

CLARE E. CONNORS 7936
Attorney General of Hawaii

CARON M. INAGAKI 3835
JOHN M. CREGOR, JR. 3521

Deputy Attorney General
Department of the Attorney
General, State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 586-1494
Facsimile: (808) 586-1369
Email: Caron.M.Inagaki@hawaii.gov
John.M.Cregor@hawaii.gov

Attorneys for Defendant
HAWAII STATE DEPARTMENT
OF EDUCATION

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.

CIVIL NO. CV18-00477 LEK-RT

DEFENDANT HAWAII STATE
DEPARTMENT OF EDUCATION'S
SCHEDULING CONFERENCE
STATEMENT; CERTIFICATE OF
SERVICE

Rule 16 Scheduling Conference

Date: January 31, 2019
Time: 9:00 a.m.
Judge: Honorable Rom Trader

Trial Date: None Set
Judge: Hon. Leslie E. Kobayashi

DEFENDANT HAWAII STATE DEPARTMENT OF EDUCATION'S
SCHEDULING CONFERENCE STATEMENT

COMES NOW Defendant Hawaii State Department of Education (hereinafter "Defendant DOE") by its attorneys, Clare E. Connors, Attorney General of Hawaii, Caron M. Inagaki and John M. Cregor, Jr., Deputy Attorneys General, pursuant to Rule 26(a)(1), Federal Rules of Civil Procedure, submits its Scheduling Conference Statement pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 16.2(b).

I. NATURE OF THE CASE

This is a purported Title IX class action lawsuit by the ACLU of Hawaii against the State of Hawaii Department of Education. The Complaint is 67 pages long containing 237 numbered paragraphs; only a double handful of those paragraphs begin to comply with the pleading requirements of FRCP Rule 8 as clarified by the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)¹ The apparent gist of the action is that female athletes at Campbell High School are not receiving equal treatment with similarly situated male athletes. The DOE is opposing this lawsuit; whatever historical disparities there may have been have disappeared and treatment in facilities, coaching, scheduling etc. are substantially equal. This being a case for

¹ Defendant DOE has not filed a motion with regard to the apparent Rule 8 violation as outright dismissal for Rule 8 violations are exceedingly rare; however, it is appropriate for this court to address this question at the Rule 16 conference.

declaratory and injunctive relief, we look to the present conditions, i.e. a court cannot enjoin that which has already past.

There are two named Plaintiffs. Both are senior girls at Campbell High School who are members of the water polo team. As with most schools on Oahu, Campbell High School has no on-campus swimming facilities – nor is there room on campus to build a pool. The boys’ and girls’ swimming and diving teams practice and hold competitions at the VMAC pool at the Patsy Mink Memorial Park.

The girls water polo team begins its practices for the current year on February 4, 2019 at the same facility. The changing facilities, restrooms and lockers are comparable for both the boys and the girls. One day per week the girls’ water polo team will be weight training on campus with full locker, shower and restroom facilities.

The first question that must be addressed in any class action lawsuit is whether or not there exists a certifiable class. The second question is whether or not the Plaintiffs are proper representatives of that class. At this point, the defense position is “no”. As a general rule in class action cases, the class certification question must be answered before addressing the merits of the case, and, that includes discovery, viz, discovery related to the merits must be held off until the question of class certification is resolved. Moore’s Federal Practice 3d § 5-23.84 *et seq.*

The posture of this case is also complicated by the fact that Defendant Oahu Interscholastic Association (hereinafter “Defendant OIA”) has filed a motion to dismiss, on jurisdictional grounds, which is not scheduled for hearing until April 5, 2019. Should that motion be granted, the nature of the case will necessarily change.

II. JURISDICTION and VENUE

Defendant DOE has no objection to either jurisdiction or venue

III. JURY TRIAL

No jury trial has been demanded nor is there any basis for jury trial.

IV. DISCLOSURES

As stated in the planning meeting report, initial disclosures were due, pursuant to rule, on January 22, 2019 and have been made; however, until the issues in this 237 paragraph Complaint have been formulated, clarified and simplified pursuant to FRCP Rule 16(c)(2)(A), the appropriate scope of disclosure remains unknown. Further, it is Defendant DOE’s position that, similar to discovery, disclosures should be limited to the class certification issue until that has been resolved.

