STATE OF HAWAIʻI
BOARD OF EDUCATION

LIMA NOʻEAU CAREER ACADEMY, Appellant v. STATE PUBLIC CHARTER SCHOOL COMMISSION, Appellee.	APPEAL NO. 20-01 FINAL DECISION OF THE BOARD OF EDUCATION

FINAL DECISION OF THE BOARD OF EDUCATION

I. INTRODUCTION

This appeal is brought before the State of Hawaii Board of Education (the "**Board**") as a proceeding pursuant to Hawaii Revised Statutes ("**HRS**") §302D-15 and Hawaii Administrative Rules ("**HAR**") Title 8, Chapter 510, wherein Lima Noʻeau Career Academy (the "**Appellant**" or "**LNCA**") requested an appellate review of the State Public Charter School Commission's (the "**Appellee**" or the "**Commission**") alleged denial of the Appellant's charter application.

II. PROCEDURAL HISTORY

A. Request for Appeal

On July 1, 2020, the Board received a letter from LNCA requesting an appeal before the Board, citing HAR §8-505-5(c), for an alleged denial of its charter application.

On July 20, 2020, Board Chairperson Catherine Payne sent a letter to LNCA and the Commission explaining that HAR §8-505-5(c) is under the jurisdiction of the Commission and that it is HAR Title 8, Chapter 510 governs the Board's charter school appeals procedures. Chairperson Payne's letter noted that the Board had not received "the entire record relating to the decision being appealed" from the Commission, pursuant to HAR §8-510-6, nor had the Board received "an opening brief" from LNCA, pursuant to HAR §8-510-7.

On July 24, 2020, the Commission sent a letter to Chairperson Payne asserting, "[T]here can be no appeal to the [Board], as there was no denial of [LNCA's] charter application."

On July 29, 2020, LNCA sent a letter to the Board asserting, "[T]he Commission has denied LNCA's application [and] LNCA is entitled by law to a written notification via mail as

required by the Commission's own administrative rules, HAR §§ 8-510-4, 8-505-5(c)." LNCA's letter contended, "[T]he Commission is acting *ultra vires* and making legal determinations beyond its authority and based on no legal justification." In its letter, LNCA requested the Board either require the Commission to "provide [LNCA] with a written notification of [the Commission's] final decision regarding LNCA" or to "allow LNCA to file its Notice of Appeal with the [Board] without the Commission's written notification of its final decision[.]"

B. Preliminary Findings and Holdings

On August 7, 2020, the Board issued preliminary findings and holdings regarding the request for appeal from LNCA. The Board found that:

(1) The Commission and LNCA disagreed on whether LNCA submitted a charter application and whether the Commission denied a charter application from LNCA;

(2) The Board, as the appellate body, has sole authority to determine whether LNCA's appeal is allowable by law; and

(3) LNCA's ability to file an appeal, pursuant to HAR §8-510-4, was not triggered because the Commission did not mail and LNCA did not receive a notification of denial.

The Board held that:

(1) It is the Board's duty as the final arbitrator, pursuant to HRS §302D-15, to provide a resolution to the procedural stalemate; and

(2) The Board's August 7, 2020 letter would serve in the place of "the notification of the authorizer's decision" required by HAR §8-510-4, provided that the date of receipt is the date of the letter, thereby waiving the requirement that a notification of the Commission's decision trigger LNCA's ability to file an appeal.

Thus, the Board permitted LNCA to file a Notice of Appeal, pursuant to HAR §8-510-5. However, the Board made it clear that the permitting of an appeal did not mean that the Board determined that the Commission denied a charter application from LNCA or that LNCA's appeal is valid. The Board noted that it would address those issues through this appeal.

C. Appellate Briefs and Oral Argument

On August 27, 2020, the Appellant filed a timely Notice of Appeal with the Board.

On September 3, 2020, the Commission transmitted its Record on Appeal to the Board.

On September 4, 2020, the Board received numerous communications from the Appellant and the Commission, including email exchanges between the parties copying the Board, emails directed to the Board, and two letters to the Board from the Appellant. All of these communications related to the transmission or substance of the index of the Record on Appeal as required by HAR §8-510-6. The Board received the first letter from the Appellant at 12:04 p.m. via an email from the Appellant's legal counsel alleging, "The record on appeal was due to [LNCA] and the Board for that matter, by yesterday. We are unaware if the Board received anything, but [LNCA] did not." This letter requested the Board to "compel the Commission to provide [LNCA] with a complete and comprehensive immediately [sic] [.]" By 12:53 p.m., the Commission transmitted the index of the Record on Appeal to the Appellant. The Board received a second letter from the Appellant at 1:36 p.m. alleging "deficiencies in the record provided by the Commission thus far" and "demand[ing] that the Commission be required to produce" several kinds of records as described in the letter that day. The Board declined to exercise its discretion to require amendments to the Record on Appeal, pursuant to HAR §8-2-6, as the Appellant did not sufficiently demonstrate how the exclusion of the described records prejudiced its ability to complete a coherent Opening Brief, particularly because the Appellant could attach any additional relevant record as an exhibit to the Opening Brief.

On September 8, 2020, the Appellant filed a timely Opening Brief with the Board.

On September 17, 2020, the Commission filed a timely Answering Brief with the Board.

