

**TO: The Honorable Donald Horner, Chairperson
Board of Education**

FROM: William Haft, NACSA

DATE: May 21, 2013

**RE: RECOMMENDATION FOR BOARD ACTION ON THE PROPOSED PROMULGATION OF
A NEW CHAPTER 8-510, HAWAII ADMINISTRATIVE RULES, ENTITLED "APPEALS"**

1. RECOMMENDATION

It is recommended that the Board of Education (Board) approve the proposed promulgation of a new Chapter 8-510, Hawaii Administrative Rules (HAR), entitled "Appeals," as attached.

2. RECOMMENDED EFFECTIVE DATE

It is recommended that the adoption of Chapter 8-510, HAR, become effective when the rule adoption process, pursuant to Chapter 91, Hawaii Revised Statutes (HRS), is completed.

3. RECOMMENDED COMPLIANCE DATE

It is recommended that compliance with Chapter 8-510, HAR, be effective upon adoption of the rules.

4. DISCUSSION

a. Conditions leading to the recommendation

Act 130, SLH 2012, codified as Chapter 302D, HRS, adopted the recommendations of the Charter School Governance, Accountability and Authority Task Force by repealing Ch. 302B, HRS, and establishing a new charter school law that creates a solid governance structure for Hawaii's charter school system with clear lines of authority and accountability that will foster improved student outcomes.





The Board hired the National Association of Charter School Authorizers (NACSA) as Transition Coordinator to assist with the implementation of Act 130, SLH 2012, codified as Chapter 302D, HRS, and to transition to the new charter school system.

As Transition Coordinator, NACSA has been working with the State Public Charter School Commission (Commission) in developing its accountability system which has the following key components:

- Administrative rules;
- Charter contract template;
- Organizational Performance Framework;
- Financial Performance Framework;
- Academic Performance Framework;
- Commission policies and protocols.

At its meeting of March 14, 2013, the Commission approved the charter contract template, organizational and financial performance frameworks, and a one-year term length for all charter schools. Commission staff has sent out the contracts to the charter schools for execution for fiscal year 2013-2014.

One of NACSA's responsibilities as Transition Coordinator is to draft administrative rules to implement Chapter 302D, HRS. As such, NACSA hired Ms. Yvonne Izu of Morihara, Lau and Fong LLP to assist in drafting the rules. Ms. Izu has extensive experience in all branches of Hawaii government and administrative law, including researching and writing opinions on Ch. 91 applicability, reviewing administrative rules as a Deputy Attorney General, serving as a Ch. 91 hearings officer as well as representing applicants in contested case hearings.

As has been done with all transition components (e.g., contract template and performance frameworks), NACSA provided the charter schools with the opportunity to provide feedback on the draft rules prior to presentation to the Commission and the Board. NACSA distributed and reviewed the draft rules with charter schools at a meeting held on March 18, 2013 (for which the Commission paid the charter schools' travel costs to Honolulu). On April 1, 2013, NACSA conducted a webinar to review the rules and respond to any questions from the charter schools. At this webinar, Ms. Izu provided an overview of Ch. 91, HRS, for the charter schools. The webinar was recorded and also made available to the charter schools.



NACSA has received no substantive comments or requests for language revision on the draft rules from charter schools either during or subsequent to the March 18 meeting and the April 1 webinar.

Therefore, the draft rules being presented here are substantially the same rules provided to the charter schools, except for changes (which are tracked in the attached rules) based on feedback from the Department of the Attorney General.

Section 302D-15, HRS, as revised by Senate Bill 244, Senate Draft 2, House Draft 1, Conference Draft 1, SLH 2013 (passed by the Legislature and expected to be signed by the Governor) reads as follows:

"§302D-15 Appeals; charter applications, renewals, or revocations. (a) The board shall have the power to decide appeals of decisions by an authorizer to deny the approval of a charter application, deny renewal of a charter contract, or revoke a charter school's charter contract. An appeal shall be filed with the board within twenty-one calendar days of the receipt of the notification of denial or revocation. Only a party whose charter application has been denied, whose charter contract renewal has been denied, or whose charter contract has been revoked may initiate an appeal under this section for cause. The board shall review an appeal and issue a final decision within sixty calendar days of the filing of the appeal.

(b) The board shall serve as the final arbitrator of appeals authorized by subsection (a).

(c) A party shall not be entitled to a hearing before the board under this section until it has exhausted all available administrative remedies.

(d) The board shall adopt rules pursuant to chapter 91 to implement this section."

In accordance with subsection (d), NACSA has drafted the attached proposed Chapter 8-510, HAR, to implement appeals to the Board.

§8-510-1, Purpose, states the purpose of the chapter.

§8-510-2, Definitions, provides the definition of terms used in the chapter.

