

2013 WL 4771740 (D.Hawai'i) (Verdict, Agreement and Settlement)  
United States District Court, D. Hawai'i.

DOE, et al.,  
v.  
State of Hawai'i.

No. 11CV00550.  
May 6, 2013.

**Class Action Settlement Agreement**

WHEREAS, Plaintiffs RICHARD ROE 1; JANE ROE 1, a minor, RICHARD ROE 2; MRS. RICHARD ROE 2; JANE ROE 2, a minor; JOCELYN COLLIER; T.L., a minor; MARIBEL OALESMA, M.T., a minor; ELVIRA DUMBRIQUE, NELSON DUMBRIQUE; C.D., a minor; OFFICE OF PUBLIC GUARDIAN, appointed legal guardian of M.L., a minor; K.L.; A.P., L.P. AND T.P. ("Plaintiffs"), were named in (or intervened in) the First Amended Complaint filed on August 26, 2011 against the STATE OF HAWAII, SYDNEY DICKERSON, and SCOTT O'NEAL, ("Defendants"), as a class action alleging that Plaintiffs and others had been the victims of sexual assaults alleged to have occurred at the HAWAII SCHOOL FOR THE DEAF AND BLIND, a school operated by the Department of Education, State of Hawaii;

WHEREAS, SCOTT O'NEAL, Cross-Complainant and Third Party Plaintiff, has filed a Cross Claim against the STATE OF HAWAII, SYDNEY DICKERSON, Cross Defendants and a THIRD PARTY COMPLAINT against ROXSANNE TOMITA, Third Party Defendant;

WHEREAS, Plaintiffs, Defendants, Cross-Complainant, Third Party Plaintiff, Cross Defendants, and Third-Party Defendant ("the Parties") have decided to resolve this matter without a determination of the merits of the Parties' various claims;

WHEREAS, the parties wish to avoid the time and expense of further litigation;

WHEREAS, the discussions have resulted in this Class Action Settlement Agreement (hereinafter "Agreement"), which, subject to the approval of the District Court, settles this action in the manner and upon the terms set forth below;

WHEREAS, this Agreement, upon its effective date, settles any and all claims brought by Plaintiffs, Cross-Complainant, and Third Party Plaintiff in the lawsuit entitled *Jane Doe, et al. v. State of Hawaii, et al.*, Civil No. 11-000550 HG KSC, including, but not limited to claims for injunctive relief and monetary damages, in their entirety;

WHEREAS, the parties have agreed to stipulate as to a class for purposes of settlement only;

NOW, THEREFORE, THE PARTIES HEREBY STIPULATE AND AGREE AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII ("DISTRICT COURT") HEREBY APPROVES, the following Settlement Agreement that finally disposes of the claims for relief in Plaintiffs' First Amended Complaint:

**I. Definitions**

"Claim Form" means the form approved by the claims administrator for the purpose of determining the validity of the claim and the amount to which the claimant is entitled.

“Claims administrator” or “administrator” means the person approved by the District Court to administer the settlement. The parties have agreed, subject to District Court approval, that Judge Riki May Amano, Ret. will serve as the Claims Administrator.

“Class Counsel” means: Michael Jay Green, Glenn Uesugi, and John Rapp, 841 Bishop St., Suite 2201, Honolulu, HI 96813; Eric Seitz, 820 Mililani St., Suite 714, Honolulu, HI 96813; and Christopher Bouslog, 500 Ala Moana Blvd., Suite 480, Honolulu, HI 96813.

“Class Fund” means total class damages to be paid by Defendants.

“Class Notice” means notice in the form annexed hereto as Exhibit A.

The “Class Period” is August 10, 2001 through the Effective Date, as defined below.

“District Court” mean the United States District Court for the District of Hawaii.

“Effective Date” means the date upon which a judgment entered by the District Court approving this Agreement becomes final. The judgment will be deemed final only upon expiration of the time to appeal, or if an appeal is filed, upon exhaustion of all appeals and petitions for certiorari.

An “Opt-Out” is any potential Class Member who files a timely Request for Exclusion and approved by the District Court.

“Settlement Class” means those persons who meet the definition of the Class Definition, as set forth below.

“Settlement Class Member” (“SCM”) means any member of the Settlement Class who does not file a valid Request for Exclusion and who timely files a sworn statement of a claim.