On September 25, 2020, at 1:24 a.m., the Appellant filed a Reply Brief with the Board. HAR §8-510-9(a) states, "Within seven days of being served with the authorizer's answering brief, the appellant may, but is not required to, file with the board and serve upon the authorizer a reply brief in response to the answering brief." Pursuant to this rule, the Appellant was required to file the Reply Brief with the Board by September 24, 2020. However, the Board declines to exercise its discretion, pursuant to HAR §8-510-13, to dismiss this appeal for the Appellant's failure to meet the deadline for filing its Reply Brief as the Commission has not asserted, nor does the Board conclude, that this failure has prejudiced the Commission in any way.

The Board determined that oral argument in this appeal was necessary, pursuant to HAR §8-510-10. The Board held virtual oral argument on October 20, 2020, at 1:00 p.m. The Board required the parties to argue, at a minimum, the following issues:

(1) Whether the purpose of the letter of intent, pursuant to HRS §302D-13, is solely to provide notification, or whether it is to provide substantive information for review;

(2) Whether the Commission's "Intent to Apply" acts solely as the letter of intent, or whether it acts as both the letter of intent and part of the charter application;

(3) Whether an authorizer can deny only a "completed" charter application, or whether it is possible for an authorizer to deny a charter application that is not "complete"; and

(4) Whether the intent of HRS §302D-15 is to provide appeal rights for only a party whose "completed" charter application was denied, or whether it is to provide appeal rights for a party whose charter application was denied notwithstanding completeness.

The Board reviewed and deliberated on the appeal at a virtual meeting on October 20, 2020, after oral argument. The members of the Board present at the virtual meeting confirmed the contents of this written decision through email.

D. Issues on Review

Consistent with the requirements of its preliminary findings and holdings, the Board has reviewed the following issues:

(1) Whether the Appellant has standing to file an appeal with the Board regarding the Commission's decision to determine LNCA's Intent to Apply Packet "incomplete";

(2) Whether an appeal from the Appellant regarding the Commission's decision to determine LNCA's Intent to Apply Packet "incomplete" is valid; and

(3) Whether the Commission's decision to determine LNCA's Intent to Apply Packet "incomplete" was appropriate.

In reviewing these issues, the Board determined the Appellant's standing to file this appeal and the validity of this appeal before reviewing the merits of the appeal.

III. FINDINGS OF FACT

The Commission's staff provided a submittal to the Commission's Applications Committee for its February 13, 2020 meeting. The submittal proposed, in part, to make the "Intent to Apply" step in the Commission's 2020 Request for Proposal (hereafter referred to as the "**RFP**") a separate and distinct step in the process designed to screen and qualify prospective applicants before proceeding to the next step of allowing the submission of a full charter application:

> "We propose to make the 'Intent to Apply' step more substantive and strategic, enabling the Commission to use this step to screen and qualify prospective applicants to proceed to the next step: submitting a full application. This qualifying determination will be based on whether the prospective applicant clearly addresses, in its Intent to Apply:
>
> 1) one or more of the Commission's Priority Needs identified in the RFP; and/or
> 2) other significant, documented educational needs in the identified target community.

> . . . Revising the 'Intent to Apply' step in this way will enable the Commission to be more strategic and responsible in focusing its limited resources and public dollars on identified and significant community needs. It will also save applicants who are not aligned with the Commission's Strategic Vision and Plan from the considerable, ultimately wasted expenditure of resources and effort in developing and submitting a full application that does not, at the outset, meet threshold criteria for approval.
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> In the new "Intent to Apply" process, the Commission will invite, or not invite, a prospective applicant to submit a full application based on whether the proposed school clearly addresses one or more of the Commission's Priority Needs and/or other significant, documented educational needs in the targeted community. Accordingly:
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> 1) An 'Intent to Apply' that does not address any of the Commission's Priority Needs or other significant, documented educational needs in Hawaii will not be invited to submit a full application. Those not invited to proceed will be informed why and will have full opportunity to submit a new Intent to Apply in a future application cycle.
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> 2) An 'Intent to Apply' that does address one or more of the Commission's Priority Needs or other significant, documented educational needs will be invited to submit a full application. The application review will focus on the applicant's capacity to implement and deliver the proposed model successfully."

See "Applications Committee Submittal" from S. Thompson to S. Cleary for February 13, 2020 Applications Committee meeting, pages 3-4 (Record on Appeal, PDF pages 16-17).[1]

On March 12, 2020, the Commission's staff presented a draft RFP to the Commission's Applications Committee, which included a section on the Intent to Apply Packet. Thereafter, during the March 27, 2020 meeting of the Commission, the Commission reviewed, in part, a report from the Commission's Applications Committee on the draft 2020 applications cycle and RFP. The Commission approved "the Draft Applications Cycle and Request for Proposal as presented on March 27, 2020 that includes language that the stated dates are subject to change due to the evolving nature of the COVID-19 pandemic, and the changing nature of government-imposed restrictions[.]" *See* Minutes of the March 27, 2020 General Business Meeting, page 3 (Record on Appeal, PDF page 214).

