ASSOCIATION OF HAWAII; THE  
AUTISM SOCIETY OF HAWAII;  
WAIANAE COAST COMMUNITY  
MENTAL HEALTH CENTER, INC.,

Plaintiffs,

vs.

JOHN WAIHEE, in his official  
capacity as Governor of the  
State of Hawaii; CHARLES  
TOGUCHI, individually and in

CIVIL NO. **93 00367**  
(Class Action)

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF;  
SUMMONS

DAE

his official capacity as )  
Superintendent of the State )  
of Hawaii Department of )  
Education; JOHN C. LEWIN, )  
individually and in his )  
official capacity as )  
Director of the State of )  
Hawaii Department of Health, )  
 )  
Defendants. )  
\_\_\_\_\_ )

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

This is a class action for declaratory and injunctive relief brought on behalf of Plaintiffs JENNIFER FELIX, DAMIEN CHENAULT, DAVID HUGHES, CHRISTOPHER MINEBURG, J.W., H.S., and K.A.F., who are children in the State of Hawaii entitled to a free appropriate public education, including a continuum of mental health programs and services to address their special needs.

The State of Hawaii lauds itself as "The Health State." At the same time, the Child and Adolescent Mental Health Division of the Department of Health (hereinafter "CAMHD"), at the request of the Governor, recently identified 336 "high end" or suicidal children who are without any mental health services. Further, CAMHD estimates that there are ten times that many children who are at risk of institutional care unless services are provided.

In the face of these staggering statistics and despite the mandates of federal and state law, the

responsible state agencies have failed to advocate effectively before the Governor and Legislature, and have failed to collaborate and coordinate their efforts to provide mental health programs and services and the "continuum of alternative placements" required by law. Instead, these agencies have slashed already inadequate programs and services. Further, these same state agencies have failed to develop any realistic plans to do anything other than provide stop-gap, crisis-based services.

In order to receive services they need and to which they are entitled, children with emotional disabilities in the State of Hawaii are often sent to the Mainland at a high cost to them, their families and the State. Alternatively, these children remain in Hawaii but are often placed unnecessarily in facilities or institutions when less restrictive community based programs and services would be more appropriate. All too often, the needs of these children are simply ignored by the responsible state agencies until intervention by the Courts and juvenile justice system occurs.

The Defendants have failed these children and their families and violated their statutory and constitutional rights. Plaintiffs seek an order from this Court declaring that the Defendants have violated these rights, and permanently enjoining Defendants from further violations of these rights.

## II. JURISDICTION

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1343(a)(3).

2. This Court has jurisdiction to award injunctive and declaratory relief pursuant to 28 U.S.C. Sections 2201 and 2202, and Rules 57 and 58 of the Federal Rules of Civil Procedure (hereinafter "F.R.Civ.P.")

## III. PARTIES

### PLAINTIFFS:

3. Plaintiff JENNIFER FELIX is 19 years old and a citizen of the island of Maui. She has been certified as in need of special education and mental health services. In order to receive adequate and appropriate services, Jennifer currently resides in the Seguin Community Living Center at the Brown School in Austin, Texas. This suit is brought by Plaintiff JENNIFER FELIX and Plaintiff FRANKIE SERVETTI-COLEMAN, her natural guardian and next friend.

4. Plaintiff DAMIEN CHENAULT is 14 years old and resides on the island of Oahu. Damien was attending Leilehua High School but was receiving no mental health services when his condition deteriorated to the point where he required hospitalization. This suit is brought by Plaintiff DAMIEN CHENAULT and Plaintiff DEBORAH CHENAULT, his natural guardian and next friend.

5. Plaintiff DAVID HUGHES is 15 years old and a resident of the island of Oahu. David was attending high

school as a special education student and residing in a therapeutic foster home. However, he frequently ran from the school and his condition and behavior deteriorated to the point that hospitalization was required. This suit is brought by Plaintiff DAVID HUGHES and Plaintiff AGNES HUGHES, his natural guardian and next friend.

