

# **ON THE LEVEL? POLICY, LAW AND THE CHARTER SCHOOL MOVEMENT**

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## FOREWORD

This report has been prepared in response to Senate Concurrent Resolution No. 113, H.D. 1 (2001), which requests the Legislative Reference Bureau to study the funding and regulation of new century charter schools from legal and policy perspectives in four thematic areas: resources, governance, compliance, and startup/shut down.

The Bureau would like to thank the Board of Education, the Department of Education, the Department of the Attorney General, the Department of Budget and Finance, the Department of Human Resources Development, the Department of Accounting and General Services, the University of Hawaii, the Department of Defense, the Hawaii State Teachers Association, the Charter Friends National Network, the Hawaii Association of Charter Schools, and individual charter school operators for giving its researchers access to their staff and resources.

The Bureau wishes to acknowledge the assistance of Mark Rosen, Research Attorney with the Bureau, in drafting portions of chapters 5 and 7 of this report.

Wendell K. Kimura  
Acting Director

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## FACT SHEET

### Frequently Asked Questions

**A. Are personnel resources allocated to public schools and charter schools in the same manner? What is the likely effect of this?**

No. The allocation of full-time equivalent positions to public schools allows principals to hire teachers without regard to the teachers' salaries and the schools' budgets. The new century charter school law, however, creates school-level salary caps for each school calculated by multiplying the average per pupil expenditure by the number of students enrolled.

**B. Will charter school and public school teachers be treated alike for purposes of tenure and service credit? What is the likely effect of this?**

Probably not. The inability to earn any probationary credit toward tenure affects all probationary public school teachers who plan to eventually teach in a public school: tenured teachers have greater job security than probationary teachers, who are often displaced by tenured teachers during the department's annual transfer period. In addition, the inability to continually earn and accrue service credits affects all tenured public school teachers because a staff reduction caused by a drop in enrollment is based primarily on service time: tenured teachers with the least number of years of service are staff reduced first.

**C. Can new century charter schools sue and be sued?**

As discussed by the Attorney General in its letter to the Bureau (Appendix D of this report), there is no provision in the charter school law that directly addresses how charter schools and local school boards are expected to deal with lawsuits, for example, whether charter schools may use state funds to initiate or defend against a lawsuit, or whether the Legislature intended that charter schools be able to sue the State. If charter schools are to be treated on the same basis as non-charter public schools, they should not be able to initiate litigation against the State, since individual non-charter public schools have never been able to sue the Superintendent or Board of Education. These policy issues must be resolved by the Legislature.

**D. Who is liable for charter school debts?**

If the charter school incurs debts, it would appear that the school is in violation of both the charter school law and its written performance contract with the Board of Education,

and is subject to one year of probation to improve its fiscal accountability. If it fails to improve, it may be closed down upon a two-thirds majority vote of the Board.

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# Chapter 1

## INTRODUCTION

**Senate Concurrent Resolution No. 113, H.D. 1.** S.C.R. No. 113, H.D. 1 (2001), requests the Legislative Reference Bureau to study the funding and regulation of new century charter schools (see Appendices A and B). The Bureau's study is to consider the following issues:

- (1) How much of a charter school's operating, capital investment, and research and development budgets should be raised by the local school board on its own and how much should the State Department of Education (HIDOE) fund?
- (2) How can the state general fund allocation to be received by a charter school be computed so as not to adversely impact the overall budget of the HIDOE?
- (3) How can the Board of Education (BOE) provide technical assistance to a charter school without requiring the school to comply with the rules of the HIDOE?
- (4) How can an applicant for a charter to operate a school appeal the decision of the BOE to not approve the applicant's completed implementation plan?
- (5) How much of a charter school's capital,<sup>1</sup> repair and maintenance, and utilities budgets should a local school board raise on its own and how much should the HIDOE fund?

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1. The Bureau took the liberty of adding a new century charter school's capital budget to this question since the lack of capital funds can be burdensome for some charter schools.

According to the National Research Council, Committee on Education Finance:

From the perspective of school finance, the most striking aspect is the financial disadvantage under which many charter schools operate. In many states, charter schools receive as operating expenses just the state share of operating revenues, not the combined state and local revenue that is available to the public schools. Even more burdensome is the lack of capital and start-up funds. A large percentage of charter schools, particularly those for which the charter was granted by nondistrict entities or those that are start-up schools, have no access to local district funds levied for capital improvements and do not have access to the capital market. As a result, most charter schools, [sic] are forced to use a portion of their operating funds or to seek funds from private sources to secure, furnish, and maintain facilities [citation omitted]. Furthermore, except in two states (Arizona and New Mexico), charter schools receive no extra state support for planning or implementation.

Without minimizing the conceptual difficulties of determining a charter school's fair share of funding, the committee simply notes that charter schools in most states have not been put on the level playing field with the public schools that would allow them to compete effectively. At the same time, we note that fair treatment with respect to the financing of capital facilities could increase overall costs of providing education unless existing school facilities are turned over to the charter schools or are sold or rented out.

*(Footnote continued on next page.)*

- (6) How can a charter school comply with the requirements of the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act,<sup>2</sup> and the *Felix* consent decree?
- (7) How can a charter school become more independent from the HIDOE, in terms of funding and regulation, while still remaining a "public school"?
- (8) What is the legal status of the public charter school?
- (9) Are they considered employees of the State or the local school board?
- (10) How can charter schools withdraw funds directly from the state treasury?
- (11) Do charter schools have legal counsel from the Attorney General's Office? If yes, does this create a conflict of interest in representing the BOE, the HIDOE, and the local school board of the charter school?
- (12) Does the BOE have the authority to revoke a charter?
- (13) If the local school board of the charter school mismanages its funds and incurs debt, is the HIDOE liable for payment?
- (14) What is the appropriate monitoring role of the HIDOE and what ongoing regulatory processes are available to ensure that the charter school is meeting all its responsibilities?
- (15) What are the most significant impediments to conversions of existing public schools?

**Background.** According to S.C.R. No. 113, H.D. 1, shortly after the law authorizing the establishment of new century charter schools<sup>3</sup> took effect, there were:

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National Research Council. *Making Money Matter: Financing America's Schools*. Committee on Education Finance, Helen Ladd and Janet Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington, DC: National Academy Press (1999), p. 188.

2. The Bureau took the liberty of adding the Americans with Disabilities Act to this question since Section 504, Subpart D of the Rehabilitation Act of 1973, as amended, goes hand-in-hand with the Americans with Disabilities Act. See Hawaii Administrative Rules, §8-53-1(b) (Department of Education; Provision of a Free Appropriate Public Education for Students with a Disability Under Section 504, Subpart D).

3. "New century charter schools" were initially known as "student-centered schools". See Act 272, Session Laws of Hawaii 1994.

The term "student-centered schools" was changed to "new century charter schools" in 1999. See Act 62, section 3, Session Laws of Hawaii 1999.

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- (1) Complaints from charter schools about the inadequate amount of funds being allocated by the HIDOE for their support; and
- (2) Complaints from the HIDOE about the inadequate amount of funds being appropriated by the Legislature for the support of these additional charter schools.

Since their inception, new century charter schools have been alternately praised as a meaningful departure from traditional pedagogics<sup>4</sup> and "business as usual", and vilified as a drain on other schools' operating budgets and the equivalent of an underfunded legislative mandate.<sup>5</sup> The HIDOE, which has been characterized as being stingy, obstructionist, and unsupportive of the charter school movement, has itself complained about the burden that twenty-three<sup>6</sup> additional charter schools will create for the rest of the public school system.

According to S.C.R. No. 113, H.D. 1, dissatisfaction with the new century charter school law, the HIDOE, and the Legislature suggests that the funding and regulation of charter schools may need to be changed in order to:

- (1) Better support charter schools; and
- (2) Better support the rest of the public school system, including schools with poor student performance or higher percentages of special needs, such as special education, higher rates of poverty, and immigrant and refugee populations.

**Recurring themes.** To put these fifteen specific questions into a more manageable perspective, the Bureau organized them according to four recurring themes:<sup>7</sup>

<b>Resources</b>	Question 1 (raising funds locally) Question 2 (the impact on the HIDOE budget) Question 5 (paying for facilities & utilities) Question 10 (withdrawing school funds directly)
<b>Governance</b>	Question 7 (giving schools more independence) Question 8 (the legal status of schools) Question 9 (the employment status of staff) Question 11 (legal representation for schools)

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4. Pedagogy or pedagogics is a term used to identify the practice of education involving curriculum, teaching, and learning. Arthur Ellis and Jeffrey Fouts, *Handbook of Educational Terms and Applications*, Princeton, New Jersey: Eye on Education (1196), p. 158.

5. Senate Concurrent Resolution No. 113, H.D. 1 (Twenty-first State Legislature).

6. There were only two charter schools in existence between July 5, 1994, and May 5, 2000: Waiālae School and Lanikai School. Both Waiālae and Lanikai were formerly "regular" or "conventional" public schools.

7. Memorandum from Dr. Ichiro Fukumoto, Adjunct Professor and Federal Projects Evaluator, University of Hawaii at Manoa, College of Education, Teacher Education and Curriculum Studies, Western Curriculum Coordination Center, to Keith Fukumoto, May 17, 2001, p. 2.

	Question 13 (state liability for school debts)
<b>Compliance</b>	Question 3 (assistance without compliance) Question 6 (IDEA, section 504, ADA, and <i>Felix</i> ) <sup>8</sup> Question 14 (monitoring schools for compliance)
<b>Startup/shutdown</b>	Question 4 (appealing the denial of a charter) Question 12 (revoking a school's charter) Question 15 (converting existing public schools)

**Strategy.** Based on these four recurring themes and fifteen specific questions, the Bureau organized this study in the following manner:

- (1) Determine the theoretical basis and purpose of the charter school movement and the new century charter school program (see Chapter 2);
- (2) Propose how charter schools should be treated with respect to resource, governance, compliance, and start-up/shutdown issues (see Chapter 3); and
- (3) Answer the Legislature's questions by applying the information gathered in Chapter 2 to the system of values proposed in Chapter 3 (see Chapters 4 through 7).

The Bureau's approach to this study stems from the belief that the Legislature's questions cannot be answered consistently:

- (1) Without knowing "what" things the new century charter school program is supposed to accomplish (*i.e.*, its outcomes);
- (2) Without knowing "how" the charter school program will accomplish the things that it sets out to do (*i.e.*, the processes); and
- (3) Without possessing a system of values to guide present and future decisions about what is "fair" and what is "unfair".