§8-510-3, When appeal allowed, clarifies the three instances for which an appeal will be heard by the Board: 1) Denial of the approval of a charter application, 2) Denial of the renewal of a charter contract, or 3) Revocation of a charter school's charter contract, as required under Section 302D-15, HRS.



§8-510-4, When appeal taken, defines the timeframe by which an applicant or a charter school must file an appeal with the Board. In accordance with statute, this timeframe is 21 days after receipt of the notification of decision. This rule further defines such receipt as three days after date of mailing and clarifies that the computation of time under §8-510-14 applies to the calculation of the three days.

§8-510-5, Notice of appeal, prescribes the requirements for the filing of request for an appeal.

§8-510-6, Record on appeal, defines the procedures related to transmitting the record relating to the appealed decision.

§8-510-7, Opening brief, requires the appellant to file an opening brief setting forth its case, including the materials facts and the appellant's arguments and conclusion.

§8-510-8, Answering brief, directs the authorizer to file an answering brief, in response to the appellant's opening brief.

§8-510-9, Reply brief, provides the appellant the option of rebutting the authorizer's answering brief.

§8-510-10, Oral argument, allows the Board to hold oral argument on the appeal if so desired.

§8-510-11, Decision on appeal, sets the parameters of the Board's decision on an appeal. As drafted, the Board may affirm the authorizer's decision, remand the case back for further proceedings, or reverse or modify the decision based on certain grounds as provided for in the rules (e.g., violation or error of law, in excess of jurisdiction, arbitrary and capricious, etc.). These are standard grounds of an appeal on the record. This section also states that the Board must issue a final decision within 60 calendar days of the filing of the appeal, as required by law.

§8-510-12, Page limits on briefs, limits the number of pages for the opening and answering briefs to 30 double-spaced pages and the reply brief to 15 double-spaced pages. This rule also provides the Board with the discretion to grant a request for an increase beyond the page limitations, however, any such request would not toll the time for filing the brief.

§8-510-13, Failure to meet deadlines, authorizes the Board to dismiss an appeal where the appellant fails to meet any of its deadlines. The same dismissal ability does not apply to the authorizer since dismissal of an appeal based on an

authorizer's failure to meet deadlines would not be fair to the appellant as it is the authorizer's decision being appealed.

§8-510-14, Computation of time, defines how the timeframe of any act under the chapter is calculated.

NACSA has also drafted and presented two other sets of proposed administrative rules to the Commission: Chapter 8-501 (Commission Rules of Practice and Procedure) and Chapter 8-505 (Charter School Applications, Renewals or Non-Renewals, and Revocations). We note that Senate Bill 244, SLH 2013, gives rule-making power to the Commission, but reserves to the Board exclusive rule-making authority over State educational policy. We further note that the Board will be reviewing these proposed rules to ensure they do not conflict or encroach on the Board's authority to set educational policy.

We note that the proposed Chapter 8-505, HAR, provides charter schools with timely notification of the prospect of non-renewal or revocation and the opportunity for a full, due process hearing prior to the Commission making a final decision on such actions. At the hearing, the charter school may submit documents, give testimony, present evidence, and call witnesses on its behalf to challenge the rationale for non-renewal or revocation and support the continuation of the school. The charter school may be represented by legal counsel. Because the charter schools have an opportunity for a full hearing at the Commission level, the Board's proposed appeal rules have been drafted as an appeal on the record versus a *de novo* appeal which would have the Board re-hear the case without any reference to the authorizer's prior decision.

b. Previous action of the Board on this matter

NACSA notes that at its meeting of December 4, 2012, the Board amended its policy 8100, "Charter Schools Appeals." The proposed Chapter 8-510, HAR, aligns with policy 8100 except for the following changes: 1) Commission replaced by "authorizer" to allow for appeals of decisions by authorizers other than the Commission, 2) Reply brief clarified to respond to arguments raised in the answering brief, 3) Page limits on the briefs added, 4) Computation of time stated slightly differently, and 5) Other technical amendments made.

c. Other policies affected

The proposed Chapter 8-510, HAR, will replace Board policy 8100 upon its adoption.



d. Arguments in support of the recommendation

Pursuant to Section 302D-15, HRS, administrative rules shall be adopted for appeals to the Board. Therefore, it is a legal requirement to promulgate such rules.

e. Arguments against the recommendation

None.

f. Findings and conclusions of the Board committee

To be determined.

g. Other State agencies or departments involved in the action

State Public Charter School Commission, charter schools.

h. Possible reaction of the public, professional organizations, unions, charter schools and/or others to the recommendation

As noted earlier, these draft rules were reviewed with the charter schools and no substantive comments were received.

i. Educational implications

The proposed rules will enable the fair, transparent, and efficient implementation of appeals to the Board thus ensuring oversight of the high stakes decisions being made by authorizers in carrying out the mission of ensuring high-quality public charter schools and quality education.

j. Personnel implications

None.

k. Facilities implications

None.

l. Financial implications

None.