## **II. Terms and Effects of Agreement**

### **A. General Provisions for Settlement**

1. Defendants agree solely for the purposes of this settlement and its implementation, that this action shall proceed as a class action as alleged in the First Amended Complaint, but if the District Court fails to approve this settlement and the parties return to litigation of this matter, Defendants retain the right to defend the action pursuant to any and all defenses previously asserted. Defendants retain all rights to object to the maintenance of the action as a class action.
2. The Plaintiffs have made two basic claims relating to the requested class and injunctive relief concerned: Defendants failed to properly supervise the students and/or school staff and Defendants attempted to cover up the alleged sexual assaults after becoming aware of the allegations.
3. Defendants challenged the merits of each of the above and contested whether this action should be certified for class action treatment.
4. For purposes of this settlement only, the Parties stipulate to the certification of the following class:

The Settlement Class is defined as any student who is or was enrolled in the Hawaii School for the Deaf and Blind or the Hawaii Center for the Deaf and Blind, between August 10, 2001 and the date of approval of this Settlement Agreement by the District Court, and who suffered injury as a result of one of the following:

- \* A sexual assault on the school grounds or on a school bus or a coerced sexual encounter on the school grounds or on a school bus involving another student or students;
- \* A sexual encounter involving a staff member; or
- \* Witnessing a sexual assault or a coerced sexual encounter involving another student on the school grounds or on the school bus or a sexual encounter involving a staff member and a student.

This class shall consist of the following subclasses:

- a. A student who was a victim of a sexual assault or a coerced sexual encounter on the school grounds or on a school bus, and who was not a perpetrator in any sexual assault or a coerced sexual encounter on the school grounds or on a school bus, involving another student or students.
- b. A student who was a victim of a sexual assault or a coerced sexual encounter on the school grounds or on a school bus, and who was a perpetrator in any sexual assault or a coerced sexual encounter on the school grounds or on a school bus, involving another student or students.
- c. A student who was involved in a sexual encounter involving a staff member.
- d. A student who witnessed a sexual assault or a coerced sexual encounter on the school grounds or on a school bus involving another student or students or a sexual encounter involving a staff member and a student.

5. This Agreement, as of the Effective Date, resolves in full all claims against the Released Persons by the SCMs, including the named Plaintiffs, involving alleged sexual assaults which occurred at the Hawaii Center for the Deaf and Blind, also known as the Hawaii School for the Deaf and Blind and any violations of Title II of the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*), Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681, *et seq.*), and the Individuals with Disabilities Acts (20 U.S.C. § 1400 *et seq.*), as alleged in the First Amended Complaint, as a result of those alleged sexual assaults. As of the Effective Date, SCMs, including the named Plaintiffs, hereby release and agree to the dismissal with prejudice of all such claims, and waive any and all rights to pursue or commence any action or proceeding before any court, administrative agency or other tribunal, or to file any complaint with regard to acts of commission or omission by the Released Persons relating to class members' injuries arising from the alleged sexual assaults ("Released Claims").

6. This Agreement does not and shall not be deemed to constitute an admission by the Defendants as to the validity or accuracy of any of the claims asserted in the First Amended Complaint, or as to Defendants' liability for any claim or of any wrongdoing whatsoever. The District Court has not issued any findings of any kind concerning the merit or lack of merit of Plaintiffs' allegations herein. Any statements or arguments made on behalf of any Plaintiff or any Defendant in connection with, or at the settlement hearing on, or in support of the settlement, shall not be used as evidence or otherwise in any way in any subsequent trial, proceeding or hearing either in this action or in any other action or proceeding between all or any of the parties, should such occur.

7. This Agreement contains all the terms and conditions agreed upon by the parties about this action, and supersedes any prior oral or written agreement, and no such prior oral or written agreement shall be deemed to exist or to vary the terms and conditions contained herein. This Agreement can be amended only in writing and any such amendments must be signed by all parties, and approved by the District Court.

8. Each SCM shall be deemed to have submitted to the jurisdiction of the District Court.

9. The Parties acknowledge that the Settlement agreed to herein is the result of extensive litigation, negotiation and mediation, and represents the best settlement achievable for all SCM.

## **B. Settlement Funds**

The following amounts as specified shall be paid on behalf of Defendants:

1. On behalf of Defendants State of Hawaii, Department of Education and Sydney Dickerson, \$5,000,000.00 (five million dollars), subject to approval and funding by the Hawaii State Legislature;
2. On behalf of Defendant Scott O'Neal, \$750,000.00 (seven hundred fifty thousand dollars);
3. No other party is required to contribute any funds to the Settlement Funds.