6. Plaintiff CHRISTOPHER MINEBURG is 12 years old and a resident of the island of Oahu. In 1992, Christopher attended Red Hill Elementary School but was determined ineligible for special education. His mother requested reevaluation in 1993. Recently, his behavior and condition deteriorated to the point that hospitalization was required. This suit is brought by Plaintiff CHRISTOPHER MINEBURG and Plaintiff ANGELA K.M. MEYER, his natural guardian and next friend.

7. Plaintiff J.W. is 6 years old and resides with his mother and two brothers on the island of Maui. J.W. attends King Kamehameha III Elementary School where he has been certified eligible for special education and school level counseling services. This suit is brought by Plaintiff J.W. and Plaintiff M.B., his natural guardian and next friend.

8. Plaintiff H.S. is 7 years old and currently resides in a foster home on the island of Hawaii. H.S.'s mother has not been able to care for her daughter's needs and placed H.S. in the custody of the State of Hawaii Department of Human Services which then placed H.S. in a

therapeutic foster home which her mother found. Recently, H.S.'s mother has voluntarily agreed to terminate her parental rights in order to ensure that H.S. will continue to receive needed services. This suit is brought by Plaintiff H.S. and Plaintiff R.S., her natural guardian and next friend.

9. Plaintiff K.A.F. is 10 years old and resides with his mother and brothers on the island of Oahu. K.A.F. currently attends Red Hill Elementary School, where he has been certified in need of special education and mental health services. This suit is brought by Plaintiff K.A.F. and Plaintiff R.A., his natural guardian and next friend.

10. Plaintiff HALE KIPA (hereinafter "HALE KIPA") is a private, non-profit corporation organized and existing under the laws of the State of Hawaii with its main office in the City and County of Honolulu, State of Hawaii. HALE KIPA's mission is to provide emergency shelter and other services for runaway and homeless youth in need of protection. HALE KIPA operates numerous programs which assist youth and their families to address their needs. Those served by HALE KIPA include youth with special mental health, educational and social services needs. Plaintiff HALE KIPA is entitled to bring this lawsuit under Article III of the Constitution of the United States. Through this lawsuit, HALE KIPA seeks to ensure that adequate and appropriate mental health services are provided to its

clients and this interest is germane to the organization's purpose. Further, the claims and relief sought do not require the participation of individual members of the organization.

11. Plaintiff HAWAII ADVOCATES FOR CHILDREN & YOUTH (hereinafter "HACY") is a private, non-profit corporation organized and existing under the laws of the State of Hawaii with its main office in the City and County of Honolulu, State of Hawaii. HACY is a statewide, citizen based, independent, special interest group organized to represent the broad interests of children in Hawaii. Plaintiff HACY is entitled to bring this lawsuit under Article III of the Constitution of the United States. Through this lawsuit, HACY seeks to ensure that adequate and appropriate mental health services are provided to children in Hawaii and this interest is germane to the organization's purpose. Further, the claims and relief sought do not require the participation of individual members of the organization.

12. Plaintiff MENTAL HEALTH ASSOCIATION IN HAWAII (hereinafter "MHA") is a private nonprofit, consumer-oriented organization of volunteers, including parents, who work through public education and community action to improve mental health services for children and adults in Hawaii. MHA is organized and exists under the laws of the State of Hawaii with its main office located in the City and County of Honolulu, State of Hawaii. MHA is entitled to



bring this lawsuit under Article III of the Constitution of the United States. Through this lawsuit, MHA seeks to ensure that adequate and appropriate mental health services are provided to its constituency and this interest is germane to the organization's purpose. Further, the claims and relief sought do not require the participation of individual members of the organization.

13. Plaintiff LEARNING DISABILITIES ASSOCIATION OF HAWAII (hereinafter "LDAH") is a private non-profit public interest organization organized and existing under the laws of the State of Hawaii with its main office in the City and County of Honolulu, State of Hawaii. LDAH is comprised of parents of children with learning disabilities and others whose mission includes direct advocacy, the promotion of appropriate, high quality educational opportunities, and the provision of appropriate services to enable these children to achieve their full potential. LDAH is entitled to bring this lawsuit under Article III of the Constitution of the United States. Through this lawsuit, LDAH seeks to ensure that adequate and appropriate mental health services are provided to its constituency and this interest is germane to the organization's purpose. Further, the claims and relief sought do not require the participation of individual members of the organization.