**Limitations.** Excluded from the scope of this study are the creation of multiple chartering authorities, the removal or raising of the cap on the number of new century charter schools permitted, and the exemption of charter schools from collective bargaining agreements (chapter 89, *Hawaii Revised Statutes*). Each of these issues has far-reaching legal, fiscal, and

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8. "IDEA" means Part B of the Individuals with Disabilities Education Act (20 U.S.C. §1400 *et seq.*; 34 C.F.R. Part 300).

"Section 504" means Section 504, Subpart D of the Rehabilitation Act of 1973, as amended (29 U.S.C. §§705, 794; 34 C.F.R. Part 104).

"ADA" means the Americans with Disabilities Act (42 U.S.C. §12101 *et seq.*; 28 C.F.R. Part 35).

"*Felix*" means the *Felix vs. Cayetano* consent decree (Civil No. 93-00367DAE).

## INTRODUCTION

policy consequences—all of which deserve to be explored in a thoughtful and thorough manner because of their potential to impact students.<sup>9</sup> While these are important issues for the Legislature to consider in time, the Bureau believes that the essential elements of the charter school program need to be defined first. Foremost among these essential elements are the theoretical basis and purpose of the charter school program.

**Disclaimer.** The system of values proposed in this report is just one of many possible value systems. The Bureau recognizes that reasonable people may disagree as to what system of values should be applied to guide present and future decisions about what is "fair" and what is "unfair". It may be easier for the Legislature, HIDOE, and charter schools to agree on how new century charter schools should be treated if a system of values is stated first and exceptions to the value system are stated last.

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9. The twenty-three charter schools in operation on the islands of Kauai, Oahu, Maui, and Hawaii enrolled 3,066 regular and special education students as of October 1, 2001. Hawaii, Department of Education, Information Resource Management Branch, "Official Enrollment Count, 2001-2002 School Year" (October 1, 2001), 9 pp.

## Chapter 2

# NEW CENTURY CHARTER SCHOOLS AND THE CHARTER SCHOOL MOVEMENT

### What are New Century Charter Schools?

**Overview.**<sup>1</sup> A new century charter school<sup>2</sup> is a public school that comes into existence through a contract with the State Board of Education (BOE). The charter—or contract—establishes the framework within which the school operates and provides financial and other public support for the school for up to four years. At the end of this period, the BOE may renew the school's charter or allow it to expire. The school's charter gives the school autonomy over its operation and frees it from many of the state laws and rules that other public schools must follow. In exchange for the flexibility afforded by the charter, the school is held accountable for achieving the goals set out in the charter and adhering to terms of the charter contract.

**Relationship to school/community-based management (SCBM) system.**<sup>3</sup> New century charter schools represent a more complete form of decentralization<sup>4</sup> than school/community-based management, in that the schools face the possibility that their charters will be revoked or not renewed, or that they will be placed on probationary status by the BOE.<sup>5</sup> Two new century charter schools (*i.e.*, Waiālae School and Lanikai School) received approval to

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1. Adapted from U.S., Department of Education, Office of Educational Research and Improvement, "The State of Charter Schools 2000, Fourth-Year Report" (January 2000), <http://www.ed.gov/PDFDocs/4yrrpt.pdf>, July 17, 2001, p. 1.
  2. The term "new century charter schools" is defined as the implementation of alternative frameworks with regard to curriculum, facilities management, instructional approach, length of the school day, week, or year, and personnel management, formed under section 302A-1182 or 302A-1183, *Hawaii Revised Statutes. Hawaii Rev. Stat.*, §302A-101.  
  
*Hawaii Rev. Stat.*, §302A-1183, was repealed by Act 209, section 4, Session Laws of Hawaii 2001.
  3. The term "school/community-based management system" is defined as a method of educational management that diffuses educational decisionmaking to involve or secure the input of those persons directly affected by the decision to be made at the school level, and encourages school-initiated methods for achieving educational goals established statewide by the Board of Education. *Hawaii Rev. Stat.*, §302A-101.
  4. Despite all the variations in rationale, the main objective of school/community-based management is to enhance student achievement. Stan Koki, "Charter School Concept VERSUS School/Community-Based Management" (1996), PREL Briefing Paper, Pacific Region Educational Laboratory, <http://www.prel.org/products/products/charter-school.pdf>, September 4, 2001, p. 2.
  5. Adapted from National Research Council. *Making Money Matter: Financing America's Schools*. Helen Ladd and Janet Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington, DC: National Academy Press (1999), pp. 186-187.

operate as SCBM schools before the BOE approved their applications<sup>6</sup> to become charter schools.

**Many types of new century charter schools.** Hawaii's charter school program, which was established in 1994, was initially limited to twenty-five existing public schools or "conversion schools" (e.g., Waialae School).<sup>7</sup> Originally referred to as "student-centered schools", conversion schools were viewed by the Legislature as the next step in the evolution of SCBM schools.<sup>8</sup> In 1999, the Legislature expanded the scope of the charter school program to include:<sup>9</sup>

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6. A detailed implementation plan (DIP) constitutes a group's application to establish a new century charter school. See *Hawaii Rev. Stat.*, §302A-1182.

7. Act 272, section 21, Session Laws of Hawaii 1994, p. 848.

8. According to the Seventeenth State Legislature:

Finally, this Act [272] builds upon the legislature's past systemic reform efforts, such as SCBM, that enable schools to become more autonomous and, in turn, directly responsible for educational outcomes. For schools which have successfully implemented school/community-based management and seek further autonomy [emphasis added], this Act allows school staff and parents in collaboration to establish student-centered schools as individual learning units within the public school system.

Act 272, section 1, Session Laws of Hawaii 1994, p. 840.

9. Act 62, section 2, Session Laws of Hawaii 1999, p. 78.

Regarding Senate Bill No. 1501, which eventually became Act 62, the Committees on Education and Labor and Public Employment, of the House of Representatives stated the following:

Your Committees find that the concept of New Century Schools, also known as charter schools, defines a new and improved approach to education, one that is free of bureaucratic red tape and accommodates the individual needs of students. New Century Schools will allow schools increased flexibility and autonomy, with a local school board serving as the governing body of each school, in exchange for greater accountability for student performance.

Your Committees further find that the development and nurturing of New Century Schools will allow the State to dramatically improve its educational standards for the twenty-first century. Currently, there are charter schools operating in over 23 states, and emerging data suggest that charter schools are spurring reform in traditional public schools [emphasis added]. In addition, a study done by the Center for School Improvement at the University of Minnesota of 30 charter schools in 9 states indicated that 68 percent of charter schools demonstrated improved student achievement. And, other studies have shown that charter schools are not only improving students' interest in school, but are enhancing teachers' levels of satisfaction.

House Standing Committee Report No. 1404 on Senate Bill No. 1501, Twentieth Legislature, 1999, State of Hawaii, p. 4.

- (1) Newly created schools or "start-up schools" (*e.g.*, Voyager, which is located in Kakaako at the Coral Commercial Center);
- (2) Newly created schools that use existing public school facilities or "schools-within-schools" (*e.g.*, Ka 'Umeke Ka'eo, which is located in Hilo at Keaukaha Elementary School); and
- (3) Existing public schools not originally established and maintained by the HIDOE (*e.g.*, University Laboratory School, which used to be operated and managed by the Board of Regents of the University of Hawaii).

Because of the need to accept the BOE's policy<sup>10</sup> and implementation guidelines<sup>11</sup> for SCBM, the leap from being an SCBM school to becoming a new century charter school is shorter than the leap from being an "ordinary" or "conventional" public school. The leap is greatest, however, for newly created (charter) schools. This is not to say that conversion schools are "better than" or "superior to" start-up schools or schools-within-schools. The Bureau believes that each type of charter school comes with its own advantages (*e.g.*, the opportunity to create a new school culture) and disadvantages (*e.g.*, the lack of financing for capital facilities). Start-up schools, however, may initially need more technical assistance<sup>12</sup> than conversion schools and schools-within-schools in order to deal effectively and efficiently with the HIDOE.

## The Theoretical Bases of the Charter School Movement

**Competition and choice.** To some people, the charter school movement is about granting individual schools increased autonomy (*i.e.*, freedom from laws and rules) in exchange for more accountability (for results) in order to foster the creation of innovative and effective public schools.<sup>13</sup> According to this competition theory, if a public school loses students to a charter school, the public school will then respond by trying to improve in order to compete and

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10. Hawaii, Department of Education, "School/Community-Based Management Policy" (November 30, 1989), <http://www.hawaii.gov/scbm/scbmp&g.htm> August 30, 2001, 1 p.

11. Hawaii, Department of Education, "School/Community-Based Management Implementation Guidelines" (November 30, 1989; Revised April, 6, 1991), <http://www.hawaii.gov/scbm/scbmp&g.htm> August 30, 2001, 9 pp.

12. Retired, HIDOE school administrative services assistants (SASA) or principals could conceivably provide technical assistance to personnel at start-up schools on an "as needed basis".

13. Lauren Rhim and Margaret McLaughlin, National Association of State Directors of Special Education, Project SEARCH, "Charter Schools and Special Education: Balancing Disparate Visions" (February 2000), <http://www.nasdse.org/charter.pdf>, July 18, 2001, pp. 2 and 8.

retain or attract students. Competition and choice are means to achieving a desired end (*i.e.*, the creation of innovative and effective public schools), not the end itself.<sup>14</sup>

**Safe harbors.** To other people, however, the charter school movement is about providing safe harbors (*i.e.*, refuges, havens, exceptions, or enclaves) designed to serve students for whom more conventional public schools are not satisfactory.<sup>15</sup> It is important to recognize that some parents and teachers have no interest in demonstration projects or the world of education reform. The education of these parents' children and what happens in these teachers' classrooms is more important than the creation of innovative and effective public schools. It is equally important, however, to draw a clear distinction between serving these students and serving their parents and teachers. First and foremost, schools—whether public or charter—should exist to serve students.

**A clear and consistent vision.** The intent of most charter school legislation and, consequently, the intent of most charter school programs are broad enough to embrace both of the abovementioned views.<sup>16</sup> This breadth, however, can lead to incorrect or inconsistent understandings, or both, of what the charter school program and charter schools are supposed to accomplish. Incorrect or inconsistent understandings of what is supposed to be accomplished can affect the evaluation of the charter school program and charter schools in adverse ways. To ensure that the evaluation of the charter school program and charter schools is fair and credible, it is important for the Legislature to clearly state the purpose of the charter school program and charter schools, and to articulate the theoretical basis for the program.

## The Purpose of the Charter School Program

Whether the new century charter school program will be considered a "success" or a "failure" may very well hinge on what its purpose is deemed to be.

