



STATE OF HAWAII
BOARD OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

January 19, 2016

TO: Lance Mizumoto
Chairperson, Board of Education

FROM: Jim Williams
Member, Board of Education

AGENDA ITEM: Board Action on designation of Board members to an investigative committee (a permitted interaction group pursuant to Hawaii Revised Statutes Section 92-2.5(b)), concerning Board responsibilities under Hawaii Revised Statutes Section 302D-11, Oversight of public charter school authorizers and review of proposed charter school legislation

I. Background

At its December 1, 2015 meeting, the Student Achievement Committee ("SAC") discussed the Board of Education's ("Board") responsibilities related to the State Public Charter School Commission ("Commission") and public charter schools, including Board oversight and evaluation of the Commission and the establishment of administrative rules related to approval of additional charter school authorizers. The investigative committee I am proposing directly relates to the Board's oversight responsibilities of the Commission and a review of proposed legislation that may affect the Board's other responsibilities related to charter schools and charter school authorizers.

II. Oversight of Public Charter School Authorizers

Hawaii Revised Statutes ("HRS") Section 302D-11(c) states, "Persistently unsatisfactory performance of an authorizer's portfolio of public charter schools, a pattern of well-founded complaints about the authorizer or its public charter schools, or other objective circumstances may trigger a special review by the [B]oard. In reviewing or evaluating the performance of authorizers the [B]oard shall apply nationally recognized principles and standards for quality charter authorizing. If at any time the [B]oard finds that an authorizer is not in compliance with an existing charter contract, its authorizing contract with the [B]oard, or the requirements of all authorizers under [HRS Chapter 302D], the [B]oard shall notify the authorizer in writing of the identified problems, and the authorizer shall have reasonable opportunity to respond to and remedy the problems."

During the December 1, 2015 SAC meeting, I noted that several Board members, including myself, have been conducting a listening tour to hear the concerns and feedback from charter school governing board members, directors, and staff regarding the Commission and the possibility of multiple charter school authorizers. The listening tour is the result of a series of informal complaints from charter school leaders over the course of several years and concluded on December 3, 2015. The comments from attendees are of significant breadth and depth and suggest there may be a pattern of well-founded complaints about the Commission, thus warranting a more formal investigation by the Board. (Note: For a more detailed report on the listening tour, please see my memorandum relating to the “Report on the 2015 Charter School Listening Tour” agenda item also dated January 19, 2016.)

Therefore, I recommend that the Board establish an investigative committee to determine if a special review of the Commission’s performance is appropriate. If the investigative committee determines that a special review is warranted, I also recommend that the investigative committee develop the process and procedures for such a review that apply nationally recognized principles and standards for quality charter authorizing, pursuant to HRS Section 302D-11(c).

III. Review of Proposed Charter School Legislation

During the listening tour, some charter school leaders asked if the Board would consider supporting a pair of legislative proposals relating to charter schools. Taffi Wise of Kanu o ka ‘Āina New Century Public Charter School sent me two legislative proposals, drafted by the Office of Hawaiian Affairs, for the Board’s consideration.

The first legislative proposal, attached as **Exhibit A**, would allow charter schools employ or retain legal counsel other than the Attorney General for purposes of charter contract negotiation, charter contract revocation, or charter contract nonrenewal processes. As state entities, the Department of the Attorney General serves as legal counsel for charter schools, and charter schools currently may not employ other legal counsel without approval from the Governor, pursuant to HRS Section 28-8.3.

The second legislative proposal, attached as **Exhibit B**, would require the Board to establish by December 1, 2016, the annual application and approval process for eligible entities to apply for chartering authority to become new charter school authorizers. Pursuant to HRS Section 302D-4, the Board is currently required to establish the annual application and approval process through administrative rules. At the Board’s December 1, 2015 General Business Meeting, Board Executive Director Alison Kunishige mentioned the Board will begin the process of promulgating administrative rules for multiple authorizers. This legislative proposal would not require the Board to establish the application and approval process through administrative rules but rather through meetings held in accordance with Sunshine Law, HRS Chapter 92.