On March 30, 2020, the Commission released the RFP. The RFP includes information about the application process overview and timeline and states, in part, the following:

[1] The same language is used in the submittal to the Commission's Applications Committee for its March 12, 2020 meeting and the submittal to the Commission for its March 27, 2020 meeting. *See* "Applications Committee Submittal" from Y. Lau to S. Cleary for March 12, 2020 Applications Committee meeting, pages 2-3 (Record on Appeal, PDF pages 28-29); *see also* "Applications Committee Submittal" from S. Cleary to J. Kim for March 27, 2020 Commission meeting, pages 2-3 (Record on Appeal, PDF pages 121-122).

April 13, 2020 Noon, Hawaii Standard Time	**Intent to Apply Packets Due** As required by HRS §302D-13(c)(2), applicants are required to submit the intent to apply packet to the Commission. Applicants must meet the requirements defined in HRS §302D-13(b), in order to be eligible to submit a charter application.
April 15, 2020	**Prospective applicants are notified of their eligibility to submit an application** Based on the intent to apply packet that was submitted by the applicant, Commission staff will determine whether the applicant meets the requirements in HRS §302D-13(b) to submit a charter application. Applicants will be notified on their eligibility to proceed with submitting a charter application.

2020 State Public Charter School Commission Request for Proposal, page 14 (Record on Appeal, PDF page 235).

The RFP also included an Intent to Apply Packet form. One of the mandatory components of the Intent to Apply Packet is the submission of "[a] resolution from the Applicant Governing Board approving the execution of the Intent to Apply Packet." *Id.*, page 27 (Record on Appeal, PDF page 248). The Intent to Apply Packet also required a certification of the applicant governing board's resolution approving the execution of the Intent to Apply Packet as follows:

> "**Certification**
> I certify that I have the authority granted by the Applicant Governing Board to submit this application and that all information contained herein is complete and accurate, and that a copy of the governing board resolution approving the execution of the Intent to Apply Packet is attached. I recognize that any misrepresentation could result in disqualification from the application process or revocation after award. The person named as the contact person for the application is so authorized as the primary contact for this application on behalf of the Applicant Governing Board."

Id., page 30 (Record on Appeal, PDF page 251).

LNCA submitted its Intent to Apply Packet by the deadline on April 13, 2020. In its Intent to Apply Packet, LNCA attached a resolution signed by the president of the Applicant Governing Board, Nona Tamanaha, stating, in part:

> "[B]e it Resolved that the Governing Board of Lima No'eau Career Academy authorizes Nona Tamanaha to submit the 2020 Intent to Apply packet to the Hawaii State Public Charter School Commission on or before April 13, 2020. Nona Tamanaha has the approval to sign and submit all the necessary letters, documents, forms, etc. in association with the Governing Board's charter school application to the Hawaii State

> Public Charter School Commission. We the Governing Board of Lima No'eau Career Academy hereby approve and adopt this resolution by Board vote on Thursday, April 9, 2020."

Lima No'eau Career Academy Intent to Apply Packet, page 7 (Record on Appeal, PDF page 318).

Ms. Tamanaha signed the resolution as the "Governing Board President." *Id.* No other members of the applicant governing board signed the resolution. However, LNCA's Intent to Apply Packet included a list of five applicant governing board members, including Ms. Tamanaha. *Id.,* pages 4-5 (Record on Appeal, PDF pages 315-316). Ms. Tamanaha also provided her information as the primary contact for LNCA in the Intent to Apply Packet and signed and certified LNCA's Intent to Apply Packet as the "Application Primary Contact" and "Governing Board President." *Id.*, pages 2, 6 (Record on Appeal, PDF pages 313, 317).

On April 15, 2020 LNCA received a letter from the Commission Interim Executive Director, Yvonne Lau, deeming the Intent to Apply Packet incomplete, stating the "[r]esolution provided does not articulate the stated requirements[.]" Lima No'eau Career Academy notification letter dated April 15, 2020 (Record on Appeal, PDF page 370). LNCA Applicant Governing Board President Nona Tamanaha sent an email to the Commission Applications and Renewal Coordinator, Lauren Endo, on April 15, 2020 requesting a phone call to "clarify what was missing in the resolution[.]" Email dated April 17, 2020 from N. Tamanaha to L. Endo (Opening Brief, Exhibit C). Ms. Endo replied to Ms. Tamanaha on April 17, 2020 regarding the Intent to Apply Packet:

> "As stated in the letter that you received, we noted that the resolution provided does not articulate the stated requirements. The requirement was for a resolution from the applicant governing board approving the execution of the intent to apply packet. The resolution submitted to address this requirement was signed by you. However, since you are also the primary contact for the purposes of the intent to apply packet, the resolution should be signed by someone else on the board to give you the authority to do so."

Email dated April 17, 2020 from L. Endo to N. Tamanaha (Opening Brief, Exhibit C).

On June 25, 2020, the Commission held a meeting to review, in part, the Intent to Apply Packets that the Commission's staff determined were incomplete. Notice of June 25, 2020 Meeting (Record on Appeals, PDF page 521). The Commission's staff submittal for this meeting provided the Commission with summaries of the Intent to Apply Packets, not the actual Intent to Apply Packets. *See* "Submittal for Consideration/Action" from Y. Lau to J. Kim for June 25, 2020 Commission meeting, pages 4-70 (Record on Appeal, PDF pages 453-519). The Commission's staff submittal provides the following reason for providing summaries instead of the actual Intent to Apply Packets:

> "Please note identification of participants submitting an Intent to Apply Packet have been redacted. This is to preserve the integrity of the overall application process where the Commission's first look at the identities of applicants will be at the completeness check which takes place after the applicants have provided a complete intent to apply packet and are invited to submit a full charter school application to the Commission for review and consideration."