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14. Many economists believe that parental choice is likely to lead to the greatest gains in productive efficiency when there is the potential for the entry of new schools or the closing down of existing schools. For example, a charter school might enter and supplant an ineffective public school. National Research Council. *Making Money Matter: Financing America's Schools*. Helen Ladd and Janet Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington, DC: National Academy Press (1999), pp. 191-192.
  15. Greg Vanourek, Bruno Manno, Chester Finn, Jr., and Louann Bierlein, Hudson Institute, Charter Schools in Action Project, Final Report, Part V (August 1997), "The Educational Impact of Charter Schools", <http://www.edexcellence.net/chart/chart5.htm>, May 9, 2001, p. 18.
  16. The intention of most charter school legislation is to: (1) increase opportunities for learning and access to quality education for all students; (2) create choice for parents and students within the public school system; (3) provide a system of accountability for results in public education; (4) encourage innovative teaching practices; (5) create new professional opportunities for teachers; (6) encourage community and parent involvement in public education; and (7) leverage improved public education broadly. United States Charter Schools, "Overview of Charter Schools", [http://www.uscharterschools.org/lpt/uscs\\_docs/58](http://www.uscharterschools.org/lpt/uscs_docs/58), May 23, 2001, p. 1.

Based on the competition theory, that purpose would be to cause improvement in the public schools by creating the kind of internal and external forces that will cause those schools to change.<sup>17</sup> Under this view, as helpful as charter schools may be to the students who enroll in them, the schools are only the means to a desired end. Stated another way, the purpose of the charter school program—of letting someone other than the HIDOE offer public education—is not just to develop new pedagogy<sup>18</sup> and establish more schools.

In addition, the charter school program presumably should produce and retain "excellent" charter schools and get rid of "unsatisfactory" charter schools. The charter school program presumably should also produce schools for average students and not just at-risk, alienated, or special needs students. (In other words, the charter school program would not be used as a means for culling at-risk, alienated, or special needs students, including their parents, from public schools.) Based on the competition theory, charter schools that attract the kinds of students (*e.g.*, self-motivated) and families (*e.g.*, supportive) that public schools want to keep are necessary for the creation of innovative and effective public schools.

Following this approach, the charter school program would be considered a success if public schools adopt charter schools' designs for school governance and management, and student learning. The power to adopt these designs (*i.e.*, the locus of control), however, rests with public schools and not with the charter school program. In other words, the success of the charter school program will be judged on the basis of actions (*i.e.*, the adoption of charter schools' designs for school governance and management, and student learning) over which the program has no control.

By comparison, based on the safe harbor theory, the purpose of the charter school program would be to create schools that serve the unique needs of students who, for reasons other than a disability, are unable to benefit from public school pedagogy and meet the educational standards of the HIDOE. While there may be a need to pacify discontent with, heal wounds caused by, and fill gaps in the public school system, such a program may not be capable of creating the kind of internal and external forces that will cause public schools to change and improve.<sup>19</sup> The drawback to simply pacifying discontent is that doing so could attenuate (*i.e.*, reduce the intensity of) demands for change and improvement in the public school system.

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17. Ted Kolderie, Charter Friends National Network (undated), "What does it mean to ask: Is 'Charter Schools' Working?", <http://www.charterfriends.org/working.html>, July 11, 2001, p. 3.

18. Pedagogy or pedagogics is a term used to identify the practice of education involving curriculum, teaching, and learning. Arthur Ellis and Jeffrey Fouts, *Handbook of Educational Terms and Applications*, Princeton, New Jersey: Eye on Education (1996), p. 158.

19. Greg Vanourek, Bruno Manno, Chester Finn, Jr., and Louann Bierlein, Hudson Institute, Charter Schools in Action Project, Final Report, Part V (August 1997), "The Educational Impact of Charter Schools", <http://www.edexcellence.net/chart/chart5.htm>, May 9, 2001, p. 19.

**Appropriating supplemental funds.** As previously mentioned, the success or failure of the charter school program may very well hinge on what its purpose is deemed to be. Similarly, the Legislature's decision to appropriate supplemental funds to offset the cost of operating twenty-three additional charter schools (and mitigate their impact on the HIDOE's budget) may very well hinge on what the purpose of the charter school program is deemed to be. For example, if that purpose is to cause public schools to change and improve in response to competition from charter schools, then supplemental funding for public schools may not be warranted. On the other hand, if that purpose is to create charter schools that serve the unique needs of students who are unable to benefit from public school pedagogy, then supplemental funding for public schools may be warranted.

**Catalyzing change . . .** Without technical assistance, public schools may be unable to successfully adopt charter schools' designs for school governance and management, and student learning. Parental involvement and student interest in a particular charter school may be the essential ingredients that render a specific design successful at the charter school but unsuccessful at a neighboring public school. Charter school parents who are exceptionally interested in their children's schools may be more motivated to become actively involved in these schools. Similarly, charter school students who are exceptionally interested in their schools' curriculum, teaching strategies, and approaches to learning (*i.e.*, recognition and accommodation of different learning styles)<sup>20</sup> may be more motivated to do well in these schools.

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20. Because of its rather cryptic and symbolic meaning, the term "curriculum" has been subject to many definitions and interpretations. Most typically, the term refers to the formal designation of that which is taught at school. Many have distinguished between the formal curriculum and the hidden curriculum. The formal curriculum is the obvious, published course of study offered by a school. The hidden curriculum represents those socializing, experiential elements that happen along the way.

"Teaching strategies" are the approaches or methods teachers use to ensure student learning. Broadly speaking, teaching strategies can be divided into two large categories: direct and indirect instruction. Direct instruction tends to be teacher-centered and is exemplified by lecture, class discussion, and related means of whole-class instruction. Indirect strategies tend to shift the center of gravity to the student. Examples of indirect instruction include cooperative learning, project methods, discovery learning, and learning centers.

The essence of "learning styles" is that each of us receives and processes information differently, and because this is so, teachers should make every attempt to know how students learn best. The logic of this thought dictates to us that all styles are equal and that intelligence and ability are equally, but differentially, distributed among human beings. Typical school assignments tend to discriminate in favor or against certain learners. But the issue may not be one of ability if one person learns much and another little from, say, a particular lecture. It may be, rather, that the lecture format was more suited to one person's learning style than to another's. What this says is that otherwise capable people are left behind in many cases simply because the approach to learning was inappropriate, not because they were incapable of learning the idea.

Arthur Ellis and Jeffrey Fouts, *Handbook of Educational Terms and Applications*, Princeton, New Jersey: Eye on Education (1996), pp. 66, 128, and 187.

A technical assistance program modeled after a successful technology transfer<sup>21</sup> program could assist public schools in *adapting* designs developed by charter schools. Expecting public schools to adapt these designs without such a catalyst<sup>22</sup> may be wishful thinking at best. If the success of the charter school program will be judged on the basis of public schools' successful adoption of charter schools' designs for governance, management, and learning, then a technical assistance program may be necessary to ensure the success of these public schools and the charter school program.

. . . **but for whom?** It will be interesting to see whether private schools are more responsive than public schools to the internal and external forces created by charter schools. Student (or market) demand affects a private school's enrollment level, which in turn affects the amount of tuition-based money flowing into the school's treasury, which in turn affects the school's ability to pay its bills. Student demand is measured by looking at such characteristics as enrollment level, acceptance and matriculation rates, attrition or retention rate, and academic reputation.<sup>23</sup>

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21. Technology transfer is the process of utilizing technology, expertise, know-how, or facilities for a purpose not originally intended by the developing organization. Technology transfers can result in commercialization or product/process improvement. The Robert C. Byrd National Technology Transfer Center, Wheeling Jesuit University (Wheeling, West Virginia), <http://www.nttc.edu/aboutnttc/faq.asp>, August 30, 2001.
  22. A catalyst is a substance that affects the rate of a chemical reaction while undergoing no permanent change in composition itself. A catalyst does not initiate a chemical reaction. Robert Barnhart, *The American Heritage Dictionary of Science*, Boston, Massachusetts: Houghton Mifflin Company (1986), p. 92.
  23. *Enrollment level* is considered a direct indicator of a school's ongoing efforts to maintain or increase student demand.

*Acceptance rate* is defined as the number of students accepted into (as opposed to enrolled in) a school divided by the number of students submitting applications for entrance into the school. Acceptance rate is considered an indicator of a school's ability to control future enrollment.

*Matriculation rate* is defined as the number of students choosing to enroll in a school divided by the number of students accepted into the school. Matriculation rate is considered an indicator of a school's relative position among the pool of schools to which applicants apply as alternatives (*i.e.*, the school's competitors). A declining matriculation rate is viewed as a sign of weakening market position due to increased competition from other schools, declining performance, or changing demographics.

*Attrition (or retention) rate* refers to the percentage of students, excluding graduates, who leave a school each year (*i.e.*, do not return). This characteristic is also expressed as retention rate, or the percentage of students, excluding graduates, who return to a school the following year. Attrition and retention rates are considered indicators of students' and parents' satisfaction with a school. These rates are used with information concerning the reasons why students chose not to return since some reasons are of greater concern to school officials than others (*e.g.*, are moving away versus run-down or out-of-date facilities).

See *SPRBs for Private Schools: Practical and Constitutional Considerations*, Legislative Reference Bureau, Report No. 2 (Honolulu: 2001), pp. 25-26.

According to Fitch IBCA, Duff & Phelps "Rating Guidelines for Private Colleges and Universities",<sup>24</sup> which are also used to rate private nonprofit grade schools that want to utilize tax-exempt municipal bonds to fund construction projects, important student demand characteristics include positive or stable enrollment trends, low acceptance and high matriculation rates, low attrition or high retention rate, and highly regarded academic reputation. These factors tend to indicate that a private school will continue to have a steady flow of tuition payments over time.

Positive or stable student demand, rather than public schools' adoption of charter schools' designs for governance, management, and learning, may be the most appropriate indicator of success for the charter school program. Identifying these designs, much less attributing their origins to charter schools, may be problematic since this would require the cooperation of public schools. Some public schools may refuse to participate in evaluation activities that could benefit the charter school program. The inability to attribute the origins of these adopted designs to charter schools could undermine one of the purposes of the charter school program—to create the kind of internal and external forces that will cause public schools to change and improve.

**The conversion school exception.** Conceptually, conversion schools<sup>25</sup> are not true charter schools because they are not true schools of choice. A conversion school, unlike a start-up school, serves as "home school" for all resident students, and "school of choice" for some resident students and all nonresident students. Unless a student is granted a geographic

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24. Fitch IBCA, Duff & Phelps, Public Finance, Higher Education Special Report (July 7, 1998), "Rating Guidelines for Private Colleges and Universities", [http://www.fitchibca.com/corporate/reports/report.cfm?rpt\\_id=33331](http://www.fitchibca.com/corporate/reports/report.cfm?rpt_id=33331), pp. 2-4, as cited in *SPRBs For Private Schools: Practical and Constitutional Considerations*, Legislative Reference Bureau, Report No. 2 (Honolulu: 2001), pp. 25-26.

