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TO: Board of Education

FROM: Catherine Payne
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AGENDA ITEM: Board Action on Board process for appointing members of the State Public Charter School Commission

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I. BACKGROUND

It is the responsibility of the Board of Education ("Board") to appoint members to fill vacancies on the State Public Charter School Commission ("Commission") whenever they occur, pursuant to Section 302D-3, Hawaii Revised Statutes ("HRS").[1] At its March 1, 2016 general business meeting, the Board adopted a process for appointing members to the Commission intended to be open and transparent and encourage public engagement while preserving applicant confidentiality.[2]

In an effort to maintain confidentiality of all applicants, prevent unwarranted invasion of privacy, and avoid dissuading potential applicants, the Board's process relied on the "deliberative process privilege" that the Office of Information Practices opined existed under Chapter 92F, HRS, the Uniform Information Practices Act. However, a recent Hawaii Supreme Court opinion overruled the deliberative process privilege.[3] In addition, changes to Sunshine Law took effect on July 1, 2018, which, among other things, require the Board to make its meeting materials available for public inspection at the time they are

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[1] Section 302D-3(c), HRS, states, in pertinent part, "The commission shall consist of nine members to be appointed by the board. The board shall appoint members who will be tasked with authorizing public charter schools that serve the unique and diverse needs of public school students." Section 302D-3(h), HRS, states, "Notwithstanding the terms of the members, the board may fill vacancies in the commission at any time when a vacancy occurs due to resignation, non-participation, the request of a majority of the commission members, or termination by the board for cause."

[2] For more information about the appointment process adopted by the Board on March 1, 2016, see this memorandum: http://boe.hawaii.gov/Meetings/Notices/Documents/2016-03-01%20GBM/GBM_20160301_Action%20on%20process%20for%20appointing%20Commissioners.pdf.

[3] The Hawaii Supreme Court's majority opinion in *Peer News LLC v. City and County of Honolulu*, electronically filed on December 21, 2018, is available here: https://www.courts.state.hi.us/wp-content/uploads/2018/12/SCAP-16-0000114.pdf.

distributed to Board members. These changes in law necessitate reevaluating several of the Board's processes, including its process for appointing members to the Commission.

II. ANALYSIS

The process the Board adopted in 2016 has the following key characteristics:

- An application process that is open to the public;
- Confidentiality for applicants;
- An opportunity for Board members to provide input on nominees;
- An opportunity for the public to testify on nominees; and
- Transparent appointments.

The revised process I propose, attached as **Exhibit A**, incorporates most of these characteristics, but it implements some them differently based on the aforementioned changes in law and the Board's past experiences with the current process. The key proposed changes are described herein.

Investigative Committee. For anticipated vacancies due to term expirations, the proposed process would require the Board to appoint members to an investigative committee[4] to review applications and nominate appointees to the Board. Currently, the Board Chairperson and Board Vice Chairperson work together to recommend a "short list" of nominees to the Board. The Board then considers the short list, deliberates on all the applications it received (using a process described later to protect the confidentiality of applicants), and publicly nominates applicants for it to consider for appointment at the next Board meeting. With the changes in law, the Board may not be able to publicly deliberate on applicants while simultaneously keeping their names confidential, so the proposed process no longer considers the possibility and instead focuses on how to put the best nominees before the full Board rather than every applicant.

An investigative committee would produce better nominations than relying on the Board Chairperson and Board Vice Chairperson simply due to the virtue of the offices. An investigative committee would consist of the Board members with the most knowledge,

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[4] Section 5.6 of the Board's By-Laws states, "The Board, as provided by law, may designate two or more Board members, but less than the number that would constitute a quorum of the Board, to investigate matters concerning Board business. The Board members designated by the Board are required to report their findings and recommendations to the entire Board at a properly noticed meeting."

The applicable law—Section 92-2.5(b)(1), HRS, relating to permitted interactions of members—states, "Two or members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to [i]nvestigate a matter relating to the official business of their board; provided that:

(A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;
(B) All resulting findings and recommendations are presented to the board at a meeting of the board; and
(C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board[.]"

experience, and interest in the Commission and the appointment process, which may include the Board Chairperson or Board Vice Chairperson. While only Board members who are part of the investigative committee (no more than four Board members) would be making the nominations, the remaining Board members will still have a chance to provide input on the nominees during the public meeting at which the Board considers appointments.

Nomination Limits. The proposed process would require the investigative committee (or the Board Chairperson, when applicable) to limit its nominations to no more than one nominee per vacant position. Currently, the Board is able to nominate more than one applicant per vacant position. There have been instances where the Board has placed all applicants on the Board's public agenda for appointment consideration even though there were fewer vacancies than applicants. This, however, devalues the important, foundational due diligence work done by the individuals putting forth nominations, which include reviewing resumes, conducting interviews, and contacting references.

The practice of nominating more applicants than there are vacancies is counterproductive and results in other problems, including:

- Unnecessarily burdening applicants whom the Board is not seriously considering for appointment;
- Placing pressure on applicants to obtain and the public to submit testimony by giving the appearance of a "popularity contest" when the appointment of applicants should be based on their ability, not the amount of favorable testimony they receive; and
- Unnecessarily creating awkward and potentially embarrassing situations for the applicants and the Board.