Id., page 2 (Record on Appeal, PDF page 451).

The Commission reviewed the Commission's staff decision that LNCA's Intent to Apply Packet was incomplete. *Id.*, pages 68-70 (Record on Appeal, PDF pages 517-519). The summary from the Commission staff stated, "Resolution from applicant [governing board] incomplete. Intent to Apply Packet primary contact signed own resolution. There was no list of [governing board] attendees or indication of vote taken." *Id.*, page 68 (Record on Appeal, PDF page 517). The Commission and its staff discussed LNCA's Intent to Apply Packet:

> "Lau discussed the issue that was primary due to the resolution. She stated there are questions on who the governing board members are and the vote for the resolution.
>
> Commissioner Takabayashi asked if the governing board members are listed in the upper portion. Lau responded it's in other documents but not the resolution itself. Commission Chair Kim asked if they are required to have minutes. Lau responded no but would assume they would have as a normal procedure.
>
> Commissioner D'Olier asked in the instructions where the resolution requirements are. Lau responded that it needs a resolution authorizing the person to sign their behalf. Cleary asked in this case, the governing board chair signed and the list of members are in the packet with the president's name. Lau responded that the issue is that a resolution must stand on its own and in this case unable to discern who the board is. Commissioner Takabayashi discussed examples of resolutions from the Legislature."

Minutes of the June 25, 2020 General Business Meeting, page 13 (Record on Appeal, PDF page 537).

The Commission "affirm[ed] the intent to apply packet #11."[2] *Id.* According to the Appellee, this meant that "the Commission decided that [LNCA's] Intent to Apply Packet was incomplete." *See* Answering Brief, page 18.

[2] Both the Appellant and Appellee have identified "Intent to Apply Packet #11," as labeled in the Commission's submittal from its staff and its minutes, as meaning LNCA's Intent to Apply Packet.

During the Commission's April 23, 2020 meeting, the Commission decided to suspend its 2020 application cycle and RFP. Minutes of the April 23, 2020 General Business Meeting, page 5 (Record on Appeal, PDF page 437). During the oral argument on this appeal on October 20, 2020, the Commission's representative informed the Board that the 2020 application cycle is still currently suspended but not canceled.

IV. STANDARDS OF REVIEW

A. Statutory Interpretation

The Appellee provides a summary of statutory interpretation in the Answering Brief that is applicable to this case, stating:

> "Statutory interpretation is a question of law reviewable *de novo*. *See generally* Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawai'i 184, 193, 159 P.3d 143, 152 (2007). When construing statutes, Hawaii courts are governed by the following rules of statutory construction:
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> > First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, [the court's] sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is [the court's] foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.
> >
> > When there is ambiguity in a statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law."
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> *Id.* at 193–94, 159 P.3d at 152–53.

Answering Brief, page 4.

B. Applicable Law and Authority

According to HRS §302D-15, "the [B]oard shall review an appeal and issue a final decision within sixty calendar days of the filing of the appeal." The Board administers the appeal process in accordance with HAR Title 8, Chapter 510. Upon review of the record, and pursuant to HAR §8-510-11, the Board may affirm the decision of the Commission, remand the case with

instructions for further proceedings, or reverse or modify the decision if the substantial rights of the Appellant may have been prejudiced because the Commission's decision is:

(1) In violation of statutory or regulatory provisions;

(2) In excess of the authority or jurisdiction of the Commission;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

V. DISCUSSION

A. Appellant has Standing

In its Answering Brief, the Appellee essentially admits that the Appellant has standing to file an appeal with the Board:

> "Generally, Hawaii courts use a three-part test to determine whether a plaintiff has standing:
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> (1) whether the plaintiff has suffered "an actual or threatened injury" as a result of the defendant's wrongful conduct;
> (2) whether the injury is fairly traceable to the defendant's actions; and
> (3) whether a favorable decision would likely provide relief for the plaintiff's injury.
>
> *See* Sierra Club v. Hawaii Tourism Authority ex rel. Board of Directors, 100 Hawai'i 242, 250–51, 59 P.3d 877, 885–86 (2002).
>
> The Commission does not assert that [LNCA] lacks standing—the Commission did decide that [LNCA's] Intent to Apply Packet was incomplete."

See Answering Brief, page 19.

The Board agrees with the Appellee's analysis and concludes that the Appellant has standing to file an appeal with the Board regarding the Commission's decision to determine LNCA's Intent to Apply Packet "incomplete."