See also Fitch IBCA, Duff & Phelps, Public Finance, Higher Education Criteria Report (July 27, 2001), "Rating Guidelines for Private Colleges and Universities", [http://www.fitchibca.com/corporate/reports/report.cfm?rpt\\_id=129846](http://www.fitchibca.com/corporate/reports/report.cfm?rpt_id=129846), 11 pp., which replaces Fitch's research dated July 7, 1998 (see above).

25. To simplify discussions that distinguish between public charter schools and "ordinary" or "conventional" public schools, the following naming convention will apply to the remainder of this report unless otherwise noted:

"Charter schools" include start-up schools, conversion schools, and schools-within-schools. The term does not include public schools. There are twenty-five charter schools in the State. Twenty-three charter schools are operational at this time; two charter schools will become operational in time for the 2002-2003 school year.

"Public schools" include school/community-based management schools, and ordinary or conventional public schools. The term does not include charter schools. There are 257 public schools at this time. This total includes Hawaii Center for the Deaf and the Blind, Pohukaina, and Jefferson Orthopedic Unit, but excludes new schools without enrollments and special schools with transient enrollments (e.g., Shriner's Hospital School).

The use of this naming convention is not intended to imply that charter schools are private schools or that charter schools should be treated like private schools.

exception to attend a public school outside a conversion school's geographic attendance area, the student must attend the conversion school.<sup>26</sup> Referring to conversion schools simply as schools of choice oversimplifies their unique relationship with the HIDOE and the charter school program. In some respects, conversion schools resemble "super" SCBM schools rather than charter schools.

The evolution from SCBM school to conversion school does not involve the opening up of a new school or the closing down of an existing school. Because the enrollment of a conversion school is limited by its facility capacity and the need to accommodate all resident students—now and in the future, it may be difficult for an "excellent" conversion school to enroll as many nonresident students as an "excellent" start-up school. Conversely, because some resident students may have no choice but to attend a conversion school, it may be difficult for an "unsatisfactory" conversion school to lose as many students as an "unsatisfactory" start-up school.

Given these nearly monopolistic conditions, it may be difficult for conversion schools to create the kind of internal and external forces that will cause public schools to change and improve. Assuming for the sake of discussion that the foregoing will be the case, it may be fairer and more credible to evaluate conversion schools as though they were "super" SCBM schools rather than charter schools. Given their varied relationships with the HIDOE and the charter school program, it may even be advantageous to formulate different policies for conversion schools and start-up schools in order to give each the unique opportunities they may need to succeed. While conversion schools are not better than or superior to start-up schools or schools-within-schools, the Bureau believes that there are certain advantages to knowing the HIDOE system and individuals within it.

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26. Hawaii Administrative Rules, §8-13-7 (Department of Education; Geographic Exceptions).

Even if a student's request for a geographic exception is approved, the student may still be unable to attend a nearby public school if mass transit or private transportation is unreliable or unavailable.

## Chapter 3

### THE LEVEL PLAYING FIELD

#### Introduction

The purpose of this chapter is to propose how new century charter schools should be treated with respect to resource, governance, compliance, and start-up/shutdown issues. As previously discussed in Chapter 1, a system of values to guide present and future decisions about what is "fair" and what is "unfair" is necessary in order to consistently answer the questions posed by S.C.R. No. 113, H.D. 1. To provide a starting point for discussing this system of values, "fair" is arbitrarily assumed to be the operational equivalent of a "level playing field". Consequently, this chapter begins with a general description of the level playing field "standard" and concludes with examples of how this standard can be applied to the new century charter school program using specific "rubrics".

#### The Level Playing Field Standard

**What is "level"?** For the purposes of this report, the playing field is considered "level" when:

- (1) Personnel and program resources are made available to new century charter schools on the same basis and in the same manner as they are made available to public schools;
- (2) Every student has a chance to attend the charter school of the student's own choosing subject to the availability of space and the ability of the school to provide reasonable accommodations for the student;<sup>1</sup> and
- (3) The only substantive differences between charter schools and public schools are:
  - (A) Charter schools' implementation of alternative frameworks for curriculum, facilities management, instructional approach, length of the school day, week, or year, and personnel management;<sup>2</sup>
  - (B) Charter schools' exemption from "all applicable state laws" except those laws regarding collective bargaining, discriminatory employment

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1. See Hawaii Administrative Rules, §8-13-7 (Department of Education; Geographic Exceptions), as it relates to an "exceptional student" or any student who is found eligible for special education and related services.

2. See the definition of "new century charter schools". *Hawaii Rev. Stat.*, §302A-101.

practices, health and safety requirements,<sup>3</sup> and implementation of the *Hawaii Content and Performance Standards II*;<sup>4</sup>

- (C) Charter schools' negotiation of supplemental agreements to master collective bargaining agreements with the exclusive representatives of charter school employees;<sup>5</sup> and
- (D) Charter schools' development of internal procurement policies and procedures, consistent with the goals of public accountability and public procurement practices.<sup>6</sup>

**Equality and equity.** In general, the Hawaii Department of Education (HIDOE) makes personnel and program resources available to public schools on the basis of "equality" (*i.e.*, the equal distribution of positions or moneys) and "equity" (*i.e.*, the need for services to achieve desired outputs or outcomes).<sup>7</sup> Paradoxically, equity sometimes involves substantial inequality, and equality occasionally involves substantial inequity.<sup>8</sup> For example, unequal inputs (*i.e.*, extra resources) may be provided to a group (*e.g.*, alienated students) believed to have extraordinary needs in order to give the group the opportunity to achieve equal outputs or outcomes (*e.g.*, the *Hawaii Content and Performance Standards II*).

**Fair or unfair.** When the "right" balance of equality and equity is achieved, spending on school programs is more likely to be considered "fair". Just the opposite, when equality and equity are thrown out of balance, spending on school programs is more likely to be considered "unfair". For example, budget cuts may pit programs for special education students against

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3. *Hawaii Rev. Stat.*, §302A-1184.

4. *Hawaii Rev. Stat.*, §302A-1182.

Hawaii, Board of Education, "New Century Charter Schools Detailed Implementation Plan Assurances" (form), undated, p. 3.

5. *Hawaii Rev. Stat.*, §302A-1184.

6. *Hawaii Rev. Stat.*, §302A-1184.

7. Hawaii, Department of Education, *Resource Allocation & Budget Execution, Allocation Formulas for School Level Staff, Fiscal Year 1995-1996*, October 5, 1994, p. 1.

The resource allocation and budget execution document and allocation formulas for school level staff were last printed and bound in 1994. For the current budget allocation of resources for school year 2000-2001, go to <http://lilinode.k12.hi.us/STATE/BUDGET/ALLOC/barc01.NSF>.

In some cases, the Legislature rather than the HIDOE makes an allocation of personnel and program resources.

8. National Research Council. *Making Money Matter: Financing America's Schools*. Committee on Education Finance, Helen Ladd and Janet Hansen, editors. Commission on Behavioral and Social Sciences and Education. Washington, DC: National Academy Press (1999), p. 69.

programs for gifted and talented students.<sup>9</sup> The U.S. Department of Education (USDOE) has adopted regulations concerning, presumably, one view of the "fair" allocation of federal moneys to charter schools.<sup>10</sup> In addition to directing how state or local educational agencies are to allocate federal funds to charter schools, the federal regulations also provide one view of the "right" balance between equality and equity.

In some cases, the federal regulations require states to treat charter schools and public schools alike. For example, a charter school is entitled to receive the proportionate amount of moneys for which the charter school is eligible under each covered (federal) program,<sup>11</sup> excluding programs under which the HIDEOE awards moneys on a discretionary, noncompetitive basis. In other cases, the federal regulations require states to treat charter schools and public schools differently. For example, allocations to a charter school, for the year the school first opens or significantly expands its enrollment,<sup>12</sup> must be based on actual enrollment or other eligibility data for the school rather than on data from a prior year.<sup>13</sup>

## Applying the Standard to Charter Schools

**Allocating personnel resources and the "salary cap" effect.** As previously mentioned, the HIDEOE allocates personnel resources to public schools by making full-time equivalent (FTE) positions available to these schools on the basis of equality and equity.<sup>14</sup> The new century charter school law, however, allocates personnel resources by making the cash equivalent of the HIDEOE's total general fund appropriation and average per pupil expenditure for similar cost items available to charter schools on the basis of equality.<sup>15</sup> Special education teacher positions, however, have been allocated to charter schools since the 2000-2001 school year in order to

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9. It is not fair to pit programs for special education students against programs for gifted and talented students because the former involve federal civil rights issues and the latter are discretionary state programs. See *Hawaii Rev. Stat.*, §302A-444, regarding programs for gifted and talented children.
  10. 34 C.F.R. §§76.785 to 76.910 (7-1-00 Edition).
  11. "Covered program" is defined as an elementary or secondary education program administered by the USDOE under which the Secretary of Education allocates funds to states on a formula basis, except that the term does not include a program or portion of a program under which the HIDEOE awards subgrants (*i.e.*, moneys) on a discretionary, noncompetitive basis. See 34 C.F.R. §§76.787 and 76.794 (7-1-00 Edition).
  12. "Significant expansion of enrollment" is defined as a substantial increase in the number of students attending a charter school due to a significant event that is unlikely to occur on a regular basis, such as the addition of one or more grades or educational programs in major curriculum areas. The term also includes any other expansion of enrollment that the HIDEOE determines to be significant. See 34 C.F.R. 76.787 (7-1-00 Edition).
  13. 34 C.F.R. §§76.791 and 76.796 (7-1-00 Edition).
  14. Hawaii, Department of Education, *Resource Allocation & Budget Execution, Allocation Formulas for School Level Staff, Fiscal Year 1995-1996*, October 5, 1994, 64 pp.
  15. *Hawaii Rev. Stat.*, §302A-1185.

ensure the provision of a free appropriate public education (FAPE). The salaries for these positions are being paid out of the HIDOE's central salary account.<sup>16</sup>

All other things being equal (*e.g.*, holding a bachelor's degree in education and a teaching license issued by the Hawaii Teacher Standards Board), veteran teachers earn more than beginning teachers.<sup>17</sup> The allocation of full-time equivalent positions to public schools allows principals to hire veteran—and generally more experienced—teachers without regard to the teachers' salaries and the schools' budgets. By allocating positions to public schools and paying teachers from a central account, the HIDOE has freed public school principals from the task of having to budget for teacher salaries. As long as a school's faculty does not exceed the number of positions allocated, the actual amount of their combined salaries is immaterial.