Limiting nominations to no more than one nominee per vacant position avoids these issues, and it focuses the Board and public on thoroughly vetting candidates that have passed an initial screening.

Nominee Disclosure. The proposed process would require the investigative committee (or the Board Chairperson, when applicable) to announce, either in writing or orally at a public meeting, the names of its nominees. Currently, as previously mentioned, the Board deliberates on all the applications it received using a process to protect the confidentiality of applicants and publicly nominates applicants for it to consider for appointment at the next Board meeting. To maintain applicant confidentiality during these deliberations, the current process assigns numbers to applicants, and Board members deliberate using these assigned numbers in lieu of applicant names. In certain instances, public disclosure of an applicant's identity may jeopardize his or her current employment or other professional positions, a consequence that may not be worth the risk to many if the Board does not even nominate them.

The proposed process still attempts to maintain some degree of confidentiality for applicants to avoid discouraging people from applying. Because of the changes in law, it is

unclear that the Board would be able to keep applicant identities confidential under the current process, so the proposed process does not contemplate public deliberations for the nomination stage. The Board would publicize only the information for those applicants whom the investigative committee (or the Board Chairperson, when applicable) actually nominates for appointment consideration. While the Board would endeavor to keep applicant information confidential to the extent afforded by law, it is still possible that the Board would be required to make applicant identifying information public at any point in the process. The application materials would make this clear to any prospective applicants.

Expedited Mid-Term Appointments. The proposed process would expedite an appointment to fill the remainder of a term when a vacancy occurs on the Commission before the expiration of the former member's term. Currently, the appointment process is the same no matter how or when a vacancy occurs. The intent of expediting mid-term appointments is to ensure the Commission does not have to operate with a vacancy for an extended period of time, which can make quorum and other essential operations difficult.

The proposed mid-term appointment process slightly shortens the application window and allows for quick nominations by giving that power to the Board Chairperson instead of an investigative committee. The Board still publicly considers the nomination for appointment and has recourse, including establishing an investigative committee, should the Board not approve the Board Chairperson's nominee. Any member of the Commission appointed in this manner would still need to go through the regular appointment process upon the expiration of the term if he or she would like to continue serving on the Commission.

III. RECOMMENDATION

I recommend that the Board adopt the proposed revised process for appointing members to the Commission attached to this memorandum.

Exhibit A

Board process for appointing members to the State Public Charter School Commission (proposed revised version)

BOARD OF EDUCATION PROCESS FOR APPOINTING MEMBERS TO THE STATE PUBLIC CHARTER SCHOOL COMMISSION

The purpose of this document is to set the general process for the Board of Education ("Board") to solicit applications for, nominate, and appoint Commissioners to the State Public Charter School Commission ("Commission"), pursuant to Hawaii Revised Statutes ("HRS") §302D-3.

PROCESS FOR UPCOMING VACANCIES DUE TO THE EXPIRATION OF EXISTING MEMBERS' TERMS

Time (Duration)	Activity
By April 1 prior to the anticipated vacancy	The Board publishes on its website a call for applications and an application form and notifies charter school stakeholders, including governing boards, charter school directors, and the Commission.
Next General Business Meeting after the publishing of the call for applications	The Board announces the call for applications and directs the public to its website. The Board establishes an Investigative Committee[i] (a permitted interaction group under Sunshine Law[ii]) to investigate any applications received and nominate recommended Commission appointees to the Board.
Window to apply begins with the publishing of the call for applications and ends 14 calendar days after the announcement is made at a General Business Meeting	The public and charter school stakeholders submit applications and resumes.[iii] An individual may apply directly or an organization can apply on an individual's behalf, provided that the application includes a certification from the individual that he or she is willing to serve as a Commissioner. The Commission may apply on behalf of individuals through this application process as well.
Within three business days after the application deadline	Board staff compiles and circulates all applications and resumes to the Investigative Committee.
By the next General Business Meeting after the application window closes, provided that there is at least five business days between the circulation of the applications and resumes to the Investigative Committee and the next meeting	The Investigative Committee develops its nomination recommendations for appointment with no more than one nominee per upcoming vacant position from the pool of applicants based on criteria in HRS §302D-3.[iv] The Investigative Committee may request Board staff conduct research on any potential nominees, provided that such research does not violate privacy rights. The Investigative Committee may recommend reopening the application window if it does not find qualified applicants to nominate to all upcoming vacant positions.

Time (Duration)	Activity
Next General Business Meeting after the application window closes, provided it is at least five business days after the circulation of the applications and resumes to the Investigative Committee	The Investigative Committee publicly reports its findings and nomination recommendations to the Board.[v] Pursuant to Sunshine Law, the Board may not deliberate or act upon any of the nominations at this meeting.
Next General Business Meeting following the Investigative Committee's report on its findings and recommendations	The Board hears any public testimony on the nominees and deliberates, as necessary, prior to making appointment decisions. If the Board does not approve a nominee for appointment for whatever reason, the Board may decide to (1) establish another Investigative Committee at the next General Business Meeting and reopen the application window or (2) delegate authority to the Board Chairperson to fill the upcoming vacancy using the mid-term vacancy process below.