B. Appeal is Valid

The Board has the "power to decide appeals of decisions by an authorizer to deny the approval of a charter application," pursuant to HRS §302D-15, and statute further provides that "[o]nly a party whose charter application has been denied . . . may initiate an appeal under [HRS §302D-15] for cause." The Appellee contends that a party whose charter application was denied is entitled to seek an appeal before the Board and that the Board can decide on such an appeal only if the charter application was "complete" at the point of denial:

> "As expressly stated in HRS § 302D-13(c)(6), the Commission—as an authorizer—is only statutorily responsible for approving or denying a completed charter application. Thereafter, an applicant whose completed charter application was denied may then seek review by the [Board] of the Commission's decision to deny the (completed) charter application. *See* HRS § 302D-15(a) (the [Board] shall have the power to decide appeals of decisions by an authorizer to deny the approval of a charter application). HRS § 302D-15(a) does not expressly state that the denial of a 'completed' Application can be appealed to the [Board]; however, HRS § 302D-13(c) expressly requires a review and decision by the Commission on a completed Application.
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> Therefore, the denial by the Commission is statutorily premised on a completed Application. And any appeal thereafter is also statutorily premised on the Commission's denial of a completed Application. *See generally* State v. Kamana'o, 118 Hawai'i 210, 218, 188 P.3d 724, 732 (2008) (a canon of statutory construction is that statutes that are *in pari materia* may be construed together—therefore, laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other—what is clear in one statute may be called upon in aid to explain what is doubtful in another); *see also* HRS § 1-16."

Answering Brief, pages 21-22.

However, the Appellee fails to recognize that a "charter application" is not the same as a "completed charter application" even within the confines of HRS §302D-13. The Legislature was selective in the use of both "charter application" and "completed charter application" in HRS §302D-13, demonstrating that it intended the terms to be distinct from each other and did not intend the terms to be interchangeable. For example, HRS §302D-13(c)(4) requires the "timely review of the charter application by the authorizer for completeness," which would be a redundant and unnecessary requirement if "charter application" meant "completed charter application" because a completed charter application would not need to be reviewed for completeness as it is already complete by nature. The same statutory section goes to use the term "*completed* charter application" when referring to the elements of the charter school application process and schedule in HRS §302D-13(c)(3) and (5). As a "charter application" is distinct from a "completed charter application" within HRS §302D-13, when construing HRS §302D-15 together with HRS §302D-13, it is clear the Board must construe these terms as referring to distinct things.

The plain language of HRS §302D-15(a) grants the Board the power to decide appeals of decisions by an authorizer to deny the approval of a charter application, not a completed charter application. As such, it is clear that a party may appeal to the Board when its charter application is denied regardless of the completeness of the charter application.

The Board concludes that the plain language of HRS §302D-15, construed with HRS §302D-13, entitles a party whose charter application was denied to seek an appeal from the Board and empowers the Board to decide on such an appeal irrespective of the completeness of the charter application. Thus, the following must be true for this appeal to be valid:

(1) LNCA must have submitted a charter application; and

(2) The Commission must have denied LNCA's charter application.

As to whether LNCA submitted a charter application, the Appellee contends that the Intent to Apply Packet is not a charter application, arguing that the "Commission decided that [LNCA's] Intent to Apply Packet—not an Application—was incomplete." Answering Brief, page 23. The Appellant contends that the substantive nature of the Intent to Apply Packet establishes it as a charter application, arguing:

> "[The Commission] misinterpret[ed] HRS § 302D[-13](b), which only requires that a 'letter of intent' be submitted. The letter of intent phase is supposed to be a notice requirement only, not a robust application, as stated specifically in HRS § 302D[-13](c)(2), '[t]he submission of a letter of intent to open and operate a start-up charter school.' The letter of intent section is also specifically stated separately from the immediate next subsection, HRS § 302D[-13](c)(3), which states as an additional and separate element of the application process, '[t]he timely submission of a completed charter application. . . . The problem is that the 'intent to apply phase' was actually a robust application, not simply a notice requirement."

Reply Brief, page 2.

The Board agrees with the Appellant that the letter of intent under HRS §302D-13 is simply a notice requirement that is informational only. HRS §302D-13(b) states, in pertinent part, "Any community, [D]epartment [of Education] school, school community council, group of teachers, group of teachers and administrators, or nonprofit organization may submit a letter of intent to an authorizer to form a charter school and establish an applicant governing board. An applicant governing board may develop a charter application pursuant to this section[.]" Thus, an eligible entity (*i.e.*, any community, Department of Education school, school community council, group of teachers, group of teachers and administrators, or nonprofit organization) has the right to (1) submit a letter of intent and (2) establish an applicant governing board. While the right to submit a letter of intent lies with the eligible entity, the right to develop and submit a charter application lies with the applicant governing board.

Further, the charter school application process must include an RFP that "[i]ncludes criteria that will guide the authorizer's decision to approve or deny a charter application," pursuant to HRS §302D-13(c)(1)(C), thereby expressly providing authority to an authorizer to approve or deny a charter application, which must be submitted by an applicant governing board, regardless of completeness as discussed *infra*. However, no express language exists in statute allowing an authorizer to deny an eligible entity's right to submit a letter of intent. If the Legislature intended an authorizer to have the ability to deny an eligible entity's right to submit a letter of intent, the Legislature would have expressly stated so in statute as it has expressly stated that an authorizer has the authority to approve or deny a charter application. Therefore, if an eligible entity has the right to submit a letter of intent, but not a charter application, and if an authorizer has the power to approve or deny a charter application, but not the eligible entity's right to submit a letter of intent, then it logically stands that the intent of the letter of intent under HRS §302D-13 is simply a notice requirement that is informational only.

