

**STATE OF HAWAII
BOARD OF EDUCATION**

P.O. BOX 2360
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March 3, 2022

TO: Board of Education

FROM: Catherine Payne
Chairperson, Board of Education

AGENDA ITEM: Board Action on appointment of Board Waiver Review Representative for purpose of reviewing School Community Council ("SCC") requests for waivers from statute, Board policy, and collective bargaining agreement provisions and to serve on the SCC Exception Review Committee

I. BACKGROUND

On July 23, 2020, the Board of Education ("Board") adopted the *School Community Council Process and Procedures for Requesting Waivers from Policies, Rules, or Procedures* (attached as **Exhibit A** and referred herein as "SCC Procedures"), pursuant to statute¹ and Board policy², to enhance the flexibility of School Community Councils ("SCCs") in facilitating school improvement. In accordance with the SCC Procedures, the Board is responsible for appointing two Board Waiver

¹ Section 302A-1126, Hawaii Revised Statutes, entitled "Waiver of policy, rule, or procedures," states, "Any state agency that may be required to act under state law on a matter affecting an individual school or its school community, shall waive otherwise applicable policies, rules, or procedures when requested to do so by a school community council unless the agency, within thirty days, can justify a denial to the appropriate authority. The board shall adopt procedures necessary to process waivers initiated by a school community council. Any general waiver of policy, rule, or procedures granted by the board to a specific school or schools may be extended by the board to apply to other schools under comparable circumstances. This section shall apply to collective bargaining agreements as provided for in all relevant collective bargaining agreements negotiated pursuant to chapter 89."

² Board Policy 500-20, entitled "School Community Council Waivers," states, in pertinent part, "The Board has established procedures whereby [SCCs], upon application to the appropriate authorities, may be granted waivers from specific provisions in statute, rules, policies, procedures, regulations, or collective bargaining agreements. The Department shall administer the procedures and make them widely available to the public."

Review Representatives, which can either be two Department of Education (“Department”) employees or one Board member and one Department employee (Exhibit A, page 3). The Board Waiver Review Representatives are responsible for reviewing all SCC waiver requests to determine whether they require Board approval, and if so, the Board Waiver Review Representatives make a recommendation to the Board.

The Board Waiver Review Representatives also act as the Board’s representatives on the SCC Exception Review Committee. A memorandum of understanding between the Board and the Hawaii State Teachers Association (“HSTA”) establishes a process and mechanism for SCCs and schools to seek waivers to the Bargaining Unit 5 collective bargaining agreement, which includes the SCC Exception Review Committee. SCC Exception Review Committee consists of the two Board Waiver Review Representatives and two representatives of HSTA, and it reviews all SCC requests seeking waivers to the Bargaining Unit 5 collective bargaining agreement.

On January 16, 2020 (prior to the adoption of the SCC Process), the Board appointed me as one of the Board’s representatives on the SCC Exception Review Committee. Rodney Luke, former Assistant Superintendent of the Office of Innovation, Strategy, and Performance (“OSIP”), served as the Board’s other representative at the time. While not formerly designated as Board Waiver Review Representatives upon the adoption of the SCC Process, Mr. Luke and I served in that capacity as the Board’s representatives on the SCC Exception Review Committee during the 2020-2021 school year.

On September 16, 2021, the Board appointed Cara Tanimura, Interim Assistant Superintendent of OSIP, as Board Waiver Review Representative pursuant to the SCC Process.

II. DISCUSSION

One of the two Board Waiver Review Representative seats is technically open. The Board can fill it with either a Board member or a Department employee. A Board member with experience as a Department school principal would be ideal for this position.

III. RECOMMENDATION

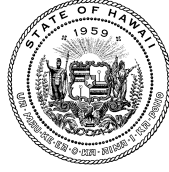
Based on the foregoing, I recommend the Board appoint Board Member Lyla Berg as the other Board Waiver Review Representative.