V. DISCOVERY and MOTIONS

Plaintiffs have already served Interrogatories and Requests for Production on Defendants which realistically cannot be answered in thirty days. Even 120 days remains unrealistic. Intervention of the court is requested. Moreover, at the risk of

overstatement, discovery should be limited to class certification until the issue is resolved.

VI. SPECIAL PROCEDURES

Rule 16(c) lists many pretrial procedures that the court may consider may be appropriate for moving the litigation. The first of these, 16(c)(A) is “formulating and simplifying the issues.” Defendant DOE urges the court to step in and do exactly that. As noted above, the Complaint spans 65 pages with 237 numbered paragraphs. The issues are neither simple nor straightforward. Without clarification by the Court, the parties could venture down many time consuming blind alleys answering discovery and, perhaps even preparing the wrong issues for trial. Hand-in-hand with 16(c)(2)(A) is 16(c)(2)(F): similarly, Defendant DOE urges the Court to take an active hand in controlling and scheduling discovery so that it does not become an exercise in inundation. Perhaps Rule 16(c)(2)(H) could also be employed referring the case to a discovery master.

VII. RELATED MATTERS

Prior to either defendant appearing in the case, Plaintiff filed five (5) individual motions each to admit *pro hac vice* out-of-state lawyers as additional counsel for Plaintiffs. Defendants did not have notice and were unaware of those motions so did not oppose them at the time. The rules for *pro hac vice* admission are simple and the case law is focused primarily on the qualifications of the out-of-state attorneys. Defendant DOE submits that five *pro hac vice* attorneys is too

many. This being a civil rights action there will undoubtedly be a petition for attorney's fees filed by the Plaintiff. Fees will undoubtedly be claimed by all counsel regardless of duplication of work or other factors multiplying the hours. Also, to the extent that one or more *pro hac* counsel travels to Hawaii for hearing, meetings, depositions or motions the claimed expenses will also mount unreasonably. For this reason, Defendant DOE requests that all but two of the *pro hac* lawyers withdraw from the case or, in the alternative, the court vacate several of the *pro hac vice* admission orders.

DATED: Honolulu, Hawaii, January 24, 2017.

STATE OF HAWAII

CLARE E. CONNORS
Attorney General of Hawaii

/s/ John M. Cregor
JOHN M. CREGOR, JR.
Deputy Attorney General

Attorney for Defendant
HAWAII STATE DEPARTMENT OF
EDUCATION

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.,

Plaintiff,

vs.

HAWAII STATE DEPARTMENT OF
EDUCATION and OAHU
INTERSCHOLASTIC ASSOCIATION,

Defendants.

CIVIL NO. CV18-00477 LEK-RT
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing document was filed electronically and served through CM/ECF, on the following at their last-known addresses:

MATEO CABALLERO, ESQ.
JONGWOOK PHILIP KIM, ESQ.
ACLU Of Hawaii
P. O. Box 3410
Honolulu, Hawaii 96801

ELIZABETH KRISTEN, ESQ.
J. CACILIA KIM, ESQ.
KIM TURNER, ESQ.
Legal Aid At Work
180 Montgomery Street, Suite 600
San Francisco, California 94104

Pro Hac Vice
Pro Hac Vice
Pro Hac Vice

HARRISON J. FRAHN, IV, ESQ. Pro Hac Vice
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, California 94304

JAYMA M. MEYER, ESQ. Pro Hac Vice
Simpson Thacher & Bartlett LLP
426 Lexington Avenue
New York, New York 10017-3954

Attorneys for Plaintiffs

DATED: Honolulu, Hawaii, January 24, 2019.

STATE OF HAWAII

CLARE E. CONNORS
Attorney General of Hawaii

/s/ John M. Cregor
JOHN M. CREGOR, JR.
Deputy Attorney General

Attorney for Defendant
HAWAII STATE DEPARTMENT OF
EDUCATION