As the request to consider these legislative proposals stems from the charter school listening tour and relates to the Board’s responsibilities regarding charter schools and authorizers, I recommend that the investigative committee also review the attached legislative proposals and develop a recommendation to the Board of whether to formally support them through written testimony to the Legislature.

IV. Conclusion

To summarize, I recommend that the Board establish an investigative committee in accordance with HRS Section 92-2.5(b) to:

1. Determine if a special review of the Commission is warranted and, if so, develop the process and procedures for such a review that apply nationally recognized principles and standards for quality charter authorizing, pursuant to HRS Section 302D-11(c); and
2. Review the attached legislative proposals and develop a recommendation to the Board of whether to formally support them through written testimony to the Legislature.

Therefore, I propose the following motion to the Board:

“Moved to designate Board Members Jim Williams (chair of committee), Brian De Lima, Hubert Minn, and Amy Asselbaye to an investigative committee to 1) determine if a special review of the State Public Charter School Commission is warranted and, if so, develop the process and procedures for such a review that apply nationally recognized principles and standards for quality charter authorizing, pursuant to Hawaii Revised Statutes Section 302D-11(c); and 2) review the legislative proposals, as attached in Board Member Jim William’s memorandum dated January 19, 2016, and develop a recommendation to the Board of whether to formally support them through written testimony to the Legislature.”

Exhibit A

Legislative proposal relating to the employment of legal counsel by charter schools for the purposes of charter contract negotiation, charter contract revocation, or charter contract nonrenewal process

A BILL FOR AN ACT

RELATING TO THE EMPLOYMENT OF ATTORNEYS BY PUBLIC CHARTER SCHOOLS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that, since 1994,
2 Hawaii's public charter schools have provided parents, their
3 children, and communities with innovative and meaningful
4 alternatives to public education. Charter schools currently
5 serve over 10,000 students, representing 5% of Hawaii's public
6 school children, in thirty four schools throughout the islands.

7 Hawaii's charter schools offer parents and children a
8 diverse array of educational approaches, including online
9 virtual education schools; programs that emphasize science and
10 technology; Hawaiian language immersion schools where
11 instruction is delivered in 'Ōlelo Hawai'i; Hawaiian-focused
12 schools with curricula founded on the Hawaiian culture and
13 language; and schools dedicated to the mainstreaming of special
14 needs students.

15 Pursuant to Act 130 of the 2012 legislative session,
16 charter schools are now authorized by the public charter school
17 commission, with continued oversight maintained by the board of

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1 education. Act 130 requires each charter school to operate under
2 fixed-term, bilateral, renewable contracts with the commission;
3 these contracts are intended to outline the roles, powers,
4 responsibilities, and performance expectations for each party.
5 Current contracts are scheduled to terminate in June 2017, and
6 the charter school commission is now preparing to negotiate with
7 charter school governing boards on the substantive provisions of
8 the next round of charter contracts.

9 Bilateral contract negotiations, by their nature, often
10 require sophisticated legal counsel for both parties, in order
11 to ensure that each side fully understands the legal obligations
12 they are agreeing to undertake. Legal assistance may be
13 particularly important in the charter school contract
14 negotiation process, insofar as non-compliance with contract
15 terms may lead to charter revocation or charter non-renewal,
16 carrying serious consequences for charter school parents,
17 students, and staff, and serious legal and financial
18 consequences for charter school non-profit arms and funders.
19 However, charter schools have not been provided legal counsel
20 and representation by the department of the attorney general in
21 the current charter contract negotiation process, and currently-
22 authorized schools are prohibited by statute from retaining
23 their own independent legal counsel. The legislature finds that

1 it is critical that charter schools and their governing boards
2 are allowed meaningful access to legal counsel, to provide
3 crucial assistance in the development and negotiation of charter
4 contracts.

5 The purpose of this bill is to specifically exempt public
6 charter schools and their governing boards from the statutory
7 prohibition on retaining outside counsel, and thereby allow them
8 to contract with and retain independent legal counsel in the
9 charter contract negotiation, charter revocation, and charter
10 nonrenewal processes.

