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Case No. 1:18-cv-00477-LEK-RT

[CIVIL RIGHTS ACTION]

[CLASS ACTION]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

A.B., by her parents and next friends, C.B. and D.B., and T.T., by her parents and next friends, K.T. and S.T., Plaintiffs, vs. HAWAII STATE DEPARTMENT OF EDUCATION and OAHU INTERSCHOLASTIC ASSOCIATION, Defendants.	Case No. 1:18-cv-00477-LEK-RT [CIVIL RIGHTS ACTION] **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT; EXHIBITS A-D** [CLASS ACTION] Hearing: June 19, 2019, 9 a.m. Mag. Judge: Hon. Rom A. Trader Trial: February 24, 2020 Related Document: Dkt. No. 69

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Neither Defendant Hawaii State Department of Education ("DOE") nor Defendant Oahu Interscholastic Association ("OIA") (collectively, "Defendants") substantively opposes Plaintiffs' request for leave to file a First Amended Complaint. The First Amended Complaint only adds an additional named plaintiff/class representative to this Title IX class action lawsuit and it makes no other changes. Accordingly, the Court should grant Plaintiffs' Motion for Leave to File the First Amended Complaint (the "Motion").

Even though DOE does not oppose the Motion, DOE filed a "limited opposition," which, without citing any authorities, argues that "[n]ow," six months after the Complaint was filed, after "much Discovery has been accomplished, [entirely by Plaintiffs by the way,] it is time for Defendant[] to address the 239 allegations . . . one by one [and DOE] simply need[s] adequate time to do it properly." Def. DOE's Limited Opp'n to Pl.'s Motion (the "Opposition") at 2-3. While Plaintiffs do not oppose DOE's request for additional time to file an amended answer—so long as such extension does not cause any delay and also reserving Plaintiffs' right to object to the amended pleading on any other

grounds—the reasons offered in the Opposition for the request[1] are all deeply problematic. Moreover, as it has been typical of DOE's conduct during the course of this litigation, DOE fails to propose a date by which it could provide its proposed Amended Answer.

The Opposition attempts to mislead this Court by suggesting that Plaintiffs would not grant Defendants a 35-day extension. Opposition at 2 ("Defendant offered to stipulate to the filing . . . if Plaintiffs would, in turn, stipulate that Defendants may have 35 days to answer or otherwise plead. Plaintiffs Declined."). This is false. Counsel for Plaintiffs sent to DOE's counsel a stipulation offering 35-days, or "until Friday, June 21, 2019 to make 'any required response' under Rule 15(a)(3) of the Federal Rules of Civil Procedure." Exh. A at 2 (Draft Stipulation to File First Amended Complaint Pursuant to Fed. R. Civ. P. 15(a)(2)). DOE counsel, Mr. John Cregor, insisted, however, that the stipulation not refer to a "required response" or to Rule 15(a)(3).[2] Mr. Cregor did not explain what he was seeking

[1] Normally, absent agreement by the parties, "[a] request for a court order must be made by motion." Fed. R. Civ. P. 7(b)(1).

[2] Rule 15(a)(3) controls the time to respond to an amended pleading, such as the First Amended Complaint, and provides: "Time to Respond. Unless the court orders otherwise, any *required response* to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." Fed. R. Civ. P. 15(a)(3) (emphasis added).

beyond what Rule 15(a)(3) would allow. Plaintiffs were willing to and indeed did propose granting DOE a 35 day extension. Plaintiffs were clear, however, that they would only grant an extension of the time to respond to the amended pleading under Rule 15(a)(3).[3] Mr. Cregor left on vacation on May 17, 2019, the day after Plaintiffs filed this Motion and before the parties could come to an agreement on this matter.[4] DOE's failure to reach a stipulation with Plaintiffs, forced Plaintiffs to proceed with this motion to amend, which, if the Motion is granted, actually provides DOE *more* time than the 35 days DOE had initially requested to respond to Plaintiffs' proposed Amended Complaint.[5]

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[3] Plaintiffs were concerned about waiving any right to object to DOE's amended answer or response, for example, on the ground that an affirmative defense had been waived by DOE's earlier failure to raise it in its Answer. *See* Fed. R. Civ. P. 12(h)(1). Plaintiffs' position is similar to that taken by Defendants during the May 15, 2019, status hearing, when they would not agree to Plaintiffs amending the Complaint without reviewing the amended pleading first.

[4] Indeed, Plaintiffs learned, for the first time, from the Opposition that DOE intends to file a First Amended Answer. Opposition at 2. If DOE had made such a request for an extension of time to file an amended answer to Plaintiffs, Plaintiffs could have agreed to it.

[5] After reviewing the Opposition and in an attempt to save judicial resources, counsel for Plaintiffs emailed Mr. Cregor explaining that counsel for Plaintiffs "remain available to further meet and confer with [Mr. Cregor] about any aspect of the amended pleadings should [he] wish to do so upon [his] return from vacation." Exh. B (May 30, 2019, Email from Mr. Caballero). Counsel for Plaintiffs have not heard back from DOE's counsel.