14. The AUTISM SOCIETY OF HAWAII is a non-profit corporation organized and existing under the laws of the State of Hawaii with its main office in the City and

County of Honolulu, State of Hawaii. The membership of the AUTISM SOCIETY includes parents and family members of children with autism, and its mission is to provide information, support, and advocacy to these persons. The AUTISM SOCIETY OF HAWAII is entitled to bring this lawsuit under Article III of the Constitution of the United States. Through this lawsuit, the AUTISM SOCIETY OF HAWAII seeks to ensure that adequate and appropriate mental health services are provided to its constituency and this interest is germane to the organization's purpose. Further, the claims and relief sought do not require the participation of individual members of the organization.

15. WAIANAE COAST COMMUNITY MENTAL HEALTH CENTER, INC., (hereinafter "WCCMHC") is a private non-profit corporation organized and existing under the laws of the State of Hawaii with its main office in Waianae, City and County of Honolulu, State of Hawaii. WCCMHC is organized to provide culturally-appropriate, community-based mental health and substance abuse services to the adults and children on the Waianae coast. The children's program services the community's children and adolescents who are most seriously mentally ill through outpatient treatment, case management and psychoeducational services. WCCMHC is entitled to bring this lawsuit under Article III of the Constitution of the United States. Through this lawsuit, WCCMHC seeks to ensure that adequate and appropriate mental health services are provided to its constituency and this

interest is germane to the organization's purpose. Further, the claims and relief sought do not require the participation of individual members of the organization.

DEFENDANTS:

16. Defendant JOHN WAIHEE, is the Governor of the State of Hawaii and is responsible for faithful execution of the federal and state laws by the State of Hawaii. He is sued in his official capacity.

17. Defendant CHARLES TOGUCHI, is the Superintendent of the State Department of Education (hereinafter "DOE"). He is responsible for administration of programs of public education and public instruction established by federal and state laws. He is sued in his official and individual capacity.

18. Defendant JOHN C. LEWIN is the Director and chief executive of the State Department of Health (hereinafter "DOH"). He is responsible for administering, directing and managing the agency and its programs which are designed to protect, preserve, care for and improve the physical and mental health of the children of the State. He is sued in his official and individual capacity.

19. At all relevant times, the Defendants have acted or failed to act as alleged herein under the color of state law.

#### IV. CLASS ACTION ALLEGATIONS

20. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b)(2) of the F.R.Civ.P., on behalf of others similarly situated.

21. Plaintiffs seek to represent a class of children and adolescents with disabilities residing in Hawaii, between the ages of 3 years and 20 years who are eligible for and in need of education and mental health services but for whom programs, services and placements are either unavailable, inadequate, or inappropriate because of the lack of residential placements and the lack of a continuum of programs and placements. Within that class, Plaintiffs also seek to represent the following subclasses:

(a) Children with disabilities whose individualized education programs include mental health services but who receive no services or inadequate services or who are inappropriately placed because of a systemic lack of mental health services.

(b) Children with disabilities whose individualized education programs fail to include adequate and appropriate mental health services because of the systemic lack of a continuum of programs and placements.

(c) Children with disabilities without individualized education programs whose need for individualized mental health services from a continuum of programs and placements are not met because of a systemic lack of mental health services.

22. Members of the class and subclasses are so numerous that joinder of all members is impracticable.

23. The size of the class and subclasses is unknown to Plaintiffs, but should be with the knowledge of Defendants.

24. There are substantial questions of law and fact common to Plaintiffs and members of the class and subclasses.

25. Plaintiffs' claims that Defendants' actions and practices deprive them of constitutionally and statutorily protected rights are typical of the claims of the class and subclasses as a whole. Plaintiffs, therefore, will fairly and adequately represent the interests of the class and subclasses.