The Intent to Apply Packet does provide the Commission with notice that an applicant governing board has been established and that it intends to develop and submit a charter application. However, the Intent to Apply Packet, by the Commission's own intentional design, is more than informational. The Commission designed it to be "more substantive and strategic, enabling the Commission to use this step to screen and qualify prospective applicants to proceed to the next step[.]" "Applications Committee Submittal" from S. Thompson to S. Cleary for February 13, 2020 Applications Committee meeting, page 3 (Record on Appeal, PDF page 16), "Applications Committee Submittal" from Y. Lau to S. Cleary for March 12, 2020 Applications Committee meeting, page 2 (Record on Appeal, PDF page 28) and "Applications Committee Submittal" from S. Cleary to J. Kim for March 27, 2020 Commission meeting, page 2 (Record on Appeal, PDF page 121). As discussed *supra*, an applicant governing board has the right to develop and submit a charter application, and an authorizer has the express power to approve or deny a charter application. However, an authorizer does not have the express power to deny an applicant governing board's right to develop and submit a charter application. Again, if the Legislature intended an authorizer to have the ability to deny an applicant governing board's right to submit a charter application, the Legislature would have expressly stated so in statute as it has expressly stated that an authorizer has the authority to approve or deny a charter application.[3] Thus, without the ability to deny the submission of a charter application,

[3] The Appellee attempts to preempt this point by arguing, "The Commission's decision determining the completeness of [LNCA's] Intent to Apply Packet before allowing [LNCA] to submit an Application is an appropriate exercise of its implied powers based upon the statutory authority under [HRS] Chapter 302D for the Commission to develop the application process for new start-up charter school applicants. *See generally* Capua v. Weyerhaeuser, 117 Hawai'i 439, 446, 184 P.3d 191, 198 (2008) (it is well-established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted). In Capua, the Court explained the policy for such implied powers:

> The reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency.

any information that an authorizer requires as part of its charter school application process that it can review and act on must be considered part of the charter application. The Commission's RFP acknowledges this by including the Intent to Apply Packet as the first "element of the application" that is evaluated by the evaluation team. *See* 2020 State Public Charter School Commission Request for Proposal, page 17 (Record on Appeal, PDF page 238).

The Board concludes that the Commission's Intent to Apply Packet acts as both the letter of intent and as a part of the charter application. Therefore, the Commission's determination of the Appellant's Intent to Apply Packet as incomplete was essentially a determination that the Appellant's charter application was incomplete.

As to whether the Commission denied LNCA's charter application, the Appellee contends that "the denial by the Commission is statutorily premised on a completed Application," as noted *supra*, and further contends that "HRS Chapter 302D does not allow the [Board] to review the completeness of the Application[.]" *See* Answering Brief, pages 22, 23. As discussed *supra*, the validity of an appeal of a decision to deny a charter application is not premised on the completeness of the charter application. The relevant issues, then, are (1) whether statute allows an authorizer to deny a charter application that is not complete and (2) whether the Commission's determination that a charter application is incomplete is a denial of that charter application.

As to whether statute allows an authorizer to deny a charter application that is not complete, statute explicitly states that the authorizer must have a process element where the authorizer approves or denies a complete charter application. The Appellee argues, "As expressly stated in HRS § 302D-13(c)(6), the Commission—as an authorizer—is only statutorily responsible for approving or denying a completed charter application." *Id.*, page 21. However, because the responsibility for approving or denying a completed charter application is a minimum requirement, HRS §302D-13(c)(6) does not describe it as the only instance in which an authorizer can deny a charter application. While the Board agrees an authorizer must either approve or deny a completed charter application, HRS §302D-13(c)(6) does not imply that an authorizer is prohibited from denying incomplete charter applications. In fact, HRS §302D-13(c)(1)(C) establishes another minimum element that an authorizer must include in its charter school application process by requiring the authorizer's RFP to "[include] criteria that will guide the authorizer's decision to approve or deny a charter application[.]" As discussed *supra*, a "charter application" is distinct from a "completed charter application." Thus, statute implies that it is possible for an authorizer to deny a charter application that is incomplete, but the authorizer must provide the criteria that it will use to guide its decision.

Capua, 117 Hawai'i at 446, 184 P.3d at 198." *See* Answering Brief, pages 23-24. The Board disagrees that preventing an applicant governing board from submitting a charter application is an implied power of an authorizer, as it is not "reasonably necessary to carry out the powers expressly granted" or "incidental to carrying out the duties and responsibilities of the [authorizer]." Pursuant to HRS §302D-5(a), "[s]oliciting and evaluating charter applications" is the first essential power and duty of an authorizer. Refusing to accept a charter application from an applicant governing board, for any reason, does not aid in the carrying out of this power and duty but avoids it.

Understanding that statute allows an authorizer to deny a charter application that is incomplete, the question as to whether the Commission's determination that a charter application is incomplete is a denial of that charter application becomes largely a matter of semantics. The intent of HRS §302D-15 is to provide an avenue to seek relief for any "party whose charter application has been denied" through an appeal to the Board. An authorizer cannot prevent that right through administrative loopholes. If an authorizer ejects a charter application from an application cycle for any reason, including deeming the charter application "incomplete," that is a *de facto* denial of the charter application. Statute does not require the Commission to deny an incomplete charter application. For example, the Commission could allow an applicant governing board additional time to provide the information necessary for a complete charter application. The Commission has instead opted to reject incomplete charter applications, as is its right as an implied power of an authorizer to establish its own charter school application process. *See* Footnote 3 for the Appellee's own explanation of implied powers. Consequently, the Commission's process results in denied, incomplete charter applications whose applicant governing boards may file appeals with the Board. The Commission denied an incomplete charter application by preventing it from moving forward in the process, which essentially ejected it from the application cycle.