Without any further explanation, the Opposition states that Mr. Cregor's vacation plans somehow provide a basis to oppose Plaintiffs' Motion and to request an extension for an indefinite period of time to answer the First Amended Complaint. While we understand that Mr. Cregor had vacation plans, Mr. Cregor is also part of a department with "180 attorneys and over 500 professional and support personnel [that] assist the Attorney General in fulfilling the responsibilities of the office."[6] In fact, Mr. Cregor is part of the largest law firm in the State of Hawai'i and "I am away on vacation" is simply not an adequate excuse to put an entire case on hold, causing undue delay to Plaintiffs and hundreds of their peers, who continue to experience unequal opportunities, treatment, and benefits in their athletic program at Campbell High School.

Finally, the Opposition states that "this First Amended Complaint dramatically changes this cause of action[, because b]ut for this amendment, this case is immediately dismissible for lack of proper Plaintiff(s)." Opposition at 2. While DOE does not explain its reasoning or cite any authorities for this bold and incorrect assertion, Plaintiffs' counsel understand from Mr. Cregor's representations at the status conference on May 15, 2019, that DOE's approach to this case has been to simply wait for the current Plaintiffs to graduate from high

[6] Dept. of the Attorney General, Overview, *available at* http://ag.hawaii.gov/about-us/overview/.

school. This is not a viable strategy for DOE given that Plaintiffs have diligently pursued this case as a class action and already have moved for class certification.[7]

Plaintiffs' addition of A.M.B., a current Campbell student, as a putative class representative does not "dramatically change" anything except DOE's defense strategy, which so far has consisted of: (1) asking for a 21-day extension to file its initial Answer, and then filing a five-page "general denial,"[8] (2) opposing without any basis Mr. Honse's *pro hac vice* application only to withdraw such opposition later,[9] (3) after requesting an extension, responding to 19 out of 25 of Plaintiffs' Interrogatories by explaining through pat and boilerplate answers that "[t]he investigation is ongoing and answers will be forthcoming as soon as the investigation is substantially complete,"[10] (4) requesting repeated extensions to

[7] That DOE's *admitted* litigation strategy has been to wait for Plaintiffs to graduate, so that DOE can substantively avoid addressing the gender inequities daily impacting Campbell High School female youth, is highly disappointing. Plaintiffs' counsel tried for months, on a number of occasions, to resolve this matter with DOE before commencing litigation. And yet DOE's silence was deafening, forcing students to sue with no other option to catalyze change and equity in their school. To see yet more delay in litigation speaks to the deep, systemic issues facing Plaintiffs and the putative class.

[8] Opposition at 2.

[9] Deft. DOE's Notice of Opposition to Pls.' Mot. to Appear Pro Hac Vice (Dkt. 43); Deft. DOE's Notice of Withdraw of Opposition (Dkt. 48).

[10] Deft. DOE's Response to Pls.' Interrogatories at 5-14 (attached hereto as Exhibit C). To date, DOE has not updated these *unverified* responses.

respond to Plaintiffs' Request of Production of Documents, only later to produce few additional documents or duplicate documents, (5) to date—five months after the requests were served—failing to produce even the most basic documents relevant to class certification such as participation data, school enrollment numbers, and practice schedules for Campbell High School, (6) failing to serve any discovery requests on Plaintiffs or notice any depositions until after Plaintiffs filed their Motion for Class Certification,[11] and (7) now, over six months after being served with the Complaint, finally deciding that "*it is time* for Defendant to address the 239 allegations of Plaintiff[s] one by one," when DOE could and should have taken the Complaint seriously from the outset. Opposition at 2 (emphasis added).

DOE's pattern of delay makes it painfully clear that DOE's entire defense strategy has been to do nothing, wait for Plaintiffs to graduate, and move to dismiss. This strategy is as legally flawed as it is wasteful and shameful. Plaintiffs and their peers sincerely hope that the so-called "dramatic changes" to the Complaint cause real dramatic changes in the way DOE approaches this litigation and Title IX compliance in the future.

In spite of these tactics, Plaintiffs have been patient and have acted in good faith, granting DOE multiple and repeated extensions. Once again, Plaintiffs do not

[11] *See, e.g.*, Def. DOE's First Request for Production of Documents and Things to Pl. A.B. (May 10, 2019) (attached hereto as Exhibit D).

oppose granting DOE additional time to file an amended answer in response to the First Amended Complaint. However, Plaintiffs reserve their right to object to any such amended pleading on any grounds, other than its timeliness under Rule 15(a)(3), and request that any such extension does not cause further delays to the resolution of Plaintiffs' Motion for Class Certification.[12] DOE's tactical requests for additional time have already been amply accommodated in this case.

DATED: Honolulu, Hawaii, June 5, 2019.

Respectfully submitted,

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[12] DOE made a request to bifurcate discovery in this case after discovery was well underway. Accordingly, Plaintiffs' ability to conduct discovery on the merits has been delayed until their pending Motion for Class Certification is resolved.