## **C. Specific Provisions**

1. The State agrees to undertake certain specific actions relating to the management and operation of the Hawaii School for the Deaf and Blind.
2. The specific actions the State has agreed to undertake is set forth in Exhibit B to the Settlement Agreement.
3. The parties agree that this Agreement may be enforced by either party through the filing of any appropriate motion to compel compliance and the parties specifically understand that nothing in this document is intended to limit the District Court's inherent authority to enforce orders and agreements, in addition to any authority to enforce which is conferred on this District Court by rule, regulation or statute;
4. The parties agree that the "Specific Provisions" portion of this Agreement shall be enforceable under the terms of this Agreement and under this civil action for a period of eighteen (18) months from the date the Class Action Settlement Agreement becomes effective, as defined below. At the expiration of said eighteen (18) month period, any obligations of the Defendants to comply with the "Specific Provisions" portion of the agreement shall continue but shall not be enforceable under the pending action.
5. The Parties agree that SCMs have the right to initiate an action or proceedings to compel compliance with the Settlement Agreement. In the event of such an action or proceedings, Defendants recognize and agree that the United States District Court for the District of Hawaii shall have jurisdiction and further agree that Defendants shall not contest standing. If the SCMs believe that any of the State or its agents, assigns or successors is not in compliance with the terms of the Settlement Agreement, then Class Counsel will give written notice to the Attorney General's office specifying the non-compliance. The State will have a reasonable time of not less than 30 calendar days from receipt of the written notice to cure the alleged non-compliance and to provide written notice to Plaintiffs' counsel in which they specify the actions taken to cure. Within 10 calendar days after receipt of the State's written notice of the actions to cure, Plaintiffs and the State shall meet and confer. If an agreement is not reached by the Parties within 10 calendar days after meeting and conferring, then the Parties agree to mediate in good faith. The Parties agree that the mediation will be held with Keith Hunter, or if he is unavailable with a mediator at Dispute Prevention and Resolution ("DPR"). If the Parties are unable to agree on an alternative mediator, Magistrate Judge Kevin S.C. Chang, or his successor, shall select the mediator from DPR. The mediator's fees and expenses shall be paid by the State. The Parties will bear their own respective attorneys' fees, costs and expenses related to all matters set forth in this subparagraph. However, in the event mediation is unsuccessful and legal action ensues, the prevailing party in the litigation shall be entitled to seek reasonable attorneys' fees subject to the discretion of the court. Should the Court award such fees, the Court may, in its discretion, consider the relative success or not of the prevailing party. Nothing in this Paragraph shall prevent or limit the prevailing party from seeking fees and costs associated with an unsuccessful mediation. Within 30 calendar days of the commencement of mediation, unless otherwise agreed upon by the Parties, the SCMs have the right to initiate an action or proceeding to compel compliance with this Settlement Agreement. Such action will be brought only after exhausting the procedures above.

6. The Parties recognize and agree that the United States District Court for the District of Hawaii shall have jurisdiction to resolve any such claims to compel compliance with this Settlement Agreement, and that the court's jurisdiction shall be limited to such claims to compel compliance and shall include no other claims, including claims otherwise pendent thereto. The Parties agree that the Plaintiffs in this case shall have standing to initiate and maintain such an action or proceeding. In such action or proceeding, the prevailing party in the litigation shall be entitled to seek reasonable attorneys' fees. In awarding such fees, the Court may, in its discretion, consider the relative success or not of the prevailing party. The right to institute litigation or proceedings as set forth in this Paragraph shall terminate eighteen (18) months from the date of approval of this Settlement Agreement.

7. It is understood between the Parties that a violation of the Specific Provisions portion of this Agreement shall not be material or actionable unless it is determined by the District Court to be material and actionable.

8. The State, through its counsel, shall provide Class Counsel with a report as to the status of the agreed upon specific actions three (3) months after approval of this Settlement Agreement, and every three (3) months thereafter, and shall provide a final status report one (1) year after approval of this Settlement Agreement.

#### **D. Attorney's Fees**

The parties agree that Class Counsel may apply to the District Court for Class Fund Attorney's Fees in the following amounts: \$200,000 each for Michael Green, John Rapp, Glenn Uesugi and Eric Seitz; and \$100,000 for Christopher Bouslog. Class Counsel may also apply for costs and general excise taxes. The total amount to be paid hereunder shall not exceed \$1 million. Class counsel may submit said application at the hearing on the Motion for Preliminary Approval of Settlement (discussed below, in Section III. A. of this Agreement). Defendants agree that an award of fees, general excise taxes and costs in the amounts set forth above is reasonable. Defendants will not oppose Class Counsel in their motion for Class Fund Attorney's Fees, General Excise Taxes and Costs as set out in this paragraph.