Proposed Motion

“Move to appoint Board Member Lyla Berg as a Board Waiver Review Representative pursuant to the Board’s *School Community Council Process and Procedures for Requesting Waivers from Policies, Rules, or Procedures.*”

Exhibit A

***School Community Council Process and Procedures for Requesting Waivers
from Policies, Rules, or Procedures (adopted July 23, 2020)***



**STATE OF HAWAII
BOARD OF EDUCATION**

**SCHOOL COMMUNITY COUNCIL PROCESS AND PROCEDURES FOR REQUESTING
WAIVERS FROM POLICIES, RULES, OR PROCEDURES**

I. Introduction

This document describes the process and procedures for School Community Councils (an “SCC” or “SCCs”) to request waivers from policies, rules, or procedures, pursuant to Section 302A-1126, Hawaii Revised Statutes.¹ The Board of Education (the “Board”) established these process and procedures with the understanding that SCCs provide “a means whereby parents, students, and community members have an increased voice in the affairs of the school” and “direction, coordination, and communication to improve teaching and learning, resulting in greater student achievement.”² The waiver process is “designed to enhance flexibility in order to facilitate school improvement,” and waivers should “improve student learning and increase student achievement.”³

The Department of Education (the “Department”) is responsible for administering these process and procedures, and the Department shall develop and maintain any forms and guidance necessary to implementation.

This document contains the following sections:

- Section I. Introduction
- Section II. Types of Waivers
- Section III. Roles and Responsibilities
- Section IV. Waiver Process
- Section V. Procedures to Request a Waiver to CBA Provisions
- Section VI. Procedures to Request a Waiver from Statute or Board Policy

¹ Section 302A-1126, Hawaii Revised Statutes, states, “Any state agency that may be required to act under state law on a matter affecting an individual school or its school community, shall waive otherwise applicable policies, rules, or procedures when requested to do so by a school community council unless the agency, within thirty days, can justify a denial to the appropriate authority. The board shall adopt procedures necessary to process waivers initiated by a school community council. Any general waiver of policy, rule, or procedures granted by the board to a specific school or schools may be extended by the board to apply to other schools under comparable circumstances. This section shall apply to collective bargaining agreements as provided for in all relevant collective bargaining agreements negotiated pursuant to chapter 89.”

² Excerpts are from the rationale of Board Policy 500-19, entitled “School Community Councils,” available here: <http://boe.hawaii.gov/policies/Board%20Policies/School%20Community%20Councils.pdf>.

³ Excerpts are from Board Policy 500-20, entitled “School Community Council Waivers,” available here: [insert when available].

- Section VII. Procedures to Request a Waiver from Department Regulations
- Section VIII. Procedures to Request a Waiver from Other State Agency Policies or Regulations
- Section IX. Disagreements, Dispute Resolution, and Appeals

II. Types of Waivers

This document defines the types of waivers as follows:

- Waiver from Statute. A waiver granted by the Board to an individual school from specific statutory provisions as allowed by law.
- Waiver from Board Policy. A waiver granted by the Board to an individual school from specific administrative rules, policies, or procedures under the Board’s jurisdiction.
- Waiver to Collective Bargaining Agreement (“CBA”) Provisions. A waiver from certain CBA provisions agreed to and granted by the Board (as the employer) and the exclusive representative of the employees covered by the applicable CBA to an individual school.
- Waiver from Department Regulations. A waiver granted by the Superintendent to an individual school from specific, system-wide internal policies, procedures, or regulations under the Department’s sole jurisdiction.⁴
- Waiver from Other State Agency Policies or Regulations. A waiver granted by a state agency other than the Board or Department from rules, policies, procedures, or other regulations under the jurisdiction of that agency.

General Waivers. In addition to the above waivers applicable to individual schools, the Board may grant General Waivers. A General Waiver is a waiver granted by the Board to all schools under the same circumstances from specific administrative rules, policies, or procedures under its jurisdiction or specific statutory provisions as allowed by law.⁵

Only the Superintendent may request a General Waiver from the Board. The Board only grants General Waivers for one school year. Before the Board considers extending any General Waiver beyond one school year, it must consider whether permanent changes to administrative rules, policies, procedures, or statute is a more appropriate approach.

III. Roles and Responsibilities

Multiple people and entities are involved in requesting and approving waivers. The roles and responsibilities of the parties involved are as follows:

- SCC. The SCC is responsible for determining whether a waiver from policies, rules, or procedures is necessary and, if so, submitting a request in accordance with this document.

⁴ This document does not cover school-level or complex-area-level policies and procedures. SCCs should work with their respective principals and CASs if they determine any exemptions from such policies and procedures are necessary. Decisions by principals and CASs may be subject to appeal.