The HIDOE's allocation methodology avoids the need to impose school-level "salary caps" (wherein the "mix" of a school's faculty is dictated by the amount of funds available), but does nothing to prevent experienced teachers from concentrating at certain public schools or from constantly transferring out of other public schools.<sup>18</sup> Conversely, the new century charter school law creates school-level salary caps for each school calculated by multiplying the average per pupil expenditure by the number of students enrolled. A school's salary cap can discourage experienced public school teachers from transferring to charter schools, or discourage tenured teachers from staying at charter schools for more than just a few years, or both.<sup>19</sup> The problems

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16. Telephone interview with Ms. Debra Farmer, Educational Specialist, Department of Education Special Education Section, December 3, 2001.

17. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, Exhibits A, 1 (corrected), 2, 3, and 4 (corrected), pp. 59-63. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

18. The Fall 2000 *School Status and Improvement Report* for Maemae Elementary School in the Honolulu departmental school district reports Maemae teachers' average years of experience to be 17.6. Thirty-eight out of forty teachers (approximately 95 percent) have five or more years of experience in Maemae Elementary School. Hawaii, Department of Education, Comprehensive Assessment and Accountability System, *School Status and Improvement Report*, School Year 1999-2000 (Fall 2000), <http://arch.k12.hi.us/pdf/ssir/2000/Honolulu/SSIR136.PDF>, July 17, 2001, p. 4.

In contrast, the Fall 2000 *School Status and Improvement Report* for Maili Elementary School in the Leeward departmental school district reports Maili teachers' average years of experience to be 10.2. Thirty out of fifty-three teachers (approximately 57 percent) have five or more years of experience in Maili Elementary School. Hawaii, Department of Education, Comprehensive Assessment and Accountability System, *School Status and Improvement Report*, School Year 1999-2000 (Fall 2000), <http://arch.k12.hi.us/pdf/ssir/2000/Leeward/SSIR257.PDF>, July 17, 2001, p. 4.

19. According to Stephen Sugarman:

In many districts, regular public schools have their teacher positions funded, rather than having district-average, per pupil, lump sums paid over to them. Charter schools, however, generally want the flexibility of configuring their staffs in innovative ways, of paying their teachers differently, and so on. This wish makes them push for a lump sum per pupil. How should the district deal with this demand? If it pays the charter school the districtwide average, the district could well find it more expensive to fund a

(Footnote continued on next page.)

discussed above stem from the basic fact that, all other things being equal, a teacher with twenty years of classroom experience will earn more—and therefore "cost" more—than a teacher with two years of experience.

**Special education and school choice.** Charter schools are subject to the same federal disability laws and regulations that apply to public schools, including *Section 504*, the *ADA*, and the *IDEA*.<sup>20</sup> The State of Hawaii, however, can exempt charter schools from those portions of state disability laws and rules that exceed the minimum requirements established by the federal government.<sup>21</sup>

In general, special education and related services are coordinated by and provided at a student's home school.<sup>22</sup> If a student is granted permission to attend a public school located

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charter school than a comparable school it runs itself—that is, assuming the charter school is a conversion of an existing public school filled with an inexperienced staff. Notice also how a policy of making a per pupil allocation to charter schools might create a strong financial incentive for many existing public schools to convert to charter schools and a disincentive for other existing schools to become charter schools. These complications of charter school funding, even more than conventional intradistrict school choice schemes, will put pressure on districts to eliminate the inequalities that now arise from the funding of teacher positions. If a district abandons funding teacher positions for its charter schools, it may well have to do the same for its ordinary schools. [emphasis added]

Stephen Sugarman. "School Choice and Public Funding", *School Choice and Social Controversy*, ed. Stephen Sugarman and Frank Kemerer. Washington, DC: Brookings Institution Press (1999), pp. 121-122, and 366.

Stephen Sugarman is the Agnes Roddy Robb Professor of Law at the University of California School of Law, Berkeley.

20. U.S., Department of Education, Office for Civil Rights, "Applying Federal Civil Rights Laws to Public Charter Schools" (May 2000), [http://www.uscharterschools.org/pdf/fr/civil\\_rights.pdf](http://www.uscharterschools.org/pdf/fr/civil_rights.pdf), July 17, 2001, pp. 3-4, 12-13, and 16-18.

U.S., Department of Education, "1997 Charter Schools National Conference, Special Education Workshop Session" (November 3, 1997), [http://www.uscharterschools.org/lpt/uscs\\_docs/43](http://www.uscharterschools.org/lpt/uscs_docs/43), May 21, 2001, pp. 2-8, 11-13, and 15-16.

21. Elizabeth Giovannetti, Eileen Ahearn, and Cheryl Lange, Charter Friends National Network, *Charter Schools and the Education of Children with Disabilities*, Second Edition, <http://www.charterfriends.org/specialed.pdf> (May 2001), p. 3.

The original version of this revised document was produced in 1997 by Project FORUM at the National Association of State Directors of Special Education with support from the U. S. Department of Education. This revised document was prepared for the Charter Friends National Network, Special Education Working Group.

22. Interview with Ms. Kathleen Takaki, Honolulu District Education Specialist, Department of Education Special Services Branch, July 19, 2001.

(Footnote continued on next page.)

outside the home school's geographic attendance area, then special education and related services are coordinated by and provided at the student's receiving school.<sup>23</sup> A student who is eligible for special education and related services ("eligible student") is not required to obtain a geographic exception if the student is placed, through the individualized education program (IEP) process, outside the home school's geographic attendance area.<sup>24</sup>

Subject to the availability of space at a receiving school and the ability of the school to provide reasonable accommodations for an eligible student, every student—including an eligible student—has the right to attend the public school of the student's own choosing. An eligible student's application for a geographic exception cannot be categorically denied if the receiving school has space available and is capable of providing reasonable accommodations for the student.<sup>25</sup> For example, the receiving school may be capable of providing an eligible student with access to elevators or extra time to get from one class to another, if the student has a health impairment that makes climbing and walking difficult.

The existence of a level playing field implies that an eligible student should be allowed to attend a charter school of the student's own choosing subject to the availability of space at the school and the ability of the school to provide reasonable accommodations for the student.<sup>26</sup>

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Interview with Mr. Dennis Dobies, Honolulu District Education Specialist, Department of Education Special Education Branch, August 2, 2001.

A student's "home school" should not be confused with "home schooling". The term "home school" means the school within the geographic attendance area that the student must attend according to the student's legal residence. Hawaii Administrative Rules, §8-13-2 (Department of Education; Geographic Exceptions). In contrast, "home schooling" means a viable educational option where a parent instructs the parent's own child. Hawaii Administrative Rules, §8-12-1 (Department of Education; Compulsory Attendance Exceptions).

23. The term "receiving school" means the school outside the geographic area of the student's legal residence. Hawaii Administrative Rules, §8-13-2 (Department of Education; Geographic Exceptions).

24. Hawaii Administrative Rules, §8-13-3 (Department of Education; Geographic Exceptions).

25. Hawaii Administrative Rules, §8-13-7 (Department of Education; Geographic Exceptions).

Hawaii, Department of Education, "Guidelines for Implementing Chapter 13, Geographic Exceptions—Revised" (December 2000), pp. 2-3.

26. This seems consistent with Hawaii Administrative Rules, §8-56-45 (Department of Education), which states:

In determining the educational placement of a student with a disability, including a preschool student with a disability, the department shall ensure that [emphasis added]:

\* \* \*

- (2) The student's placement:
  - (A) Is determined at least annually;
  - (B) Is based on the student's IEP; and
  - (C) Is as close as possible to the student's home;

*(Footnote continued on next page.)*

Conceptually, attendance at a charter school would be considered the equivalent of attendance at a public school located outside the home school's geographic attendance area—as a matter of choice. For example, special education and related services are coordinated by and provided at Kula Kaiapuni `O Anuenue—a kindergarten to grade 12 Hawaiian language immersion school located on the island of Oahu. Anuenue is a true school of choice in that it has no geographic attendance area and all of its students are enrolled on geographic exceptions.<sup>27</sup> Anuenue, however, is not a charter school.

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- (3) Unless the IEP of a student with a disability requires some other arrangement, the student is educated in the school that the student would attend if nondisabled [emphasis added];
  - (4) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs; and

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The HIDEOE considers the abovementioned rules to be student rights. For example, according to the HIDEOE, "[e]very student with a disability has the right to . . . [b]e educated as close as possible to the student's home". Hawaii, Department of Education, "Parent *and* Student Rights in Special Education", RS 01-0071 (Rev. of RS 00-448), August 2000, pp. 8-9.

The HIDEOE is required, however, to consider any potential harmful effect on the student or on the quality of services that the student needs. According to the HIDEOE, "[i]n selecting the least restrictive environment, the Department must consider any potential harmful effect on the student or on the quality of services that the student needs . . .". Hawaii, Department of Education, "Parent *and* Student Rights in Special Education", RS 01-0071 (Rev. of RS 00-448), August 2000, p. 9.

Requiring students to be placed as close to home as possible is supposed to discourage placements in distant schools, particularly in a residential treatment program. The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. Part 104—Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to 300 C.F.R. §300.552:

2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program [emphasis added]. An equally appropriate education program may exist closer to home, and this issue may be raised by the parent under the due process provisions of this subpart.

U.S., Department of Education, Office of Special Education and Rehabilitative Services, "Assistance to States for the Education of Children With Disabilities, Preschool Grants for Children With Disabilities, and Early Intervention Program for Infants and Toddlers With Disabilities", Federal Register: Vol. 62, No. 204; Wednesday, October 22, 1997; Proposed Rules; p. 55107, cited in U.S., Department of Education, "Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities", Federal Register: Vol. 64, No. 48; Friday, March 12, 1999; Rules and Regulations; pp. 12639 and 12640.