5. OTHER SUPPLEMENTARY RECOMMENDATIONS

None.

Attachment: Chapter 8-510, HAR



HAWAII ADMINISTRATIVE RULES

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 5

CHARTER SCHOOLS

CHAPTER 510

APPEALS

§8-510-1	Purpose
§8-510-2	Definitions
§8-510-3	When appeal allowed
§8-510-4	When appeal taken
§8-510-5	Notice of appeal
§8-510-6	Record on appeal
§8-510-7	Opening brief
§8-510-8	Answering brief
§8-510-9	Reply brief
§8-510-10	Oral argument
§8-510-11	Decision on appeal
§8-510-12	Page limits for briefs
§8-510-13	Failure to meet deadlines
§8-510-14	Computation of time

§8-510-1 Purpose. This chapter governs appeal procedures before the board of education under chapter 302D, Hawaii Revised Statutes. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-2 Definitions. As used in this chapter, unless a different meaning clearly appears in the context:

"Appellant" means the party taking an appeal.

"Applicant" means the applicant who submits a charter application to an authorizer.

"Authorizer" means an authorizer as defined in 302D-1, Hawaii Revised Statutes.

"Board" means the board of education. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-3 When appeal allowed. An appeal may only be taken from a decision by an authorizer as provided by law to:

- (1) Deny approval of a start-up or conversion charter school application;
- (2) Deny renewal of a charter contract; or
- (3) Revoke a charter contract. [Eff _____]
(Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-4 When appeal taken. An appeal shall be filed with the board within twenty-one days after the applicant's or the charter school's receipt of the notification of the authorizer's decision. For these purposes, an authorizer's notification of decision shall be deemed received three days after the date of mailing to the applicant or charter school as computed in accordance with section 8-510-14. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-5 Notice of appeal. An appeal shall commence by the filing of a notice of appeal which shall clearly identify the appellant, contact information for the appellant, and the decision being appealed. The appellant shall file the notice of appeal with the board in accordance with section 8-2-2, Hawaii Administrative Rules, and shall serve a copy upon the authorizer at the office of the authorizer. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-6 Record on appeal. Within seven days of the filing of the notice of appeal, the authorizer shall transmit to the board the entire record relating to the decision being appealed, and shall transmit to the appellant an index of the record which was transmitted to the board. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-7 Opening brief. Within ten days after the filing of the notice of appeal, the appellant shall file with the board and serve upon the authorizer an opening brief, which shall contain the following:

- (1) A concise statement of the case, setting forth the nature of the case, the course and disposition of the proceedings by the authorizer, and the facts material to consideration of the questions and points

presented. In presenting those material facts, the appellant shall clearly set forth all supporting and contradictory evidence that was presented to, or considered by, the authorizer;

- (2) The argument, containing contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, rules, statutes and parts of the record relied upon; and
- (3) A conclusion, stating with particularity the relief sought. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-8 Answering brief. Within ten days of being served with appellant's opening brief, the authorizer shall file with the board and serve upon the appellant an answering brief in response to the opening brief. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-9 Reply brief. (a) 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.

(b) The reply brief shall respond only to arguments raised in the answering brief. Any argument raised for the first time in the reply brief shall be disregarded. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-10 Oral argument. The board, in its discretion, may hold oral argument on the appeal. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-11 Decision on appeal. (a) Upon review of the record, the board may affirm the decision of the authorizer, 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 authorizer's decision is:

- (1) In violation of statutory or regulatory provisions;
- (2) In excess of the authority or jurisdiction of the authorizer;
- (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.

(b) The board shall review an appeal and issue a final decision within sixty calendar days of the filing of the notice of appeal. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-12 Page limits for briefs. (a) An opening or answering brief shall not exceed 30 double-spaced pages, and a reply brief shall not exceed 15 double-spaced pages, exclusive of indexes and appendices.

(b) An authorizer or appellant may request an increase in the number of pages beyond the limits defined in subsection (a) which may be granted by the board at its discretion, provided that any such request shall not toll the time for filing of the brief.

§8-510-13 Failure to meet deadlines. The board shall have full discretion to dismiss an appeal where the appellant fails to meet any of the deadlines in this chapter. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302D-15, 302D-22)

§8-510-14 Computation of time. The time in which any act provided in this chapter is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday and then it is also excluded. When the prescribed period of time is less than seven days, Saturdays, Sundays, or legal holidays within the designated period shall be excluded in the computation. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§91-2)