11 SECTION 2. Section 28-8.3, Hawai'i Revised Statutes, is
12 amended by amending subsection (a) to read as follows:

13 "(a) No department of the State other than the attorney
14 general may employ or retain any attorney, by contract or
15 otherwise, for the purpose of representing the State or the
16 department in any litigation, rendering legal counsel to the
17 department, or drafting legal documents for the department;
18 provided that the foregoing provision shall not apply to the
19 employment or retention of attorneys:

20 (1) By the public utilities commission, the labor and
21 industrial relations appeals board, and the Hawaii
22 labor relations board;

- 1 (2) By any court or judicial or legislative office of the
2 State; provided that if the attorney general is
3 requested to provide representation to a court or
4 judicial office by the chief justice or the chief
5 justice's designee, or to a legislative office by the
6 speaker of the house of representatives and the
7 president of the senate jointly, and the attorney
8 general declines to provide such representation on the
9 grounds of conflict of interest, the attorney general
10 shall retain an attorney for the court, judicial, or
11 legislative office, subject to approval by the court,
12 judicial, or legislative office;
- 13 (3) By the legislative reference bureau;
- 14 (4) By any compilation commission that may be constituted
15 from time to time;
- 16 (5) By the real estate commission for any action involving
17 the real estate recovery fund;
- 18 (6) By the contractors license board for any action
19 involving the contractors recovery fund;
- 20 (7) By the office of Hawaiian affairs;
- 21 (8) By the department of commerce and consumer affairs for
22 the enforcement of violations of chapters 480 and
23 485A;

- 1 (9) As grand jury counsel;
- 2 (10) By the Hawaii health systems corporation, or its
- 3 regional system boards, or any of their facilities;
- 4 (11) By the auditor;
- 5 (12) By the office of ombudsman;
- 6 (13) By the insurance division;
- 7 (14) By the University of Hawaii;
- 8 (15) By the Kahoolawe island reserve commission;
- 9 (16) By the division of consumer advocacy;
- 10 (17) By the office of elections;
- 11 (18) By the campaign spending commission;
- 12 (19) By the Hawaii tourism authority, as provided in
- 13 section 201B-2.5;
- 14 (20) By the division of financial institutions for any
- 15 action involving the mortgage loan recovery fund;
- 16 (21) By the office of information practices; [~~or~~]
- 17 (22) By public charter schools as defined in section 302D-
- 18 1, for any action involving the charter contract
- 19 negotiation, charter revocation, or charter nonrenewal
- 20 processes; or
- 21 (23) By a department, if the attorney general, for reasons
- 22 deemed by the attorney general to be good and
- 23 sufficient, declines to employ or retain an attorney

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1 for a department; provided that the governor waives
2 the provision of this section.”

3 SECTION 3. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 4. This Act shall take effect upon its approval.

INTRODUCED BY: _____

By Request

DRAFT

Exhibit B

Legislative proposal relating to the establishment of an annual application and process for new charter school authorizers

A BILL FOR AN ACT

RELATING TO PUBLIC CHARTER SCHOOL AUTHORIZERS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The country's first charter school law was
2 enacted by Minnesota in 1991, to allow teachers and educators to
3 explore alternative, results-oriented, and student-centered
4 educational approaches without the restrictions of most state
5 and local laws and regulations. Hawai'i's first alternative-
6 model schools, Wai'alaie Elementary and Lanikai Elementary, were
7 established pursuant to Act 272 of the 1994 legislature, which
8 created an opportunity for existing department of education
9 schools to convert to "student centered" schools. In 1999, the
10 legislature enacted Act 62, which allowed new and existing
11 department of education public schools to be established as "new
12 century" public charter schools, with the goal of dramatically
13 improving the State's educational standards for the twenty-first
14 century. The 1999 legislature concluded that as long as a
15 public charter school complies with the requirements that it be
16 free for all attending students, that its admissions policy be
17 nondiscriminatory, and that it meets statewide performance
18 standards, it should be able to make decisions relating to the

1 provision of educational services free from other statutory and
2 regulatory requirements. Thus, Act 62 nurtured the ideal of
3 more autonomous and flexible decision-making at the school
4 level, and sought to explore alternative frameworks regarding
5 curriculum, facilities management, instructional methods, and
6 personnel management.