27. Telephone interview with Mr. Charles Naumu, Principal, Kula Kaiapuni `O Anuenue, December 24, 2001.

Kula Kaiapuni `O Anuenue—a Roosevelt Complex<sup>28</sup> school—has its own special education teacher and student services coordinator positions but contracts for school-based behavioral health (SBBH) services. These positions are directly involved in the coordination and provision of special education and related services at the school level. A level playing field implies that special education and related services should be coordinated by and provided at an eligible student's charter school if the school has space available and can provide reasonable accommodations for the student. The HIDOE may request a due process hearing if it disagrees with the educational placement<sup>29</sup> of an eligible student or the provision of a free appropriate public education to the student.<sup>30</sup>

**Student transportation and school choice.** Schools that converted from being regular public schools to charter schools ("conversion schools")—specifically Waialae School and Lanikai School—serve as home schools for all area students, and schools of choice for some area students and all nonresident students enrolled under geographic exceptions.<sup>31</sup> Referring to conversion schools simply as schools of choice, however, oversimplifies their unique relationship with the HIDOE. For example, some area students may have no choice but to attend a conversion school if their request for a geographic exception to attend a public school is denied.<sup>32</sup> Even if an area student's request for a geographic exception is approved, the student

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28. The Roosevelt Complex is comprised of the following schools: Theodore Roosevelt High, Prince David Kawananakoa Middle, Robert Louis Stevenson Middle, Kula Kaiapuni `O Anuenue (K-12), Abraham Lincoln Elementary, Ma`ema`e Elementary, Manoa Elementary, Noelani Elementary, Nu`uanu Elementary, and Pauoa Elementary. Hawaii, Department of Education, "School Status and Improvement Report, 2000-01: School Complex Summary" (Honolulu, <http://arch.k12.hi.us/pdf/ssir/2001/Honolulu/Honolulu%20District%20Complexes.PDF>, December 10, 2001, pp. 18 to 23.

29. The HIDOE considers enrollment in a charter school as a change of placement, which must be made within the IEP process. Enrollment in a public school on a geographic exception, however, is not considered a change of placement. Interview with Ms. Debra Farmer, Educational Specialist, Department of Education Special Education Section, October 10, 2001.

The term "placement" means an appropriate educational setting for the implementation of the program for a student with a disability based upon the individualized education program. Placement must be provided in the least restrictive environment in a continuum of educational arrangements. Hawaii Administrative Rules, §8-56-2 (Department of Education; Provision of a Free Appropriate Public Education for a Student with a Disability).

30. Hawaii Administrative Rules, §8-56-72 (Department of Education; Provision of a Free Appropriate Public Education for a Student with a Disability).

Hawaii, Department of Education, "Parent and Student Rights in Special Education", RS 01-0071 (Rev. of RS 00-448), August 2000, p. 14.

31. Interview with Mr. Charles Higgins, Public Charter Schools Specialist, Department of Education Public Charter Schools Program, December 2001.

32. Hawaii Administrative Rules, §8-13-7 (Department of Education; Geographic Exceptions).

may still be unable to attend a nearby public school if transportation, whether provided by the State<sup>33</sup> or otherwise, is unreliable, unavailable, or unaffordable.

Students who are not eligible for transportation to and from public schools because they are on geographic exceptions are currently allowed to ride a school bus if there are unused seats on the bus and if the accommodation of these students will not result in additional cost to the State.<sup>34</sup> The existence of a level playing field implies that if public school students on geographic exceptions are allowed to ride a school bus, then charter school students who attend a start-up school should also be allowed to ride the bus. Attending a public school on a geographic exception, as well as attending a start-up school, is a matter of choice.

With respect to student transportation, area students who attend a conversion school (and who are therefore identically situated to area students attending a public school) should be given priority seating over public school students on geographic exceptions. Nonresident students who attend a conversion school, charter school students who attend a start-up school, and public school students on geographic exceptions should be allowed to ride a school bus if there are unused seats on the bus and if the accommodation of these students will not result in additional cost to the State. Priority seating should not be given to nonresident students who attend a conversion school, charter school students who attend a start-up school, or public school students on geographic exceptions since attending these schools is a matter of choice. Any unused bus seats left remaining after all requests for priority seating have been accommodated should be assigned through a lottery to ensure fairness.

**Priority consideration for geographic exceptions.** Priority consideration for a geographic exception is given to applicants who request an exception for any of the following reasons.<sup>35</sup>

- (1) Authorized physical residence in the receiving school's geographic attendance area;
- (2) Program of study of the receiving school that is not available at the home school;
- (3) Siblings of students currently enrolled in the receiving school who will continue to be enrolled in the coming school year; or
- (4) Children of staff at the receiving school.

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33. The purpose of providing transportation to students is to facilitate compliance with the state compulsory attendance law and to provide access to equal educational opportunity without undue transportation hardships. Hawaii Administrative Rules, §8-27-1 (Department of Education; Student Transportation).

34. Hawaii Administrative Rules, §8-27-5 (Department of Education; Student Transportation).

35. Hawaii Administrative Rules, §8-13-7 (Department of Education; Geographic Exceptions).

The reasons for priority consideration are not ranked and each is given equal consideration. All other requests for geographic exceptions are considered only after priority requests have been accommodated. An application for a geographic exception cannot be denied if the receiving school has space available. A request for priority consideration, however, can be denied if the reasons for the request are not the same as those enumerated above.

As previously mentioned, conversion schools serve as home schools for all area students, and schools of choice for some area students and all nonresident students. The existence of a level playing field implies that area students can choose to attend conversion schools or, perhaps more importantly, choose not to attend conversion schools. Conceptually, area students who attend charter schools should be allowed to opt out of their conversion schools on the same basis and in the same manner that area students who attend public schools are allowed to opt out of their home schools. Requiring students to attend charter schools against their will undermines the principle of school choice, and is unfair to these students and their schools.

To create a level playing field, priority consideration for geographic exceptions should be given to applicants who wish to opt out of conversion schools. This would be consistent with giving priority consideration to applicants who request a geographic exception because the program of study of the receiving school (e.g., orchestra) is not available at the home school. Although priority consideration for geographic exceptions is not being given to applicants who wish to opt out of SCBM schools, charter schools represent a substantial departure from SCBM schools and other public schools.

**Tenure and service credit.** To become tenured, all teachers entering the service of the HIDOE for the first time must serve as probationary employees of the department for a minimum period of two consecutive years<sup>36</sup> or four semesters.<sup>37</sup> Probationary teachers who participate in the Hawaii National Guard Youth Challenge Program can earn up to four semesters of probationary credit, but must return to a public school for one day and the remainder of their contract (usually one school year or two semesters) in order to become tenured.<sup>38</sup> Preliminary indications from the BOE are that probationary public school teachers who transfer to a charter

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36. *Hawaii Rev. Stat.*, §302A-607.

37. Two years is interpreted to mean four semesters. For example, see Hawaii, Department of Education, "Draft Personnel Guidelines for BU 5 Teachers Employed by New Century Public Charter Schools (K-12)", June 29, 2001, p. 4.

38. Telephone interview with Ms. Sandra McFarlane, Director, Department of Education Personnel Services Branch, August 16, 2001.

While participating in the Youth Challenge Program, a teacher is under the direction, supervision, and control of the Hawaii National Guard, which has authority over all program requirements and working conditions. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, p. 77. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

school—whether a conversion school, a school-within-school, or a start-up school—will not be allowed to earn any probationary credit toward tenure.<sup>39</sup>

While the memorandum of understanding between the BOE and the Hawaii State Teachers Association (HSTA) concerning the Youth Challenge Program clearly states that the memorandum does not set any precedent,<sup>40</sup> a level playing field implies that probationary public school teachers who transfer to charter schools should be allowed to earn up to four semesters of probationary credit toward tenure. It also implies, however, that tenure should be granted only upon a probationary teacher's return to a public school for at least one day and the remainder of the teacher's contract. In other words, on a level playing field, charter schools would not be allowed to grant tenure to probationary teachers.

Tenured teachers who participate in the Youth Challenge Program continue to earn and accrue service credits as if they were in their regular teaching positions.<sup>41</sup> In somewhat similar fashion, the President of the HSTA ("President") continues to accrue HIDOE service credit for the period of the President's leave without pay from the department.<sup>42</sup> When the President returns from the leave, the President is placed in the appropriate range/step of the salary schedule as if the President had remained in service.

Preliminary indications from the BOE are that tenured public school teachers who transfer to a charter school will not earn and accrue service credits while the charter school employs them.<sup>43</sup> The inability to continually earn and accrue service credits affects all tenured public school teachers because a staff reduction caused by a drop in enrollment is based primarily on service time: tenured teachers with the least number of years of service are staff reduced first.<sup>44</sup> Tenured teachers in nonshortage areas may be especially reluctant to transfer to a

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39. Hawaii, Department of Education, "Draft Personnel Guidelines for BU 5 Teachers Employed by New Century Public Charter Schools (K-12)", June 29, 2001, p. 4.

40. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, p. 77. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

41. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, p. 76. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

42. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, pp. 6-7. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

43. Hawaii, Department of Education, "Draft Personnel Guidelines for BU 5 Teachers Employed by New Century Public Charter Schools (K-12)", June 29, 2001, p. 2.

44. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, pp. 31-32. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

While service time can also be used by a principal or immediate supervisor to make assignments and affect transfers involving two or more teacher-applicants, service time is used only when there is no material  
(Footnote continued on next page.)

charter school if they cannot earn and accrue service credits while the charter school employs them.

While the agreement between the HSTA and the BOE clearly states that the abovementioned provisions are limited to the President of the HSTA,<sup>45</sup> the existence of a level playing field implies that tenured public school teachers who transfer to charter schools should:

- (1) Continue to earn and accrue service credits as if they were in their regular teaching positions; and
- (2) Be placed in the appropriate range/step of the salary schedule as if they had remained in service when they return to the HDOE.

**Financing charter school facilities.** Unlike their public school, conversion school, and school-within-school counterparts, start-up schools must rent or build facilities, or ask the public to donate facilities, or both. The cost of building public schools is usually spread out over twenty years through the issuance of general obligation bonds. Neither the BOE, the HDOE, nor individual public schools are responsible for debt service—or the payment of principal and interest on these bonds. These bonds are the responsibility of the State, and are backed by its full faith and credit (*i.e.*, taxing power).

Debt service attributable to public schools amounted to \$84,698,210, during fiscal year 1999-2000, or \$457 per pupil based on an official enrollment count of 185,036 (see Table 1). Since neither the BOE, the HDOE, nor individual public schools are responsible for the payment of principal and interest on these general obligation bonds, they essentially operate "rent free" and "debt free" in their physical facilities.

**Table 1**  
**PER PUPIL DEBT SERVICE PAYMENTS**

<b>Fiscal Year</b>	<b>Debt Service (\$)*</b>	<b>Official Enrollment Count (Pupils)</b>	<b>Per Pupil Expenditure (\$)</b>
1997-1998	83,167,889	189,281	439
1998-1999	84,900,352	187,395	453
1999-2000	84,698,210	185,036	457
<i>Average</i>	<i>84,255,484</i>	<i>187,237</i>	<i>450</i>

\* Includes principal and interest payments.