26. Plaintiffs are represented by attorneys who have litigated several class actions in this jurisdiction and will adequately represent the interests of the class and subclasses. Plaintiffs know of no conflicts of interest among members of the class or subclasses.

27. Defendants have acted or refused to act on grounds generally applicable to the class and subclasses as a whole, thereby making appropriate final injunctive and declaratory relief with respect to the class and subclasses.

#### V. APPLICABLE LAW

28. Plaintiffs reallege paragraphs 1 through 27 and incorporate them herein.

29. Hawaii law provides that:

All eligible children and youth between the ages of birth and seventeen shall receive the necessary mental health services to insure their proper and full development. Hawaii Revised Statutes Section 321-171.

30. Under the Individuals with Disabilities Education Act (hereinafter "IDEA"), the State of Hawaii receives federal financial assistance for a portion of the cost of providing special education and related services to children with disabilities. IDEA mandates that the State provide these children with a "free appropriate public education." 20 U.S.C. Section 1412(b)(2).

31. To assure a free appropriate public education, the DOE must identify and evaluate a child with a disability and provide special education and related services in conformity with an individualized education program (hereinafter "IEP"). The State must provide the related services mandated by the IEP.

32. IDEA mandates special education that is specially designed instruction, at no cost to the parents or guardians, designed to meet the unique needs of a child with a disability. Under IDEA, related services are any support services required to assist a child with disabilities in order that the child benefit from special education, including mental health services.

33. IDEA requires the State to provide an educational placement where the IEP is capable of being

fully implemented. If the student's needs cannot be met in a program in a public sector placement, the child must be referred for placement in a more specialized school, including those operated by private entities. The continuum of placements includes the classroom, the home, hospitals and institutions, and public and private residential placements.

34. Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504"), prohibits discrimination on the basis of disability in, among other things, federally funded educational activities and ensures that students with disabilities are identified and evaluated and receive an appropriate public education.

35. Under Section 504, a protected "individual with disabilities" is one who has a [physical or] mental impairment which substantially limits one or more major life activities or has a record of such impairment or is regarded as having such an impairment.

36. With respect to public pre-school, elementary, and secondary school services, an individual with disabilities is protected by Section 504 if (s)he is: within the ages when state law mandates such services; similarly situated to a non-disabled person who receives such services; or someone entitled to a free appropriate public education under IDEA.

37. Section 504 mandates a "regular or special education and related aids and services" for a child with a

disability which must be designed to meet individual educational needs of a disabled child as adequately as the needs of non-disabled child are met.

38. Under both IDEA and Section 504, children with disabilities must receive full and individualized evaluations of their needs. The results of the evaluations shall be used to determine whether an individual child has a disability and meets IDEA and Section 504 eligibility criteria, to develop educational goals and objectives for that child, to design special education instruction for that child, to decide on the educational setting and determine what kinds of related aids and services will be necessary for that child.

39. 42 U.S.C. Section 1983 protects persons from deprivation under color of state law, of their federal constitutional and statutory rights.

#### VI. FACTUAL ALLEGATIONS

40. Plaintiffs reallege paragraphs 1 through 39 and incorporate them herein.

41. The individual Plaintiffs and the class they represent, are all children protected by IDEA and/or Section 504. Plaintiffs, and children like them, have need for a variety of residential and non-residential programs, depending on their response to their current educational and therapeutic programs and their changing family circumstances.



42. The DOE must provide the necessary programs and services to meet the individualized needs of Plaintiffs. The DOE may provide the required continuum of services, programs and placements itself or through cooperative agreements. The DOE has failed to meet the requirements of the federal law for the following reasons:

A. Lack of Cooperation Between Responsible State Agencies

43. In 1985, the DOE and DOH entered into an Interagency Memorandum of Agreement (MOA) describing their respective responsibilities under IDEA and Section 504 to provide mental health services to children with disabilities. Despite that MOA, the DOE and DOH have failed to cooperate to provide a continuum of adequate and appropriate services, programs and placements to Plaintiffs.

