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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

J. and R. DOE AS GUARDIAN AD LITEM FOR I. ROE, J.D. DOE, E. DOE, D. DOE AND O. DOE: J. and E. ROE AS GUARDIAN AD LITEM FOR O. ROE, F. ROE, and N. ROE: F. BOE AS GUARDIAN AD LITEM FOR Z. BOE, S. BOE and X. BOE: H. and J. LOE AS GUARDIAN AD LITEM FOR A. LOE, L. LOE, M. LOE, G. LOE and R. LOE; ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

VS.

JAMES PLYLER, SUPERINTENDENT OF THE TYLER INDEPENDENT SCHOOL DISTRICT, IN HIS OFFICIAL CAPACITY: LEWIS LAMPKIN, CHARLES CHILDERS, CARL ROSS, MARTIN EDWARDS, VERNON GOSS, MICHAEL BREEDLOVE and ROBERT RANDALL IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE BOARD OF TRUSTEES OF THE TYLER INDEPENDENT SCHOOL DISTRICT

DEFENDANTS.

CIVIL ACTION NO. TY-77-261-CA

PLAINTIFFS MEMORANDUM OF POINTS AND AUTHORITIES THAT THIS ACTION BE MAINTAINED AS A CLASS ACTION

I.

Plaintiffs' Motion that this action be maintained as a class action is brought on behalf of all undocumented alien school-age children of Mexican origin living within the boundaries of the Tyler Independent School District. Plaintiffs Doe, Roe, Boe and Loe have standing in this litigation to represent such a class. They are school age children of Mexican origin, who like their parents through whom they sue, are undocumented aliens. They all reside within the Tyler Independent School District and, but for the acts of the Defendant District, would be attending its schools.

This action should be maintained as a class action, on behalf

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of all undocumented alien children as described above. As this Memorandum of Law will make clear, all the criteria of Rule 23 have been fulfilled and substantial policy reasons exist for treating this as a class action.

II.

THIS ACTION SHOULD BE MAINTAINED AS A CLASS ACTION UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN THAT THE PREREQUISITES OF RULE 23 HAVE BEEN MET.

A. The Prerequisites of Rule 23(a) Have Been Met.

1. The Class is Too Numerous for Joinder.

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable", but sets forth no specific number of members necessary to maintain a class action. A determination of sufficient numerosity must be made in light of the particular circumstances of each case. Cypress v. Newport News General and Non-Sectarian Hospital Association, 375 F. 2d 648, 653 (4th Cir. 1967) (finding eighteen members sufficient to sustain a civil rights class action). While this is essentially a case-by-case question, the rule is most readily satisfied "where a party is charged with discriminating against a class, usually one whose members are incapable of specific enumeration." Advisory Committee on Federal Rules, 39 F.R.D. 69, 102 (1966).

In this case, plaintiffs represent a group whose members are so numerous that joinder would be impracticable--those undocumented school-age children of Mexican descent living within the Tyler Independent School District. At the hearing on the preliminary injunction held by this court on September 4, 1977, plaintiffs testified that there were approximately forty to fifty such students in the district presently excluded from public school as a result of defendants' actions. The exact number of such children cannot be accurately ascertained because of the precarious legal status of undocumented families, and may be slightly higher than fifty. The

same considerations which prompted the named plaintiffs to bring this action under pseudonyms, discussed at Paragraph 5 of their Complaint, prevent simlarly situated parents and children from being readily identified.

An additional reason for maintaining this action as a class action is the openended nature of the class which will fluctuate in size as more undocumented children reach school age or move within the boundaries of the Tyler Independent School District. These future class members are presently unascertainable and therefore could not be joined as named plaintiffs at this time. Such open-ended classes have been explicitly approved in numerous cases. See, e.g., Keyes v. School District No. 1, 413 U.S. 189, 197 (1974); Cypress v. Newport News General and Non-Sectarian Hospital Ass'n., supra.

2. Common Questions of Law and Fact

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Plaintiffs have adequately satisfied both aspects of this requirement. There are both common issues of law and common issues of fact relating to plaintiffs claims that defendants'policy of charging undocumented school-aged residents of the district a tuition of $1,000 is an unconstitutional exercize of its power.

The common issues of fact include:

1. Whether the district excludes undocumented school-aged residents from public schools absent payment of $1,000 tuition;
2. Whether the district provides opportunity to contest the imposition of tuition on students it identifies as undocumented aliens; and
3. Whether the district singles out Spanish surnamed students or students of Mexican ancestry in determining which students or prospective students are undocumented aliens.

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The common issues of law include:

1. Whether the district's policy denies undocumented school-age residents their right to equal protection of the laws as guaranteed by the Fourteenth Amendment;
2. Whether the district's failure to provide legally sufficient opportunity to contest the imposition of tuition denies these children the procedural due process guarantees of the Fourteenth Amendment;
3. Whether the district's implimentation of its policy invidiously discriminates against undocumented children of Mexican ancestry on the basis of their national origin in violation of 42 U.S.C. Section 1983, 42 U.S.C. Section 2000(2) and the Equal Protection clause of the Fourteenth Amendment; and
4. Whether the State of Texas is attempting by the statute underlying the district's policy, to regulate immigration in an area which is preempted by federal law.