PROCESS FOR MID-TERM VACANCIES

Time (Duration)	Activity
Within five business days of receiving written notification of the vacancy	The Board publishes on its website a call for applications and an application form and notifies charter school stakeholders, including governing boards, charter school directors, and the Commission.
Window to apply ends 14 calendar days after the publishing of the call for applications	The public and charter school stakeholders submit applications and resumes. An individual may apply directly or an organization can apply on an individual's behalf, provided that the application includes a certification from the individual that he or she is willing to serve as a Commissioner. The Commission may apply on behalf of incumbent members through this application process as well. An incumbent member of the Commission whose term is set to expire and is seeking reappointment must submit an application.
Within three business days after the application deadline	Board staff compiles and provides all applications and resumes to the Board Chairperson.

Time (Duration)	Activity
By the next General Business Meeting after application window closes, provided that there is at least six business days between the Board Chairperson receiving the applications and resumes and the next meeting	The Board Chairperson develops his or her nomination recommendation for appointment with no more than one nominee from the pool of applicants based on criteria in HRS §302D-3 to fill the remainder of the term of each vacant position. The Board Chairperson may request Board staff conduct research on any potential nominee, provided that such research does not violate privacy rights. The Board Chairperson may reopen the application window if he or she does not find qualified applicants to nominate to the vacant position, provided that he or she reports the reopening of the application window to the Board at the General Business Meeting.
At least six business days prior to the General Business Meeting	Board staff notifies the nominee of the Board Chairperson's nomination and possible appointment at the next General Business Meeting. Board staff informs the nominee that his or her name will be on the Board's public meeting agenda.
Next General Business Meeting after application window closes, provided it is at least five business days after the Board Chairperson receives the applications and resumes	The Board Chairperson presents his or her nomination. The Board hears any public testimony on the nominee and deliberates, as necessary, prior to making an appointment decision. If the Board does not approve the nominee for appointment for whatever reason, the Board may decide to (1) request that the Board Chairperson offer another nominee from the pool of applicants at the next General Business Meeting, (2) request that the Board Chairperson reopen the application window, or (3) establish an Investigative Committee at the next General Business Meeting and use the upcoming vacancy process above to fill the mid-term vacancy.

[i] Section 5.6 of the Board's By-Laws states, "The Board, as provided by law, may designate two or more Board members, but less than the number of members that would constitute a quorum of the Board, to investigate matters concerning Board business. The Board members designated by the Board are required to report their resulting findings and recommendations to the entire Board at a properly noticed meeting."

[ii] HRS §92-2.5(b)(1) states, "Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to [i]nvestigate a matter relating to the official business of their board; provided that:

(A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;

(B) All resulting findings and recommendations are presented to the board at a meeting of the board; and
(C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board[.]"

[iii] The Board keeps applications and resumes confidential only to the extent allowable by law. The Board will make the names and resumes of all applicants nominated by the Investigative Committee publicly available on its website. Through the act of submitting an application, every applicant agrees to these terms and should be mindful that information provided could become public.

[iv] HRS §302D-3 states, in pertinent part:

"(c) The commission shall consist of nine members to be appointed by the board. The board shall appoint members who will be tasked with authorizing public charter schools that serve the unique and diverse needs of public school students. […] The board shall consider the combination of abilities, breadth of experiences, and characteristics of the commission, including but not limited to reflecting the diversity of the student population, geographical representation, and a broad representation of education-related stakeholders. The commission shall be exempt from sections 26-34 and 26-36.

(d) Understanding that the role of the commission is to ensure a long-term strategic vision for Hawaii's public charter schools, each nominee to the commission shall meet the following minimum qualifications:

(1) Commitment to education. Each nominee's record should demonstrate a deep and abiding interest in education, and a dedication to the social, academic, and character development of young people through the administration of a high performing charter school system;
(2) Record of integrity, civic virtue, and high ethical standards. Each nominee shall demonstrate integrity, civic virtue, and high ethical standards and be willing to hold fellow commission members to the same;
(3) Availability for constructive engagement. Each nominee shall commit to being a conscientious and attentive commission member; and
(4) Knowledge of best practices. Each nominee shall have an understanding of best practices in charter school educational governance or shall be willing to be trained in such.

(e) Each nominee to the commission shall ideally meet the following recommended qualifications:

(1) Experience governing complex organizations. Each nominee should possess experience with complex organizations, including but not limited to performance contract management, and a proven ability to function productively within them; and
(2) Collaborative leadership ability. Each nominee should have substantial leadership experience that ideally illustrates the nominee's ability to function among diverse colleagues as an effective team member, with the ability to articulate, understand, and help shape consensus surrounding commission policies."

[v] The Investigative Committee may or may not disclose nominee names in written meeting material or on a public meeting agenda at the nomination stage. The Investigative Committee can opt to disclose nominee names orally at the meeting only. Board staff will make every effort to notify nominees before the Board or Investigative Committee publicly discloses their names or includes them on a public meeting agenda. Names will be public at the appointment stage.