7 Under Act 62, new century charter schools would be governed
8 by individual school boards accountable to the board of
9 education. Charter schools that did not meet student
10 performance standards or were not fiscally responsible had two
11 years to improve, or face closure by a two-thirds majority vote
12 of the board of education. Notably, all funds generated by
13 individual school boards, which were not from supplementary
14 grants, were deemed separate and apart from allotted public
15 funds and could be expended at the discretion of the individual
16 school boards. New century charter schools were also exempted
17 from all applicable state laws except laws regarding collective
18 bargaining and discriminatory practices.

19 After several revisions, Hawai'i's charter school laws were
20 last reorganized by Act 130 of the 2012 legislature, an omnibus
21 bill based on recommendations developed by the task force on
22 charter school governance, accountability and authority. Among
23 other provisions, Act 130 replaced the charter school review

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1 panel with the state public charter school commission as the
2 authorizer of public charter schools, to review charter school
3 applications and negotiate and approve performance-based charter
4 contracts that ensure accountability in academic, financial, and
5 organizational outcomes for each school.

6 Act 130 also expressly provided for the establishment of
7 additional authorizers, a first in Hawai'i's charter school
8 history. This was consistent with specific recommendations made
9 by the National Association of Charter School Authorizers
10 (NACSA), which had warned against relying too long upon only a
11 single charter school authorizer.

12 According to NACSA, a single authorizer may have a tendency
13 to create unnecessarily bureaucratic and overly burdensome
14 regulations over time, particularly as more charter schools are
15 established and overseen by the authorizer. Such regulations
16 and requirements may eventually result in the loss of charter
17 schools' intended freedom to be innovative in their development
18 of class curricula, instructional practices, and school
19 administrative approaches. Additional authorizers would provide
20 a check against the development of overly burdensome and
21 bureaucratic requirements, by giving charter schools more
22 individualized oversight, as well as the option to seek charter
23 approval or renewal from alternative regulatory entities.

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1 Accordingly, NACSA specifically recommended that an additional
2 authorizer for Hawai'i charter schools be established by July
3 2013.

4 Notwithstanding NACSA's specific recommendation for Hawai'i,
5 the state public charter school commission remains the state's
6 sole public charter school authorizer. As such, the commission
7 must now oversee thirty four public charter schools - over twice
8 the maximum number generally recommended by NACSA - as well as
9 review and decide upon all new charter school applications.
10 Despite the statutory rulemaking authority granted by Act 130,
11 the board of education has still not begun the comprehensive
12 rulemaking process necessary for the creation of an additional
13 charter school authorizer. Given that four years have passed
14 with no such movement by the board of education, legislative
15 action appears necessary to facilitate the establishment of
16 additional charter school authorizers.

17 The purpose of this Act is to require the board of
18 education, by December 1, 2016, to establish the annual
19 application and approval process and the policies, criteria, or
20 guidelines for evaluating applications for chartering authority,
21 via board action at a publicly noticed hearing held in
22 accordance with chapter 92 and in lieu of the chapter 91
23 rulemaking process, and to require the board of education to

1 report on the status of its policies, criteria or guidelines for
2 evaluating chartering authority applications to the 2017
3 legislature.

4 SECTION 2. Section 302D-4, Hawaii Revised Statutes, is
5 amended to read as follows:

6 **"§302D-4 Chartering authority application for eligible**
7 **entities.** (a) The commission created under section 302D-3 may
8 authorize public charter schools anywhere in the State.

9 (b) Governing boards of accredited public and private
10 postsecondary institutions, including community colleges,
11 technical colleges, and four-year universities may apply to the
12 board, pursuant to this section, for statewide, regional, or
13 local chartering authority, in accordance with each
14 institution's regular operating jurisdiction.

15 (c) A county or state agency may apply to the board,
16 pursuant to this section, for chartering authority.