⁵ The Board does not grant general waivers to CBA provisions. The Board, Department, and exclusive representative should formalize any generally applicable changes to CBA provisions through appropriate written agreements, not this waiver process.

- Principal. The principal is responsible for providing advice and technical assistance to the SCC with regard to waiver requests and ensuring waiver requests are in the best interest of the school's students in accordance with the Academic and Financial Plan.
- Complex Area Superintendent ("CAS" or "CASs"). The CAS is responsible for ensuring the waiver request aligns with the school's Academic and Financial Plan, providing recommendations to the SCC and principal, and resolving disagreements between an SCC and its principal with regard to waiver requests.
- State Office. The state-level office responsible for coordinating and assisting with SCC waiver requests and distributing forms, guidance, and other information related to the waiver request process and procedures to SCCs, principals, and CASs. The State Office serves as a liaison between SCCs and their principals and decision-makers.
- Superintendent. The Superintendent is responsible for designating the State Office and setting the annual waiver process timeline based on the Board Chairperson's deadline. The Superintendent has final decision-making authority over requests for Waivers from Department Regulations.
- Board Waiver Review Representatives. The Board Waiver Review Representatives are responsible for reviewing all waiver requests to determine whether they require Board approval, and if so, the Board Waiver Review Representatives make a recommendation to the Board. The Board Waiver Review Representatives act as the Board's representatives on the SCC Exception Review Committee. The Board Waiver Review Representatives can either be two Department employees or one Board member and one Department employee.⁶
- Hawaii State Teachers Association ("HSTA") Waiver Review Representatives. The HSTA Waiver Review Representatives are responsible for reviewing all waiver requests to determine whether they affect the Bargaining Unit 5 CBA and require waivers from any of its provisions.
- SCC Exception Review Committee. The SCC Exception Review Committee (comprised of the Board Waiver Review Representatives and the HSTA Waiver Review Representatives) is responsible for reviewing all waiver requests in accordance with the procedures in Sections V through VIII.
- Board. The Board is responsible for establishing the SCC process and procedures for requesting waivers, through this document, and approving any periodic changes. The Board appoints the Board Waiver Review Representatives. The Board has final decision-making authority over requests for Waivers from Statute, Waivers from Board Policy, and Waivers to CBA Provisions (as the employer only).
- Others. Other state agencies are responsible for decision-making on requests for Waivers from Other State Agency Policies or Regulations. Exclusive representatives of bargaining units other than Bargaining Unit 5 are responsible for decision-making on requests for Waivers from CBA Provisions, as applicable.

⁶ To avoid complications with Sunshine Law, this document contemplates only up to one Board member serving as a Board Waiver Review Representative. Additional procedures, including the incorporation of a permitted interaction group, are necessary if two Board members serve as the Board Waiver Review Representative.

IV. Waiver Process

Main steps. The steps below outline the general process for all waiver requests. Procedures that are specific to each type of waiver request are contained in Sections V through VIII. The main steps of the process are:

1. Determine need. After approval of a school's Academic and Financial Plan, the SCC determines, in consultation with the school's principal, whether it needs to request a waiver to implement the plan.
2. Complete application form. After an SCC determines it needs a waiver, it completes an application form provided by the State Office.
3. Submit to principal. The SCC submits the completed application form to the principal. The principal conducts a technical review of the application to ensure the SCC provides all the required information completely and accurately and, if necessary, assists the SCC in completing the form correctly.
4. Submit to CAS. The principal submits the application to the CAS. The CAS reviews the application to ensure it aligns with the school's Academic and Financial Plan and identifies all the applicable, specific provisions from statute, policy, rules, procedures, regulations, and/or CBAs. The CAS may offer recommended changes or considerations to the SCC regarding its application and waiver request, which the SCC may accept or decline. The CAS may describe any concerns he or she has about the request on the application form, but the CAS does not have the authority to deny the request or prevent the application from moving to the next step.
5. Submit to State Office. The CAS submits the application to the State Office. The State Office prepares a cover memorandum for the application explaining key information about the waiver request. If key information is missing, the State Office may request it from the CAS, principal, and SCC, but the State Office does not have the authority to deny the request or prevent it from moving forward.
6. Submit to SCC Exception Review Committee. The State Office submits the request to SCC Exception Review Committee for review. The Board Waiver Review Representatives determine whether the request requires Board approval, and if so, the Board Waiver Review Representatives develop a recommendation for the Board. The HSTA Waiver Review Representatives determine whether the request affects the Bargaining Unit 5 CBA and requires waivers from any of its provisions. Any request requiring a waiver from Bargaining Unit 5 CBA provisions must go through the procedures to request a Waiver from CBA Provisions (see Section V). The HSTA Waiver Review Representatives do not have the authority to deny a request or prevent it from moving forward if the request does not affect the Bargaining Unit 5 CBA.
7. Additional submissions. The State Office determines who to submit the request to next depending on the type of waiver requested, and the State Office submits the cover memorandum and application accordingly (see Sections V through VIII for specific procedures).
8. Decision and notification. The decision-maker and decision-making process depends on the type of waiver requested (see Sections V through VIII for specific procedures). Regardless of the