3. Claims and Defenses Typical of the Class

Rule 23(a)(3) requires that "the claims and defenses of the representative parties are typical of the claims on defenses of the class." In this case the representative plaintiffs have claims which affect the members of the class in that their interests are "coextensive with the interests of the entire class." Eisen v. Carlisle and Jacquiline, 391 F. 2d 555, 562-563 (2nd Cir. 1968). See also, Patterson v. General Motors, 10 FEP Cases 921 (N.D. Ill. 1974).

Plaintiffs Doe, Roe, Loe and Boe claim that they have been effectively excluded from public education in Tyler because of the district's policy with respect to undocumented aliens. They further claim to have been singled out for enforcement of this policy because of their Mexican ancestry. Their claims are typical of the claims of all undocumented school-aged district residents of Mexican

ancestry and the relief plaintiffs seek--invalidation of that policy--will substantially benefit the entire class.

4. Fair and Adequate Protection of the Interests of the Class.

Rule 23(a)(4) requires that "the representative party will fairly and adequately protect the interests of the class." Fair and adequate protection of the class members is demonstrated by the representation by competent counsel, vigor in representation of the class members' interest and an absence of collusion or antagonistic interests between the representatives and other class members. Moss v. Lane Co., 50 F.R.D. 122, 126 (W.D. Va. 1970), aff'd. 471 F. 2d 883 (4th Cir. 1973); Johnson v. Georgia Highway Express, Inc., 417 F. 2d 1122 (5th Cir. 1969); Eisen v. Carlisle and Jacqueline, supra. The plaintiffs in this action clearly meet these standards. They are represented by competent counsel and there is absolutely no evidence that this suit is collusive or that their interests are antagonistic to those of other class members.

Plaintiffs' attorneys are qualified and experienced in civil rights litigation in the area of education. Lawyers from the Mexican American Legal Defense and Educational Fund have been and are representing plaintiffs in numerous lawsuits in federal and state courts including Keyes v. School District No. 1, 413 U.S. 189 (1973); United States v. Texas Education Agency, 467 F. 2d 142 (5th Cir. en banc 1972); United States v. Texas Education Agency, E.D. Tex. No. 5281; Serna v. Portales, 499 F. 2d 1147 (10th Cir. 1974); Arvizu v. Waco ISD, 373 F. Supp. 1264 (W.D. Tex. 1973); Alvarado v. El Paso ISD, W.D. Tex. No. EP-70-CA-279 ; Ross v. Eckles, S.D. Tex. No. 10-144 and Mendoza v. Tucson School District No. 1, D. Ariz., No. CIV-74-204 TUC WCF. Roberta Rodkin similarly has an extensive civil rights practice before this and other courts.

B. The Prerequisites of Rule 23(b)(2) Have Been Met.

In addition to meeting the requirements of Rule 23(a), an action to be maintained as a class action must also qualify under one of the subdivisions of Rule 23(b). This action qualifies under Rule 23(b)(2) since:

> [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

This section of Rule 23(b) specifically contemplates civil rights actions such as the instant case. 39 F.R.D. 69, 95, 102 (1966). In this case defendants have acted on grounds specifically applicable to each member of the class--undocumented alien status and Mexican national origin.

III.

SUBSTANTIAL POLICY REASONS EXIST FOR MAINTAINING THIS LAWSUIT AS A CLASS ACTION.

In addition to the provision of Rule 23 itself, there are substantial policy reasons militating in favor of maintaining this action as a class action. Many members of the plaintiffs class, coming from undocumented alien families, are indigent. Most indigent individuals despair of success in the courts, and do not file lawsuits even if they believe they have a valid claim. In just such a situation, "when it is unlikely that individual claimants will file an action, it has been held that class actions are particularly useful." Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970). As Judge Weinstein of the Eastern District of New York has asserted:

> The class action is particularly appropriate where those who have allegedly been injured are in poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately

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expensive - Kalven and Rosenfield, The Contemporary Function of the Class, 8 U. Chi. L. Rev. 684, 686 (1941).

Doglow v. Anderson, 43 F.R.D. 472, 485 (E.D. N.Y. 1968).

In this case, not only the indigent condition of many of the class members, but their status as undocumented aliens, decreases the likelihood that they will bring individual actions to enforce their rights. The same factors which prompted the named plaintiffs to sue under pseudonyms and seek the protective order of this court, operate to prevent class members from coming forward publicly and filing actions in their own names. As undocumented aliens, these class members are members of a politically powerless group in need of special protection.

IV.

CONCLUSION

For the reasons discussed above, plaintiffs' motion that this action should be maintained as a class action on behalf of undocumented school-aged residents of the Tyler ISD who are of Mexican origin should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linda Hanten, hereby certify that a true and correct copy of the foregoing has been mailed in a United States Postal Box, postage prepaid in San Francisco, California on this 30th day of September, 1977 to Ms. Suzan Cardwell, Assistant Attorney General of Texas, Supreme Court Building, P.O. Box 12548, Austin, TX 78711. And a copy was also sent to Mr. John C. Hardy, 200 Peoples National Bank, South, Tyler, TX.

Linda Hanten

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