#### **E. Monetary Damages**

1. Payment of the amounts set forth above, by the State, is subject to appropriation by the Legislature, as required by law. The Defendants shall use their best efforts to seek appropriation by the Legislature.

2. The Claims Administrator will divide and distribute the Class Fund remaining after distribution and payment of attorney's fees, case costs and administrative costs individually to class members to exhaust available funds proportionately based upon the following damage schedule:

First Tier Compensation--\$20,000

Second Tier Compensation--\$75,000

Third Tier Compensation--\$200,000

These amounts are the minimum amounts, and may be increased at the sole discretion of the Claims Administrator.

To be awarded the Second or Third Tier of compensation, the claimant would have to offer additional information regarding the severity, duration and impact upon the individual SCM. Consideration to be used to determine the level of compensation will include, but not be limited to: The use of coercion or threats; the amount of force associated with, and the type and frequency of, the abuse; and the pain and suffering of the claimant as evidenced by such factors such as erratic job history, mental health treatment, substance abuse, or other evidence of physical, psychological, and emotional issues.

3. It is agreed among the Parties that the schedule set forth above does not constitute an admission by the Defendants as to the value of any future claim for damages arising out of alleged sexual assaults, but is solely a means for equitably distributing the Settlement Fund. The Parties further agree that no part of the Settlement Agreement may be used to establish the value of future claims because the values are unique to this action and the underlying facts and circumstances.

4. The determination of the value of each SCM's claim will be based upon review of the Claims Forms to be completed by each SCM. It shall be up to the Claims Administrator to determine the validity of the information contained on the Claims Forms. The Claims Administrator has the right to request additional supporting documentation, and the individual must submit the additional supporting documentation within 45 days of a request from the Claims Administrator.

5. The determination as to whether a class member is entitled to compensation for an alleged sexual assault shall be based on the Claims Forms and required supporting documentation (if any) to be completed by each potential SCM.

6. The final determination of the value of a claim of an individual SCM is at the sole discretion of the Claims Administrator based upon a preponderance of the evidence standard. This determination of the Claims Administrator is final and non-appealable by any party or SCM. By submitting a Claim Form, potential class members agree to be bound by the determinations of the Claims Administrator, waive any right to appeal, and waive any cause of action against the Claims Administrator for negligence or gross negligence in relation to administration and distribution of the Class Fund.

7. If the total value of claims paid, not including claims brought by the individuals that choose to Opt-Out of the settlement, is less than the value of the Class Fund minus Class Fund Attorney's Fees and case costs and the administrative costs, the remainder of the Class Fund shall be distributed pro rata in a formula to be determined by the Claims Administrator, increasing the compensation of each individual SCM. This pro rata formula is at the sole discretion of the Claims Administrator. By submitting a Claim Form, potential class members agree to be bound by the determinations of the Claims Administrator, waive any right to appeal, and waive any cause of action against the Claims Administrator for negligence or gross negligence in relation to the determination of this pro rata formula, and its implementation.

8. All funds due under this Agreement shall be paid into a special trust or class settlement account established by the Claims Administrator, and shall be distributed from there pursuant to the terms of this Settlement Agreement. Interest earned from any such accounts is part of the Class Fund. Upon receipt of said funds and without further order of the Court, the Claims Administrator is authorized to immediately pay the following: (a) any attorney fees and costs to Class Counsel approved by the Court by check made payable to the Trust Accounts of Class Counsel; (b) reimbursement of any administrative costs to the administrator approved by the Court; (c) reimbursement to the State of the one-half of the fees of the Court-Appointed Master, Judge Riki May Amano (Ret.).

9. Plaintiffs' counsel agrees to join or express no opposition in any motion to dismiss any and all actions arising out of any released claims brought by a SCM. The Claims Administrator shall notify Plaintiffs' counsel and Defendants whether any claim brought by a SCM involve a "released claim" and shall prepare a declaration to that effect which shall be submitted to the Court.

10. The Claims Administrator shall not incur any liability to the State of Hawaii or any of the Parties for any actions taken in connection with his duties processing and paying claims from the Class Fund.

#### **F. Miscellaneous Provisions**

1. The Parties agree they are jointly responsible for the fees of the Court-Appointed Master, Judge Riki May Amano (Ret.). The Parties agree the State shall be responsible for one-half of Judge Amano's fees and the remaining one-half shall be paid from the Plaintiffs Settlement Fund, once the funds have been appropriated by the Legislature and released. Judge Amano's fees are not to be considered Plaintiffs costs and in no way affect the distributions referenced in II.D. herein. The Department

of the Attorney General will advance the payment of Judge Amano's fees from its litigation expenses fund. Reimbursement of Plaintiffs one-half share that was advanced by the Department of the Attorney General shall be paid from the Plaintiffs Settlement Fund, once the funds have been appropriated by the Legislature and released

2. Plaintiff-Intervenors AP, LP and TP through their counsel shall within 5 business days following approval of the Settlement Agreement enactment into law of the settlement contained herein file a dismissal with prejudice of all claims against The State of Hawaii and the State of Hawaii Department of Education in Civil Number 10-1-0276-02 RAN, filed in the Circuit Court of the First Circuit, State of Hawaii.