waiver type, the State Office is responsible for notifying the SCC, principal, and CAS of the decision.

The subject matter of a waiver request could require the SCC to request a waiver from provisions across statute, rules, policies, procedures, and/or CBAs, thus resulting in a request for more than one type of waiver. Under this circumstance, the State Office may need to run the request through multiple sets of procedures simultaneously and ensure all appropriate decision-makers receive the portions of the request over which they have jurisdiction.

Application form. The State Office maintains an application form for SCCs to use to request waivers. The application form must require an SCC to ensure that the waiver aligns with its Academic and Financial Plan and demonstrate, with specificity:

1. The provisions of statute, rules, policy, regulations, and/or a CBA from which the SCC is requesting a waiver;
2. The circumstances unique to the school justifying the waiver;
3. How the waiver will improve student learning and increase student achievement;
4. The school's plan to achieve full compliance with the statutory requirements after the waiver expires (for Waivers from Statute only);
5. Whether the principal and CAS concur with the request; and
6. Alternatives considered or implemented by the school prior to requesting the waiver.

Timeline. The Board Chairperson, on behalf of the Board, sets the annual deadline for waiver requests to come before the Board for decision-making. The Superintendent sets the timeline and any other internal deadlines necessary to meet the Board's deadline. The timeline should include and account for the dispute resolution and appeals process described in Section IX. The State Office communicates the timeline, deadlines, process, procedures, and forms to all SCCs, principals, and CASs annually.

V. Procedures to Request a Waiver to CBA Provisions

The Board has an executed memorandum of understanding with the Hawaii State Teachers Association ("HSTA") describing a process and mechanism for SCCs and schools to seek waivers to the Bargaining Unit 5 CBA.

The memorandum of understanding (hereafter referred to as "HSTA MOU") establishes the SCC Exception Review Committee comprised of two representatives appointed by HSTA and two representatives appointed by the Board. The Board Waiver Review Representatives act as the Board's representatives to SCC Exception Review Committee, and the HSTA Waiver Review Representatives act as HSTA's representatives to the SCC Exception Review Committee. The SCC Exception Review Committee establishes its own rules of operation (of which the State Office maintains a copy) and acts in accordance with the HSTA MOU.

The procedures below apply to requests for waivers from the HSTA CBA and align with the HSTA MOU:

1. The SCC determines whether it needs to request a Waiver to CBA Provisions (see Step 1 under Section IV).

2. Before the SCC can complete and submit an application form, the SCC needs agreement from the Bargaining Unit 5 members at the school on the waiver request. In accordance with the HSTA MOU, Bargaining Unit 5 members use a consensus decision-making process and reach consensus when all bargaining members in the school agree that “their points of view have been heard and understood and that they can live with the decision.” If bargaining unit members have exhausted good faith efforts and did not reach consensus, they use the fallback decision-making process described in the HSTA MOU. The fallback decision-making process allows all active bargaining unit members at the school to vote by secret ballot. In order for the vote to be valid, two-thirds of all of the ballots cast must be affirmative.
3. If the Bargaining Unit 5 members at the school agree with the waiver request either through the consensus or fallback decision-making processes, the SCC completes the application form (see Step 2 under Section IV) and submits it to the principal.
4. The principal reviews the application (see Step 3 under Section IV) and submits it to the CAS.
5. The CAS reviews the application (see Step 4 under Section IV) and submits it to the State Office.
6. The State Office prepares a cover memorandum for the application (see Step 5 under Section IV) and submits both documents to the SCC Exception Review Committee.
7. The SCC Exception Review Committee reviews the request (see Step 6 under Section IV). If HSTA or its authorized representatives reject the request, the request is considered denied and the State Office prepares notifications accordingly (see Step 8 under Section IV). If HSTA or its authorized representatives agree to the request, the Board Waiver Review Representatives make a recommendation to the Board, as the employer, on whether to approve or deny the request. The State Office prepares the recommendation material for the Board.
8. The Board reviews the Board Waiver Review Representatives’ recommendation and makes a final decision. The State Office prepares notifications of the decision accordingly (see Step 8 under Section IV), but it cannot finalize notifications of approval without first receiving HSTA’s approval in writing.

If the HSTA MOU substantively changes, the aforementioned procedures in this section are invalid to the extent that the changes to the HSTA MOU conflict with the procedures. If the HSTA MOU expires without renewal, the aforementioned procedures in this section are invalid.

The Board does not have any other active, formal written agreements with the exclusive representatives of other bargaining units working at the school level describing a process or mechanism for SCCs and schools to request waivers to the respective CBAs. Any SCC or school wishing to seek any such waiver should inform the Superintendent and Board.⁷

VI. Procedures to Request a Waiver from Statute or Board Policy

The procedures below apply to requests for Waivers from Statute and Waivers from Board Policy:

⁷ As of the adoption of this document, the Board is seeking a written agreement with the Hawaii Government Employees Association to establish a formal process for requesting waivers from provisions in the Bargaining Units 2, 3, 6, 9, and 13 CBAs. When the parties reach an agreement, the Board will amend this document.

1. The SCC determines whether it needs to request a Waiver from Statute or Board Policy (see Step 1 under Section IV).
2. The SCC completes the application form (see Step 2 under Section IV) and submits it to the principal.
3. The principal reviews the application (see Step 3 under Section IV) and submits it to the CAS.
4. The CAS reviews the application (see Step 4 under Section IV) and submits it to the State Office.
5. The State Office prepares a cover memorandum for the application (see Step 5 under Section IV) and submits both documents to the SCC Exception Review Committee.
6. The HSTA Waiver Review Representatives review the request to determine whether it affects the Bargaining Unit 5 CBA and requires waivers from any of its provisions (see Step 6 under Section IV), and if so, the request must simultaneously follow the procedures to request a Waiver from CBA Provisions (see Section V). The Board Waiver Review Representatives review the request and make a recommendation to the Board on whether to approve or deny the request. The State Office prepares the recommendation material for the Board.
7. The Board reviews the Board Waiver Review Representatives' recommendation and makes a final decision. The State Office prepares notifications of the decision accordingly (see Step 8 under Section IV).

VII. Procedures to Request a Waiver from Department Regulations

The procedures below apply to requests for Waivers from Department Regulations:

1. The SCC determines whether it needs to request a Waiver from Department Regulations (see Step 1 under Section IV).
2. The SCC completes the application form (see Step 2 under Section IV) and submits it to the principal.
3. The principal reviews the application (see Step 3 under Section IV) and submits it to the CAS.
4. The CAS reviews the application (see Step 4 under Section IV) and submits it to the State Office.
5. The State Office prepares a cover memorandum for the application (see Step 5 under Section IV) and submits both documents to the SCC Exception Review Committee and the Superintendent.
6. The HSTA Waiver Review Representatives review the request to determine whether it affects the Bargaining Unit 5 CBA and requires waivers from any of its provisions (see Step 6 under Section IV), and if so, the request must simultaneously follow the procedures to request a Waiver from CBA Provisions (see Section V). The Board Waiver Review Representatives review the request to determine whether it affects policies, rules, or procedure over which the Board has jurisdiction, and if so, the request must simultaneously follow the procedures to request a Waiver from Statute or Board Policy (see Section VI).
7. The Superintendent reviews the request and makes a final decision. The State Office prepares notifications of the decision accordingly (see Step 8 under Section IV).