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difference between qualifications of the applicants. In other words, service time functions as a non-neutral tiebreaker. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, pp. 29-30. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

45. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, p. 7. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

**The color of money.** A level playing field implies that state and federal moneys should be made available to charter schools on the same basis and in the same manner as they are made available to public schools. It also implies that moneys in special, revolving, and trust funds should be made available to charter schools on the same basis and in the same manner as they are made available to public schools. Conceptually, charter schools should not gain a monetary advantage over public schools, and public schools should not be placed at a monetary disadvantage to charter schools, if the playing field is level.<sup>46</sup>

Assuming the existence of a level playing field, moneys that are made available to public schools on a competitive,<sup>47</sup> discretionary,<sup>48</sup> or categorical<sup>49</sup> basis should be made available to charter schools on the same basis. For example, if public schools must compete with one another for grant moneys (or services the grant moneys procure), then charter schools should have to compete with public schools for the same moneys (or services). If moneys are made available to public schools based on a demonstrated need, then these moneys should be made available to charter schools that demonstrate the same need. If moneys are made available to public schools for the purpose of implementing a specific program of study or aiding a specific sort of student, then these moneys should be made available to charter schools for the same purpose.

Similarly, moneys that are made available to public schools on a nondiscretionary, noncompetitive, or noncategorical basis should be made available to charter schools on the same basis. If the playing field is level, neither charter schools nor public schools should gain a monetary advantage or be placed at a monetary disadvantaged relative to the other.

Moneys that are made available to public schools by the Legislature on the basis of geography (*i.e.*, on a school-specific, complex-specific, or district-specific basis), however, should be made available to charter schools only with the approval of the Legislature. Likewise, moneys that are held in existing trust funds within the HIDOE should be made available to charter schools only with the approval of the moneys' donors.

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46. Conceptually, moneys are "taken away" from a public school when a charter school is given moneys for programs the charter school does not operate or students the charter school does not serve. Conversely, moneys are "taken away" from a charter school when the charter school is not given moneys for programs it operates and students it serves.

Similarly, moneys are "taken away" from a secondary charter school when an elementary charter school is given moneys for programs the elementary school does not operate or students the elementary school does not serve. Conversely, moneys are "taken away" from an elementary charter school when a secondary charter school is given moneys for programs the secondary school does not operate or students the secondary school does not serve.

47. "Competitive" means awarded through competitive means, *e.g.*, "incentive innovative grants" (16756).

48. "Discretionary" means based on a demonstrated need, *e.g.*, "night security" (37661).

49. "Categorical" means for a specific program or specific student, *e.g.*, "Hawaiian studies" (16807) and "pregnant/parenting program" (12641), respectively.

**Elementary and secondary school moneys.** With respect to the allocation of program moneys (by the HIDOE) to elementary and secondary public schools, moneys strictly for secondary (*i.e.*, middle or high) public school programs are not made available to elementary public schools, and moneys strictly for elementary public school programs are not made available to secondary public schools.<sup>50</sup> For example, moneys for high school athletic directors (27358) are not made available to elementary and middle schools. Conversely, moneys for primary prevention/intervention—Felix (15674), also known as the primary school adjustment project (PSAP); and for comprehensive elementary counseling (26877), are not made available to middle and high schools.

Based on HIDOE practices for allocating program moneys to elementary and secondary public schools, moneys strictly for secondary charter school programs should not be made available to elementary charter schools, and moneys strictly for elementary charter school programs should not be made available to secondary charter schools. Assuming the existence of a level playing field,<sup>51</sup> and applying the foregoing HIDOE allocation practices to charter schools, moneys strictly for secondary public school programs should be made available only to secondary charter schools, and moneys strictly for elementary public school programs should be made available only to elementary charter schools.

Reporting requirements imposed on the use of these moneys by the Legislature, the federal government, or their donors should apply to charter schools in the same manner that the requirements apply to public schools. Public schools and charter schools that are unwilling or unable to abide by these requirements should be made to return these moneys.

**Apples, oranges, and per pupil expenditures.** Section 302A-1185, *Hawaii Revised Statutes*, specifies that charter schools are to receive an allocation of state general funds based on the total HIDOE general fund appropriation and per pupil expenditure for the previous fiscal year. (While the foregoing representation is an over-simplification of a complex law and the intricacies of its implementation, the representation is sufficient for the purposes of the following discussion.) Implicit in the use of per pupil expenditures is the assumption that the per pupil expenditure for elementary school students (*i.e.*, K-5 and K-6), middle school students (*i.e.*, 6-8 and 7-8), high school students (*i.e.*, 9-12), and multi-level school students (*i.e.*, K-8, K-9, 6-12, 7-12, and K-12), whether they are enrolled in public schools or charter schools,<sup>52</sup> are equal or nearly equal.

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50. With respect to public schools, moneys strictly for middle school programs (*e.g.*, the primary instructional needs of intermediate/middle schools program—or PINS, 16817, 16819, and 16936) are not made available to elementary or high schools, and moneys strictly for elementary or high school programs (*e.g.*, high school athletic directors and comprehensive elementary counseling) are not made available to middle schools.
51. The existence of a level playing field implies that state and federal moneys, as well as moneys in special, revolving, and trust funds, should be made available to charter schools on the same basis and in the same manner as they are made available to public schools.
52. Organizational structure (*i.e.*, elementary, middle, high, or multi-level school), rather than enrollment in public schools or charter schools, is the main subject of this particular discussion.

Based on HIDOE data (see Table 2 in Appendix C), the abovementioned assumption does not appear to be entirely true when, for example, public schools' per pupil expenditures for "instruction",<sup>53</sup> based on enrollment,<sup>54</sup> are compared.<sup>55</sup> Public elementary schools' per pupil expenditure for instruction, based on enrollment, was \$2,967; middle schools' per pupil expenditure for instruction was \$2,815; high schools' per pupil expenditure for instruction was \$2,667; and multi-level schools' per pupil expenditure for instruction was \$2,920. In comparison, public elementary, middle, high, and multi-level schools' per pupil expenditure for "instruction", based on enrollment, was \$2,866.

Per pupil expenditures for "instructional support",<sup>56</sup> vary similarly. Public elementary schools' per pupil expenditure for instructional support, based on enrollment, was \$800; middle schools' per pupil expenditure for instructional support was \$748; high schools' per pupil expenditure for instructional support was \$982; and multi-level schools' per pupil expenditure for instructional support was \$1,215. In comparison, public elementary, middle, high, and multi-level schools' per pupil expenditure for instructional support, based on enrollment, was \$873.

The "one size fits all" assumption that is implicit in the use of per pupil expenditures<sup>57</sup> is not supported by the abovementioned data. A difference of \$101 per pupil for instruction-related

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53. "Instruction" includes those resources reaching pupils in the classroom, such as the salaries and benefits of teachers, substitutes, instructional paraprofessionals, pupil-use technology, software and instructional materials, trips, and supplies. Hawaii, Department of Education, "Hawaii School Expenditure Reporting System (HSERS)", Fiscal Year 1999-2000 (October 9, 2001), <http://165.248.10.76/insight00/insight00a.htm>, October 24, 2001.

54. Enrollment for school year 1999-2000 was 185,036 (K-12). Hawaii, Department of Education, Planning, Budget, and Resource Development Office, *The Superintendent's Eleventh Annual Report on School Performance and Improvement in Hawaii, 2000* (April 2001), RS 01-1129, <http://arch.k12.hi.us/pdf/report/2000/SuptRept2000.pdf>, October 30, 2001, p. 2.

See Appendix # for a discussion about the methodology and sources of information used by the Bureau to compute public elementary school, middle school, high school, and multi-level school enrollment for school year 1999-2000.

55. See Appendix # for a discussion about the methodology and sources of information used by the Bureau to compute these expenditure figures.

The Bureau's per pupil expenditure figures exclude capital improvement projects and debt payments, and expenditures by other agencies.

56. "Instructional support" includes expenditures for student support personnel (guidance and counseling, library and media, extracurricular and student services); costs to support teachers, such as curriculum development, in-service and staff development, and sabbaticals; and other program support expenditures. Hawaii, Department of Education, "Hawaii School Expenditure Reporting System (HSERS)", Fiscal Year 1999-2000 (October 9, 2001), <http://165.248.10.76/insight00/insight00a.htm>, October 24, 2001.

57. The implicit assumption is that the per pupil expenditure for elementary school students, middle school students, high school students, and multi-level school students, whether they are enrolled in public schools or charter schools, are equal or nearly equal.

expenditures represents a \$30,300 shortfall to an elementary charter school that enrolls 300 students.<sup>58</sup> Conversely, a difference of \$199 per pupil for instruction-related expenditures represents a \$59,700 windfall to a charter high school that enrolls 300 students.<sup>59</sup>

Expenditures for instructional support include expenditures for "program support" (*e.g.*, district resource teachers), "teacher support" (*e.g.*, sabbaticals), and "pupil support" (*e.g.*, counselors). Consequently, expenditures for instructional support are not made entirely at the school level, and cannot be simply added to expenditures for instruction in order to compute, for example, a per pupil allocation for elementary charter schools. Expenditures for school management (*e.g.*, principals and office staff), utilities (*e.g.*, electricity), repair and maintenance, etc. are classified as "leadership" and "operations", respectively, not as "instruction" or "instructional support".

Given the variability in per pupil expenditures for instruction and instructional support among public schools, it may be fairer to both public schools and charter schools if personnel and program resources are made available to charter schools on the same basis and in the same manner as they are made available to public schools.

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58. \$2,866 (public elementary, middle, high, and multi-level schools) - \$2,967 (elementary public schools) = -\$101 per pupil for instruction-related expenditures.

59. \$2,866 (public elementary, middle, high, and multi-level schools) - \$2,667 (public high schools) = +\$199 per pupil for instruction-related expenditures.

# Chapter 4

## RESOURCES

### Introduction

The purpose of this chapter is to answer the Legislature's questions concerning resources and new century charter schools by applying the information gathered in Chapter 2 to the system of values proposed in Chapter 3.

<b>Resources</b>	Question 1 (raising funds locally) Question 2 (the impact on the HIDOE budget) Question 5 (paying for facilities & utilities) Question 10 (withdrawing school funds directly)
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### Raising Funds Locally (Question 1)

**Question:** *How much of a new century charter school's operating, capital investment, and research and development budgets should be raised by the local school board on its own and how much should the State Department of Education (HIDOE) fund?*

**Response:** According to the HIDOE,<sup>1</sup> public schools are not requested to raise money for funding of positions, supplies, and equipment. Funds are provided to schools in an equitable manner as appropriated by the Legislature and allocated by the Governor. Public schools may seek fundraising opportunities to enable purchase of positions, supplies, and equipment as deemed necessary by the schools to supplement their base budgets.<sup>2</sup>

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1. Fax from Ms. Patricia Hamamoto, Superintendent, Department of Education, to Keith Fukumoto, December 5, 2001.