44. In 1991, the DOE acknowledged "serious shortfalls" in implementing the MOA which had prevented the DOE from assuring that mental health services were provided as required by IEPs. Neither the DOE, nor the DOH have changed their pattern of non-cooperation since that time.

45. In January 1993, the Legislative Auditor reported on the abject failure of the DOE and DOH to fulfill their obligations to provide mental health services under the MOA. The report stated that the two state agencies failed to collaborate regarding whom they service, appropriate referrals, financial assessments, data collection, monitoring confidentiality and treatment

facilities. The report concluded that the status of mental health services for special education students was "uncertain" and that within the DOE and DOH, responsibilities for providing mental health services are not clearly defined.

B. Lack of Coherent or Consistent Planning

46. Although the DOH and DOE were directed in 1988 by Act 257 to develop an ongoing mechanism to assess, document, and report to the legislature and governor unmet needs for mental health services for students in each geographic region, the law has not been followed.

47. In March 1990, the Office of Civil Rights of the United States Department of Justice (hereinafter "DOJ") issued a report on Hawaii State Hospital, which included an adolescent residential treatment program, finding that the facility "routinely violated patients' constitutional rights." In March 1991, the DOJ filed suit against the State of Hawaii because of these unconstitutional conditions.

48. During the summer of 1991, the Salvation Army closed its adolescent residential treatment program operated under contract with the DOH.

49. In July 1991, because of continued criticism by the DOJ, DOH closed its adolescent residential treatment facility at Hawaii State Hospital and either discharged the patients or transferred them to a newly

created eight bed program funded by a contract with Castle Hospital, or to a private psychiatric facility, Kahi Mohala.

50. In September 1991, the DOJ and DOH entered into a settlement agreement in the suit filed by the DOJ whereby adequate and appropriate education would be provided in the Children's and Adolescent Residential Services Program ("CARS").

51. Under its contract with the DOH, Castle Hospital was required to comply with the terms of the settlement agreement between DOJ and DOH. In May 1992, the DOJ outlined deficiencies in the Castle Hospital residential treatment program and in the DOH's residential treatment program for children at Leahi Hospital. The DOJ concluded that:

- (a) "The conditions [at Castle] were simply abhorrent." No identifiable treatment program was in place at Castle.
- (b) Physical and medical restraints were used excessively and inappropriately.
- (c) Adolescents were admitted who did not fit the admission criteria.
- (d) Treatment plans were missing or inadequate.

52. In October 1992, Castle notified DOH that it was terminating its eight bed adolescent residential treatment contract with DOH as of December 31, 1992, because of a lack of support, including funding, from the State.

53. In October 1992, DOH announced it would transfer the Castle residents to Kahi Mohala while a new residential treatment facility was being established for 18 youths at Hawaii State Hospital to open in Spring 1993.

54 In October 1992, DOH announced it was cutting by 75% the funding for Po'ailani, a private community-based program for severely emotionally disturbed adolescents. As a result, the program closed.

55. By the end of November 1992, most of the Castle adolescent residents had been discharged. A few were transferred to other facilities, including correctional facilities.

56. The new residential treatment facility at Hawaii State Hospital was never opened. Since January 1993, youth needing a secure residential treatment program have been placed at Kahi Mohala, in mainland institutions, in overly restrictive acute care facilities, in shelters that are not equipped to address their needs, or they have not been placed at all.

57. In August 1992, in a report to DOJ, DOH determined that immediate post-residential transition services were needed to get youth out of more restrictive care. None have been established. It also acknowledged that all vacancies on the DOH's Children's Teams must be filled to provide mandated mental health services; there are still vacancies.