17 (d) Governing boards of non-profit or charitable
18 organizations, which are exempt from federal taxes under section
19 501(c)(3) or 501(c)(6) of the Internal Revenue Code, may apply
20 to the board, and may be granted statewide chartering
21 authority. Nonpublic sectarian or religious organizations and
22 any other charitable organization which in their federal
23 Internal Revenue Service Form 1023, Part IV, describe activities

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1 indicating a religious purpose, are not eligible to apply to
2 become an authorizer under this chapter.

3 (e) ~~[The]~~ By December 1, 2016, the board shall establish
4 ~~[through administrative rules,]~~ the annual application and
5 approval process for all entities eligible to apply for
6 chartering authority pursuant to this section~~[- provided that~~
7 ~~the board shall not approve any application for chartering~~
8 ~~authority until July 1, 2014, or until the board adopts rules,~~
9 ~~whichever is later.],~~ and the policies, criteria, or guidelines
10 for evaluating applications for chartering authority. By June 30
11 of each year, the board shall make available information and
12 guidelines for all eligible entities concerning the opportunity
13 to apply for chartering authority under this chapter.
14 Notwithstanding the public notice and hearing requirements of
15 chapter 91, the annual application and approval process, and the
16 policies, criteria, or guidelines for evaluating applications
17 for chartering authority, shall be established and may be
18 amended from time to time by a majority vote of the board at a
19 meeting held in accordance with chapter 92. The application
20 process shall require each interested eligible entity to submit
21 an application that clearly explains or presents the following
22 elements:

- 1 (1) Written notification of intent to serve as an
2 authorizer in accordance with this chapter;
- 3 (2) The applicant entity's strategic vision for
4 chartering;
- 5 (3) A plan to support the vision presented, including
6 explanation and evidence of the applicant entity's
7 budget and personnel capacity and commitment to
8 execute the responsibilities of quality charter
9 authorizing, in accordance with this chapter;
- 10 (4) A draft or preliminary outline of the request for
11 proposals that the applicant entity, if approved as an
12 authorizer, would issue to solicit public charter
13 school applicants;
- 14 (5) A draft of the performance framework that the
15 applicant entity, if approved as an authorizer, would
16 use to guide the establishment of a charter contract
17 and for ongoing oversight and evaluation of public
18 charter schools, consistent with the requirements of
19 this chapter;
- 20 (6) A draft of the applicant entity's renewal, revocation,
21 and nonrenewal processes, consistent with section
22 302D-18;

1 (7) A statement of assurance that the applicant entity
2 seeks to serve as an authorizer in fulfillment of the
3 expectations, spirit, and intent of this chapter, and
4 that if approved as an authorizer, the entity will
5 fully participate in any authorizer training provided
6 or required by the State; and

7 (8) A statement of assurance that the applicant will
8 ensure public accountability and transparency in all
9 matters concerning its charter-authorizing practices,
10 decisions, and expenditures.

11 (f) By June 30 of each year, the board shall decide
12 whether to grant or deny chartering authority to each
13 applicant. The board shall make its decisions on the merits of
14 each applicant's proposal and plans.

15 (g) In the event an application is denied, the board shall
16 notify the applicant in writing, served by registered or
17 certified mail with return receipt requested, stating the
18 reason(s) thereof, with specific references to the adopted
19 policies, criteria, or guidelines.

20 [g](h) Within sixty days of the board's decision, the
21 board shall execute a renewable authorizing contract with each
22 entity it has approved for chartering authority. The initial
23 term of each authorizing contract shall be six years. The

1 authorizing contract shall specify each approved entity's
2 agreement to serve as an authorizer in accordance with the
3 expectations of this chapter, and shall specify additional
4 performance terms based on the applicant's proposal and plan for
5 chartering. No approved entity shall commence charter
6 authorizing without an authorizing contract in effect.

7 [~~h~~](i) This section shall not apply to the commission."

8 SECTION 3. No later than twenty days prior to the
9 convening of the regular session of 2017, the board of education
10 shall prepare and submit a report to the legislature on the
11 status of the policies, criteria, or guidelines for evaluating
12 applications for chartering authority.

13 SECTION 4. Statutory material to be repealed is bracketed
14 and stricken. New statutory material is underscored.

15 SECTION 5. This Act shall take effect upon its approval.

INTRODUCED BY: _____

By Request