Based on the foregoing, LNCA submitted a charter application through its Intent to Apply Packet, and the Commission's ejection of LNCA's charter application from the application cycle was a *de facto* denial of LNCA's charter application. Therefore, the Board concludes that the Appellant's appeal is valid.[4] The Board further concludes that the Commission must issue notifications of denial to all applicant governing boards whose Intent to Apply Packets the Commission denies (*de facto* or otherwise) in the current application cycle in accordance with HAR Section 8-505-5(c), including the "a statement that the applicant may file an appeal with the [B]oard within twenty-one calendar days of receipt of the written notification of denial."

C. Commission Erred in Denying Appellant's Charter Application

The Commission found the Appellant's Intent to Apply Packet incomplete, effectively denying the Appellant's charter application, essentially because of who did or did not sign the resolution from the applicant governing board approving the execution of the Intent to Apply Packet. The Commission's two fundamental arguments as to why the resolution was improper are (1) the resolution is a legal instrument that was improperly executed by the agent rather than the principal, and (2) the resolution "lacked unequivocal evidence that the Applicant

[4] The Board disagrees that allowing this and similar appeals "will obstruct the statutory responsibilities of the Commission[.]" *See* Answering Brief, page 27. On the contrary, the Board would be obstructing statutory appeal rights if it did not accept this appeal. Indeed, this case is evidence that the risk of the Commission skirting its statutory responsibilities is higher than the risk of the Board overstepping its authority and interfering with the Commission's statutory responsibilities. Had the Commission abided by the letter and spirit of the law and its own written processes and procedures, the Board would be affirming the Commission's decision in this case. Instead, the Board is left setting precedents that could have been avoided if the Commission and its staff had not pursued contrived technical errors that come across as an attempt to circumvent its responsibility to evaluate charter applications.

Governing Board authorized the action" because it was not signed by the applicant governing board or an acceptable proxy. *See* Answering Brief, page 25.

Regarding why the resolution is an improperly executed legal instrument, the Commission contends, "The Resolution is the legal instrument or document establishing the delegated authority from the Applicant Governing Board to its designated lead contact or agent. It is inappropriate having the designated lead contact/agent execute the Resolution establishing the designated lead contact/agent's delegated authority. … Under general agency law, the President was the agent and the Applicant Governing Board was the principal. Fundamentally, the purported agent cannot execute the legal instrument or document—the Resolution—that purportedly established the agent's delegated authority." Id, pages 10, 26.

The Board disagrees on the fundamental premise of this argument that the resolution is a "legal instrument." As discussed *infra*, the resolution is an expression of the will of the applicant governing board. It is not, however, a "legal instrument," and none of the legal citations within the Appellee's Answering Brief imply as much. While it may be the opinion of the Commission's legal counsel that "[i]t is inappropriate having the designated lead contact/agent execute the Resolution establishing the designated lead contact/agent's delegated authority," that is not a requirement adopted by the Commission and communicated to prospective applicants through the RFP. In this matter, the Board agrees with the Appellant that the Appellee "has tried its best to grasp at straws asserting a lot of irrelevant information with regard to … agency/principle legalese[.]" *See* Reply Brief, page 9.

As to the Appellee's second fundamental argument regarding why the resolution was improper, although not entirely clear in the Answering Brief, the Appellee appears to argue that the resolution lacked evidence that the Appellant's applicant governing board approved it because other members of the board besides the board president did not sign the resolution. The Appellee attempts to explain why the lack of the proper signatures is significant:

> "[T]he sine qua non or essential element of a Resolution is the voting by the members of the Applicant Governing Board and execution by the members of the Applicant Governing Board would unequivocally establish evidence of that voting authorizing the action. *See generally* Colorado Common Cause v. Coffman, 85 P.3d 551, 555 (Colo.App. 2003) (a resolution is a formal expression of the opinion or will of an official body or public assembly, adopted by vote; as a legislative resolution—therefore, a resolution generally requires action by a voting body) (citing Black's Law Dictionary 1178 (5th ed. 1979)); Public Opinion v. Chambersburg Area School Dist., 654 A.2d 284, 287–88 (Pa.Cmwlth. 1995) (the common and approved usage of the term Resolution is a formal expression of the opinion or will of an official body adopted by vote; as a legislative resolution—in other words, a Resolution is a proposal pertaining to some matter that is presented to an official body for consideration and, if adopted by vote, becomes the formal expression of the opinion or will of the official body on that matter) (citing Black's Law Dictionary 1178 (5th ed. 1979))."

See Answering Brief, pages 24-25.