C. Lack of Funding

58 The DOE and DOH have failed to meet their obligations under IDEA and Section 504 as evidenced by the following:

(a) Plaintiff JENNIFER FELIX has been placed in the State of Texas pursuant to court order because no appropriate services, programs or placements are available in the State of Hawaii. Jennifer has been diagnosed with severe mental retardation and organic personality disorder. She has been certified eligible for special education and is in need of mental health services to address her behavioral problems services. Recently, the DOE and DOH have indicated that they intend to return Jennifer to Maui. Due to the severity of her illness, Jennifer will or may need a residential treatment program, an adolescent day treatment program, a therapeutic foster home, crisis management, and case management which are unavailable in Hawaii.

(b) Plaintiff DAMIEN CHENAULT has been certified as severely emotionally disturbed since 1986. After two prior residential placements and several psychiatric hospitalizations, he returned to Hawaii in the summer of 1992. At the start of the 1992-93 school year, Leilehua High School requested the DOH provide mental health services to Damien, but none were provided until his condition deteriorated so that he was admitted to Kahi Mohala Hospital. Damien needs or may need a secure residential

treatment program, a residential foster or group home, or a day treatment program which are unavailable in Hawaii.

(c) Plaintiff DAVID HUGHES was certified eligible for special education as emotionally handicapped (EH) before he moved to Hawaii in 1991. After a period of hospitalization, in the fall of 1992 David was placed in a therapeutic foster home and attended Castle High School. Even though eligible for mental health services, for a period of four months, no plan was developed. David's behavior deteriorated and he frequently ran from school. Recently, hospitalization was again required. David needs or may need a secure residential setting, a therapeutic group home, crisis services and therapeutic case management which are unavailable in Hawaii.

(d) Plaintiff CHRISTOPHER MINEBURG was diagnosed with attention deficit disorder and had behavioral difficulties before moving to Hawaii from Arizona where he lived with his father. As a result of these behaviors, in 1991 Christopher's mother requested that the DOE conduct a comprehensive evaluation. However, Christopher was determined not eligible for special education. School level and limited counselling by CAMHD staff was available. In late 1992 Christopher's behaviors worsened; he repeatedly ran away requiring intervention by the police and he was placed in Hale Kipa. In March 1993 long term residential treatment was suggested for Christopher. He returned home, his behaviors deteriorated and he was then hospitalized at

Castle Hospital for three weeks. Upon his discharge from Castle no appropriate programs, services, or placements were available and Christopher was discharged to home with a 24 hour nurse or companion. Christopher needs or may need a residential treatment program, therapeutic foster care, therapeutic case management or other mental health services which are unavailable in Hawaii.

(e) Plaintiff J.W. was certified by the DOE as specific learning disabled (SLD) in January 1991 when he was in the kindergarten at King Kamehameha Elementary School. In 1992, J.W. was reevaluated and diagnosed as speech and language impaired (SLI). J.W.'s behavior continued to be erratic; he had difficulty with peer relationships and exhibited outbursts of violent behavior. In August 1992, J.W.'s mother placed him in Leahi Hospital where he was diagnosed as having Tourette's Syndrome. Since November, 1992, J.W. has again been attending King Kamehameha III Elementary School where his behavior continues to deteriorate and where even with a one-on-one aide, he continues to run off and display aggressive behavior toward teachers and students. J.W. may need a residential treatment program, case management and other mental health services which are unavailable in Hawaii.

(f) Plaintiff H.S. is diagnosed with autism with hyperactivity. H.S. was evaluated when she was 2 1/2 years old. She was then placed in a DOE pre-school with a behavior modification plan and referred to the DOH. At the end of

1991, H.S.'s behaviors grew worse and her mother placed her in Leahi Hospital, operated by the DOH. H.S. was discharged from Leahi Hospital to her mother without any follow-up care or support. Shortly thereafter, H.S.'s behaviors grew worse and her mother was unable to care for her. H.S. was placed in the custody of the Department of Human Services and resides in a therapeutic foster home. Due to the severity of her illness, H.S. will or may need a residential treatment program, an adolescent day treatment program, crisis management, and case management which are unavailable in Hawaii.