VIII. Procedures to Request a Waiver from Other State Agency Policies or Regulations

The procedures below apply to requests for Waivers from Other State Agency Policies or Regulations:

1. The SCC determines whether it needs to request a Waiver from Other State Agency Policies or Regulations (see Step 1 under Section IV).
2. The SCC completes the application form (see Step 2 under Section IV) and submits it to the principal.
3. The principal reviews the application (see Step 3 under Section IV) and submits it to the CAS.
4. The CAS reviews the application (see Step 4 under Section IV) and submits it to the State Office.
5. The State Office prepares a cover memorandum for the application (see Step 5 under Section IV) and submits both documents to the SCC Exception Review Committee and the Superintendent.
6. The HSTA Waiver Review Representatives review the request to determine whether it affects the Bargaining Unit 5 CBA and requires waivers from any of its provisions (see Step 6 under Section IV), and if so, the request must simultaneously follow the procedures to request a Waiver from CBA Provisions (see Section V). The Board Waiver Review Representatives review the request to determine whether it affects policies, rules, or procedure over which the Board has jurisdiction, and if so, the request must simultaneously follow the procedures to request a Waiver from Statute or Board Policy (see Section VI).
7. The Superintendent reviews the request and determines the appropriate agency and individual to which to address the request. The State Office prepares a memorandum from the Superintendent to the agency detailing the waiver request for the Superintendent to send.
8. As provided by law, the agency must either grant or deny the waiver request within 30 calendar days. If the agency denies the waiver request, it must provide justification for the denial to the appropriate authority. The State Office prepares notifications of the decision accordingly (see Step 8 under Section IV).

IX. Disagreements, Dispute Resolution, and Appeals

While the Board encourages a school's SCC and principal to work together closely and come to consensus as often as possible, the Board acknowledges that disagreements may occur from time to time. State law allows a principal to "set aside" any decision by an SCC and allows the SCC to appeal any such decision by the principal.⁸ This document includes a dispute resolution process, which acts as a built-in appeals process for waiver requests. The following steps describe the dispute resolution process in the event the SCC and principal disagree.

1. After the SCC submits the application to the principal and he or she reviews it (see Step 3 under Section IV), the principal may decide to stop the application from advancing to the next step of the process by notifying the SCC of his or her disagreement and decision unless the SCC objects to the decision. If the SCC objects to the principal's decision, the principal must indicate and describe the disagreement on the application form and submit it to the CAS for resolution.

⁸ Section 302A-1124(g), Hawaii Revised Statutes, states, "The principal shall have the authority to set aside any decision made by the school community council if the principal determines it to be in the best interests of the school; provided that the principal notifies the school community council. If the school community council opposes a decision of the principal, an appeal shall first be brought to the complex area superintendent for resolution and, if necessary, to the superintendent and, finally, to the board of education."

2. If an application under review by the CAS (see Step 4 under Section IV) indicates a disagreement between the SCC and the principal regarding the waiver request, the CAS must attempt to resolve the disagreement. If the parties are unable to reach a mutual agreement, the CAS describes the failed dispute resolution on the application form and forwards it to the State Office for processing. The CAS does not have the authority to deny the request or prevent the application from moving to the next step.
3. If an application under review by the State Office (see Step 5 under Section IV) indicates a failed dispute resolution, the State Office prepares a cover memorandum for the application explaining key information about the waiver request and the disagreement between the SCC and the principal, also noting any concerns or comments from the CAS. The State Office submits the memorandum and application to the Superintendent for review.
4. The Superintendent reviews the memorandum and application and determines whether the requested waiver is in the best interest of the students at the school. The Superintendent issues his or her decision in writing, and the State Office provides the written decision to the SCC, principal, and CAS. The Superintendent's decision on a request for a Waiver from Department Regulations is final. The SCC may appeal the Superintendent's decision on a request for any other type of waiver by submitting an appeal to the State Office.
5. If an SCC appeals the Superintendent's decision to deny a waiver request (except for a denial of a request for a Waiver from Department Regulations), the State Office provides the appeal, the Superintendent's written decision, cover memorandum, and application to the Board Waiver Review Representatives (described in Section III). The Board Waiver Review Representatives review the documents and make a recommendation to the appropriate decision-making authority (as described in Sections V through VIII).