4. The parties agree that any reports prepared by experts for the purpose of this litigation, and paid for by the State of Hawaii, Department of Education, are the property of the State and may not be released by any other party, without the express written permission of the State of Hawaii, Department of Education or a court order. Class Counsel is not responsible for the payment of the costs of any reports prepared for the purpose of this litigation.

5. To the extent possible under applicable laws, rules and regulations, any funds received by any SCM pursuant to this Agreement, shall not be utilized to disqualify, reduce, affect or prevent any class member from receiving any public entitlements and money.

### **III. Steps for Seeking Settlement Approval**

Plaintiffs and Defendants shall jointly take all necessary steps in appropriate sequence as follows:

***A. Preliminary Approval of Settlement Agreement*** The Plaintiffs will file a Motion for Preliminary Approval of Settlement Agreement within 30 days of execution of this Agreement by the parties. Defendants will join in support of this motion.

#### ***B. Class Notice***

The parties believe, and will so represent to the District Court, that the best notice practicable under the circumstances of these cases is as follows:

1. It is understood and agreed by the Parties, that the cost of notification will be paid by the Department of the Attorney General as a litigation administrative expense.

2. Direct notice by mail to potential class members (former students) as identified by the State of Hawaii on lists compiled by the State of Hawaii, containing the last known address of potential SCMs.

3. Notice published once in each of three successive weeks in at least one newspaper of general circulation in each County within the State of Hawaii wherein such a newspaper is published.

4. The class notice shall advise potential SCMs that they will be bound by the judgment in this action unless within 30 days or such other time set by the District Court after the first date of the publication of the notice they file a written election to be excluded from the class, and providing further that each member of the class who did not file a written election to be excluded will be required to file, within such time limit as may be set by the District Court upon the recommendation of the Claims Administrator a sworn statement of claim or be forever barred from recovery in these actions.

5. Class notice will further advise that those who would like to file objections to the proposed Settlement must do so within 30 days after the first date of the publication of the notice; and that the hearing on any

6. The Claims Administrator shall be responsible for ensuring the class notifications by publication and mailing are completed, and for certifying completion of the same to the District Court.

**C. Final Approval of Settlement and Distribution of Funds; Final Judgment**

Within a time to be set by the District Court, the Claims Administrator shall complete review of all claims and shall submit to the District Court, with copies to the Parties, a "Plan of Allocation," which shall set forth a plan or formula for allocation of the Class Fund, whereby the Class Fund shall be distributed to SCMs after payment of expenses of notice and administration of the fund and such attorneys' fees, costs, and expenses as earlier approved by the District Court. Upon determination that the proposed Plan of Allocation is consistent with this Agreement, the District Court shall issue an order granting final approval of settlement and distribution of funds and enter a final judgment dismissing all claims in this action with prejudice as to all Defendants as of the effective date. The Claims Administrator shall make payment as authorized within a time to be set by the District Court. If there is an appeal of the District Court's final approval of Settlement and Distribution of Funds, the Defendants will join the Plaintiffs in defense of the District Court's decision.

Dated: February 1, 2013

By: <<signature>>

JOHN F. MOLAY

Deputy Attorney General

Counsel for State of Hawaii.

Department of Education

Dated: February 1, 2013

By: <<signature>>

CHRISTIAN B. FITZGERALD

Deputy Attorney General

Counsel for Sydney Dickerson

Dated: February 5, 2013

By: <<signature>>

RANDALL K. SCHMITT

Counsel for Scott O'Neal

Dated: February 1, 2013

By: <<signature>>



MICHAEL J. GREEN

Class Counsel

Dated: February 1, 2013

By: <<signature>>

GLENN UESUGI

Class Counsel

Dated: February 6, 2013

By: <<signature>>

JOHN RAPP

Class Counsel

Dated: February 1, 2013

By: <<signature>>

ERIC SEITZ

Class Counsel and Counsel for Roxsanne Tomita

Dated: February \_\_\_, 2013

By: \_\_\_\_\_

CHRISTOPHER BOUSLOG

Class Counsel