(g) Plaintiff K.A.F. was certified by the DOE as emotionally handicapped in 1988 when he was attending kindergarten. In 1990, K.A.F. transferred from a public to a private school but because of the difficulty of this adjustment, he was then transferred to the Center for Learning and Achieving Students (CLAS) operated by the DOH. K.A.F.'s behaviors included slipping into a fantasy world, making hand gestures, speaking although no one is present, distorting reality and difficulty in establishing relationships with others. Depending on the progress of his illness, he will or may need a residential treatment program, a therapeutic foster home, case management and other mental health services which are unavailable in Hawaii.



59. Further illustrations of Defendants' failure to fund the continuum of mental health services, programs and placements to Plaintiffs necessary to comply with the mandates of federal law include the following:

- (a) In 1991, the United States Department of Education determined that the DOE had not complied with the requirements of IDEA that mental health services be provided to meet the needs of children eligible for special education and related services. The federal Department of Education ordered DOE to provide or purchase the mental health services that the DOH could not provide.
- (b) The DOE currently estimates that of the 6,000+ students who "critically" need mental health services from DOH, only 400 of those students can get service from the DOH.
- (c) Although the DOE has stated that it must have 100% of its positions funded in order to provide staffing to deliver a free appropriate public education to children who are certified in need of special education, the legislature has funded only 92% of those positions.
- (d) In April 1993, the House Finance Committee rejected a bill which would have provided \$8.1 million over two years for therapeutic

foster homes, day treatment programs and therapeutic case management positions statewide. Without that funding, only 24 out of the 289 needed therapeutic foster home slots are available statewide.

(e) The DOH's State Cluster Program, created pursuant to Hawaii Revised Statutes Section 321D-1 to coordinate the efforts of State agencies to develop service plans and programs for "multisystem" children having severe emotional and developmental problems, has determined that it will no longer use its appropriated "flexible" funds to place children in out-of-state residential treatment programs. Funds appropriated for Cluster Service are estimated by DOH to serve only 5% of those needing services.

(f) DOH estimates that 600 children on Maui suffer from severe and disabling mental illness. The County of Maui currently has no publicly funded day treatment program for children ages 6 to 12 years, only seven slots available for adolescent day treatment, no therapeutic foster homes, no therapeutic group homes for emotionally disturbed children, and no residential treatment programs. Further, while there are seven

beds for children and adolescents in a new wing at the Maui Memorial Hospital, due to lack of funds, staffing cannot be provided and the unit has not been opened.

- (g) The DOE has a practice of identifying a child in need of mental health services on the child's IEP, but failing to specify the mental health services to be provided or to request such services from the DOH because no such services are available. In 1991, the U.S. Department of Education ordered the DOE to cease that practice and provide or purchase needed mental health services, but the practice continues.
- (h) The DOH administers or funds nine Children's Teams--six on Oahu, one each on Kauai, Hawaii, and Maui. The Children's Teams have long waiting lists of children referred by DOE for psychological and psychiatric evaluation.
- (i) Neither DOH nor DOE maintains accurate budget documents showing the cost of mental health services provided to public school students, what services are provided or how many students are served.
- (j) Therapeutic foster homes are funded by the DOH through Catholic Charities for only 20

children on Oahu, and 4-5 children on Kauai in a therapeutic group home. Catholic Charities receives many referrals from DOH for adolescents needing psychiatric residential treatment services for whom no placements are available.

- (k) DOH has no psychiatric acute-care facility for children and adolescents. There is a waiting list for admission of adolescents to Kahi Mohala's acute care facility as well as to its residential treatment program and adolescent day treatment program.
- (l) In a report issued in August, 1992, CAMHD reiterated that additional community based resources were required to prevent inappropriate and more restrictive placements for seriously emotionally disturbed youth.
- (m) Since late 1992, no publicly operated and administered residential and educational program has been available in the State of Hawaii for adolescents in need. The DOH and DOE pay for services at private facilities in Hawaii and on the Mainland. Youth needing residential treatment facilities are discharged into the community from the private facilities, such as Kahi Mohala, because of waiting lists of more needy youth.

- (n) In early 1993, the DOE and DOH cut their budgets by ten percent. As a result, programs and services for children with mental health needs have been closed, staff has been released and the continuum of care options for children with disabilities has narrowed.