The Appellant asserts, "[T]he Commission actually has interpreted the requirement that there be a 'resolution from the Applicant Governing Board approving the execution of the Intent to Apply Packet' to mean something unwritten and unsubstantiated by law or legal precedent[.]" Reply Brief, page 4. The Board agrees. The Appellee fails to acknowledge that it is neither standard practice nor implied through any of the legal citations in the Answering Brief that a resolution adopted through a vote by a body is valid only if signed by all or specific members of that body or even signed at all. In fact, only the chairperson signs the Board's own resolutions. If a resolution must be adopted by a vote of the board in order to communicate the will of the board, then a signature of a single board member (whether it is the president or another member) does not "execute" or make the resolution valid. It is the affirmative vote of the board that makes the resolution valid, and that vote is typically (but not universally) captured by meeting minutes, as was the case with LNCA's resolution. Therefore, it is unreasonable for the Commission to expect the required resolution to be signed by all or specific members of the applicant governing board without expressly stating it in the RFP. If the Commission needs "unequivocal evidence" that the applicant governing board has authorized the action expressed through the resolution, then the Commission should formally adopt a specific requirement to address this need and communicate the requirement through its RFP. Statute requires the Commission's RFP to "[state] clear, appropriately detailed questions," pursuant to HRS §302D-13(c)(1)(D), yet the Commission's resolution requirement is ambiguous. The fault of this ambiguity lies with the Commission, not the Appellant.

The Board has trouble understanding why the Commission's staff felt compelled to interpret the resolution requirement in the way they did. The justification the Commission's staff offered to the Commission's board for changing the Intent to Apply phase of the application process, a change the Commission approved, was to "[address] one or more of the Commission's Priority Needs and/or other significant, documented educational needs in the targeted community." "Applications Committee Submittal" from S. Thompson to S. Cleary for February 13, 2020 Applications Committee meeting, page 3 (Record on Appeal, PDF page 16), "Applications Committee Submittal" from Y. Lau to S. Cleary for March 12, 2020 Applications Committee meeting, page 3 (Record on Appeal, PDF page 29) and "Applications Committee Submittal" from S. Cleary to J. Kim for March 27, 2020 Commission meeting, page 3 (Record on Appeal, PDF page 122). The record does not indicate that the Commission approved the change in the application process as a means to expel applicants from the application cycle for technical errors or omissions (especially fabricated ones) that have nothing to do with the quality of the applicant or whether the applicant can meet the Commission's priorities. The Commission's intent behind the revised Intent to Apply phase and the staff's execution of it do not align, which is further evidence that the Commission's staff abused their Commission-authorized discretion. The record indicates that the Commission's board affirmed the staff's decision to deny the Appellant's charter application without reviewing the actual Intent to Apply Packet, only information filtered by the Commission's staff under the guise of "preserv[ing] the integrity of the overall application process[.]" *See* "Submittal for Consideration/Action" from Y. Lau to J. Kim for June 25, 2020 Commission meeting, page 2 (Record on Appeal, PDF page

451). The evidence suggests that the Commission's board either delegated too much power to its staff, lacked oversight of its staff, or both.

VI. CONCLUSIONS OF LAW

The Commission erred in its finding that the Intent to Apply Packet was not a charter application.

The Commission erred in its finding that preventing an "incomplete" charter application from proceeding through the rest of the application process, effectively ejecting the charter application from the application cycle, was not a denial of a charter application.

The Commission erred in denying the Appellant's charter application, as the Commission's staff based their decision on an arbitrary and capricious interpretation of the requirement for a resolution from the applicant governing board approving the execution of the Intent to Apply Packet, which the Commission's board later affirmed. This arbitrary and capricious interpretation was an abuse and clearly unwarranted exercise of the discretion provided to the Commission's staff by the Commission's board in the staff's review of the Appellant's Intent to Apply Packet.

Accordingly, the Board, after reviewing the evidence of record and by unanimous vote of its members who were present and voting (Chairperson Catherine Payne, Kaimana Barcarse, Margaret Cox, Lynn Fallin, Dwight Takeno, Bruce Voss), remands the Commission's decision denying the Appellant's charter application with the following instructions for further proceedings:

INSTRUCTIONS

1. The Commission shall reconsider, by November 30, 2020, all Intent to Apply Packets (*i.e.*, charter applications) that it denied for its 2020 application cycle—including LNCA's Intent to Apply Packet—and make a decision on each charter application to either allow that charter application to move forward in the 2020 application cycle upon resumption of the application cycle or to deny the charter application. If the Commission denies an Intent to Apply Packet after reconsideration, the Commission shall issue a notification of denial to the respective applicant governing board in accordance with HAR §8-505-5(c);

2. Due to the ambiguity of the Commission's RFP, the Commission shall deem a resolution that is clearly or implicitly identified as being from the application governing board (regardless of whether the resolution is signed or who signs it) and that plainly states approval for the execution of the applicant governing board's Intent to Apply Packet as having met the "resolution from the Applicant Governing Board approving the execution of the Intent to Apply Packet" requirement for the Commission's 2020 application cycle; and

3. The Commission shall consider the rejection of any charter application for any reason, including determinations of incompleteness, in the Commission's 2020 application cycle and future application cycles as a denial of that charter application. The Commission shall subsequently follow its administrative rules and provide notification to the respective applicant governing board of the denial, including a statement that the applicant governing board may file an appeal with the Board within 21 calendar days of receipt of the written notification of denial.

Honolulu, Hawaii, this 27th day of October 2020.

BOARD OF EDUCATION

Catherine Payne, Chairperson