60. With respect to the issues raised in this lawsuit, Plaintiffs cannot and are not required to exhaust administrative remedies because:

(a) Resort to the administrative process would be futile and inadequate.

(b) As a matter of policy and practice, and with respect to the entire Plaintiff class and subclasses, Defendants have failed to provide a continuum of programs and services mandated by IDEA, Section 504 and other applicable statutes.

(c) As a matter of policy and practice, and with respect to the entire Plaintiff class and subclasses, Defendants' actions have the effect of excluding an entire class of children from educational and appropriate related services.

(d) Administrative hearing officers are not empowered to grant the systemic relief demanded here, including the creation of a continuum of services and mandated coordination of services between two state agencies.

61. The responsible state agencies have failed to ensure development and availability of a continuum of mental health services, programs and placements for children with disabilities, including Plaintiffs, as required by IDEA and Section 504.

#### FIRST CAUSE OF ACTION

##### VIOLATION OF IDEA

62. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1 through 61 of this Complaint, inclusive.

63. Defendants' failure to provide the continuum of mental health services, programs, and placements violates Plaintiffs' rights under IDEA and its implementing regulations in that as a matter of general practice they have:

(a) Failed to implement individualized education programs and include mental health services from a continuum of programs and placements.

(b) Failed to properly develop individualized education programs that take account of and are responsive to Plaintiffs' behavioral and mental health needs.

(c) Failed to ensure that children with disabilities are provided with the individualized mental health services and programs in the least restrictive environment appropriate to their needs.

64. As a result of Defendants' acts, Plaintiffs and the class they represent have been injured or will suffer injury.

#### SECOND CAUSE OF ACTION

##### VIOLATION OF SECTION 504

65. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1 through 64 of this Complaint, inclusive.

66. Defendants have failed to provide Plaintiffs with related mental health aids, services, programs and placements as required by Section 504 and discriminated against them based on their disability by committing the acts and omissions described herein.

67. As a result of Defendants' acts, Plaintiffs and the class they represent have been injured or will suffer injury.

#### THIRD CAUSE OF ACTION

##### 42 U.S.C. SECTION 1983

68. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1 through 67 of this Complaint, inclusive.

69. Defendants' failure to adhere to the requirements imposed on them by IDEA and Section 504 violates Plaintiffs' rights to due process of law guaranteed by the 14th Amendment of the United States Constitution for

which Plaintiffs are entitled to bring this action under 42 U.S.C. Section 1983.

70. As a result of Defendants' acts, Plaintiffs and the class they represent have been injured or will suffer injury.

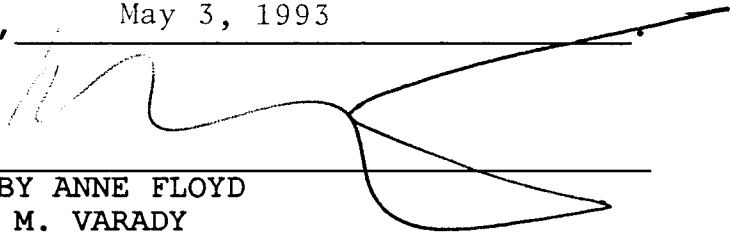
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court:

1. Assume jurisdiction of this case.
2. Certify this action as a class action pursuant to Fed. R. Civ. P. 23(b)(2).
3. Declare that Defendants have violated Plaintiffs' rights as set forth herein.
4. Enter preliminary and permanent injunctions requiring Defendants to cease illegal practices described in this Complaint and to comply with and fulfill obligations mandated under federal law.
5. Award Plaintiffs their costs and attorneys' fees as provided in IDEA, Section 504, and 42 U.S.C. Section 1988.
6. Grant Plaintiffs such other appropriate relief as may be just and proper, including the appointment of a special master to assume control of the Child and Adolescent Mental Health Division of DOH and to determine and report on the number of placements and programs necessary to comply with federal law.



DATED: Honolulu, Hawaii, May 3, 1993



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