The HIDOE's policy seems consistent with administrative rules prohibiting community organizations (*e.g.*, parent-teacher-student organizations) from sponsoring activities that would result in the direct monetary assessment of public school students for in-class activities. See Hawaii Administrative Rules, §8-45-1(a) (Department of Education, Community Sponsored Activities).

2. According to the Education Program Manager for the National Conference of State Legislatures, to the best of his knowledge, no state explicitly requires charter schools to engage in fundraising. Telephone interview with Mr. Eric Hirsch, Education Program Manager, National Conference of State Legislatures (Denver, Colorado), December 13, 2001.

According to the Governance Program Director for the Education Commission of the States, to the best of his knowledge, no state explicitly requires charter schools to engage in fundraising. Telephone interview with Mr. Todd Ziebarth, Governance Program Director, Education Commission of the States (Denver, Colorado), December 19, 2001.

*(Footnote continued on next page.)*

In general, the HIDOE makes personnel and program resources available to public schools on the basis of "equality" (*i.e.*, the equal distribution of positions or moneys) and "equity" (*i.e.*, the need for services to achieve desired outputs or outcomes). Schools have discretionary power in the use of resources that are provided. Appropriation bills containing specific provisos or single act appropriations may not enable schools, complexes, departmental school districts, or the department the flexibility in the expenditure of these funds.

Assuming the Legislature intends to place charter schools on as equal a footing as public schools, then the local school board of a charter school should be required to raise money for basic needs to the same extent that the parent-teacher-student organization of a public school is required to raise money for basic needs. For example, if a multi-level (*e.g.*, K-12) public school is not required to raise money for regular education teacher positions, then a multi-level charter school should not be required to raise money for regular education teacher positions either. Charter schools should be allowed to raise money for supplemental programs and positions to the same extent that public schools are allowed to raise money for supplemental programs and positions.

Thus, under the existing charter school law and practice, the funding of a new century charter school's operating, capital investment, research, and development budget appears to be primarily the responsibility of HIDOE. The local school boards of charter schools may raise additional funds, but such funds will merely supplement the charter school's budget.

## The Impact on the HIDOE Budget (Question 2)

**Question:** *How can the state general fund allocation to be received by a new century charter school be computed so as not to adversely impact the overall budget of the HIDOE?*

**Response:** According to the HIDOE,<sup>3</sup> "across the board" spending restrictions have been imposed on EDN 100 (school-based budgeting), EDN 200 (instructional support), EDN 300 (state and district administration), EDN 400 (school support), and EDN 500 (school community service) in order to fund charter schools. There is no separate appropriation or budget proviso

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According to the Director of the Charter Friends National Network, to the best of his knowledge, no state explicitly requires charter schools to engage in fundraising. The underfunding of charter schools, however, creates an implicit requirement to raise funds. Telephone interview with Mr. Jon Schroeder, Director, Charter Friends National Network (Saint Paul, Minnesota), December 17, 2001.

A fifty-state search of state statutes and law review/journal articles produced no examples of states that explicitly require charter schools to engage in fundraising. Interview with Ms. Claire Marumoto, Research Librarian, Legislative Reference Bureau Library, December 14, 2001.

3. Telephone interview with Ms. Linda Unten, Acting Director, Department of Education Budget Branch, December 5, 2001.

for charter schools.<sup>4</sup> No such spending restrictions have been imposed on EDN 150 (comprehensive school support services) or EDN 407 (public libraries).

This question presumes that charter schools are not supposed to adversely impact the overall budget of the HIDOE. The Legislature's decision to appropriate supplemental funds to offset the cost of operating twenty-three additional schools (and mitigate their impact on the HIDOE's budget), however, may ultimately hinge on what the purpose of the charter school program is deemed to be. For example, if that purpose is to cause public schools to change and improve in response to competition from charter schools, then supplemental funding for public schools may not be warranted. On the other hand, if that purpose is to create charter schools that serve the unique needs of students who are unable to benefit from public school pedagogy, then supplemental funding for public schools may be warranted.

The cost of operating twenty-three additional schools can be offset partly by counting former private school students and former home-schooled students enrolled in start-up schools after May 4, 2000; and students enrolled at The Education Laboratory (the former University of Hawaii Laboratory School) after August 15, 2001, as workload increases for budgetary purposes.<sup>5</sup> In other words, these students would be considered "new" to the HIDOE, and moneys would be appropriated by the Legislature to accommodate this increase in enrollment. Students who transfer to start-up schools from mainland or overseas schools—whether public or private—would also be considered workload increases. The treatment of these students as workload increases would be the same as if a large private school in Hawaii were to suddenly close, or a large increase in the number of new state residents caused a surge in public school enrollment.

Former private school students and former home-schooled students enrolled in conversion schools after August 1995, would be counted as workload increases. Students who transfer to conversion schools or start-up schools from Hawaii public schools would not be counted as workload increases.

Under the charter school law, the funding for the new century charter schools by the HIDOE is intended as a legitimate purpose as established by the legislature. Accordingly, such funding does not "adversely impact" the budget of HIDOE, inasmuch as such funding is an integral and necessary part of the total budget of HIDOE.

## **Paying for Facilities and Utilities (Question 5)**

***Question:** How much of a new century charter school's capital, repair and maintenance, and utilities budgets should a local school board raise on its own and how much should the HIDOE fund?*

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4. Act 259, Session Laws of Hawaii 2001, pp. 704 to 706.

5. The first start-up schools were granted their charters on May 5, 2000. The Education Laboratory was granted its charter on August 16, 2001. Hawaii, Department of Education, Public Charter Schools Program, "Public Charter Schools Directory—Operating School Year 2001-2002" (August 23, 2001), 5 pp.

**Response:** The local school board of a charter school should be required to raise money for the charter school's capital, repair and maintenance, and utilities budgets to the same extent that the parent-teacher-student organization of a public school is required to raise money for the public school's capital, repair and maintenance, and utilities budgets. Charter schools should be allowed to raise money for facilities and utilities to the same extent that public schools are allowed to raise money for facilities and utilities.

As previously discussed in Chapter 3, since individual public schools are not responsible for the payment of principal and interest on general obligation bonds used to build, expand, and renovate public school buildings, they essentially operate "rent free" and "debt free" in their physical facilities. By not having to pay for the debt service on their physical facilities, public schools effectively received a \$457 per pupil advantage, based on an official enrollment count of 185,036, compared to some start-up schools during fiscal year 1999-2000.

A level playing field implies that facilities subsidies should be made available to start-up schools, first, on the basis of equity; and, second, on the basis of equality. Start-up schools that do not pay rental fees should not receive facilities subsidies. Start-up schools that pay rental fees should receive subsidies large enough only to pay their rental fees, up to the maximum established by the product of the per pupil facilities subsidy and their enrollments. Facilities subsidies could be applied to mortgage payments if start-up schools decide to build their own facilities or substantially renovate rented facilities.

According to the authors of the *National Charter School Finance Study* (December 2000), Arizona provided more charter school facilities funding per pupil than the state provided for an average school district in 1998-1999. The District of Columbia provided comparable facilities funding. Florida, Massachusetts, and Minnesota provided substantial, though not necessarily comparable, funding for facilities.<sup>6</sup>

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6. F. Howard Nelson, Edward Muir, and Rachel Drown. *Venturesome Capital: State Charter School Finance Systems* (National Charter School Finance Study). <http://www.ed.gov/pubs/chartfin/charterfin.pdf>, American Federation of Teachers Educational Foundation: December 2000, p. 5.

This study was funded by the U.S. Department of Education and contracted to the American Federation of Teachers Educational Foundation.

More specifically, *i.e.*, with respect to amounts of funding and methods for their computation, the authors reported:

For most of its charter schools, Arizona provides more facilities funding than surrounding school districts. The District of Columbia provides facilities funding approximately comparable to public schools, as did Massachusetts in 1998-99. Minnesota provided 80 percent funding for lease payments, up to the state average expenditure for debt redemption and capital (\$465 per pupil in 1998-99). In 1999-2000, lease aid increases to 90 percent of approved costs up to \$1,500 per pupil. . . .

In Arizona, the state provides generous funding for capital outlay and capital levy expenditures. Some of the funding for state authorized charter schools depends on grade level and school size.[footnote deleted] The capital outlay revenue limit program provides \$195 (large elementary schools) to \$330 per pupil (small high schools). The

(Footnote continued on next page.)

capital levy revenue limit program, which depends on school size but not grade level, provides \$195 (large schools) to \$300 per pupil (small schools). Regular and charter high schools get \$70 per pupil for textbooks, which in Arizona is considered a capital expense. The third capital assistance program (\$496 to \$569 per pupil) is available only to charter schools. Under the new school capital finance system, school districts get state funding based on need. Average funding totals about \$400 per pupil. . . .

Charter schools in the District of Columbia received a facilities allowance of \$617 per pupil in 1998-99. The use of the funds is not limited to capital. The facilities allowance for 1999-2000 increased to \$1,058 per pupil, approximately the average per-pupil capital expense in other public schools for the prior fiscal year. . . .

\* \* \*

In 1999, the Florida Legislature established a separate capital outlay trust fund for charter schools with its own annual appropriation. Beginning in their third year of operation, charter schools receive the state's share of the 30-year amortized cost of a "student station" in annual installments. In 1998-99, that annual figure amounted to \$387 for each elementary school student, \$443 for each middle school student and \$587 for each high school student. Charter schools can use capital outlay funds only for capital expenses. . . .

In Milwaukee charter schools, capital outlay and debt service of the school district are included in the base charter school funding (about \$90 per student) . . . .

Rhode Island adopted a more deliberative approach to providing capital funding for charter schools. Considered on a case-by-case basis, a minimum of 30 percent funding of capital costs is guaranteed to those schools deemed to be in need. . . .

F. Howard Nelson *et al.*, pp. 71-73.

According to *Education Week*, while thirty-four states and the District of Columbia have active charter school programs, only eight—Arizona, Minnesota, Massachusetts, Florida, Utah, New York, the District of Columbia, and Colorado—have programs that provide direct funding for capital expenses through grants or per pupil allocations. *Education Week* (June 20, 2001) <http://www.edweek.org/ew/ewstory.cfm?slug=41facilbox.h20&keywords=charter%20schools%20facilities> December 13, 2001, 4 pp.

For more information concerning direct funding for capital expenses through per pupil allocations see:

- (1) *District of Columbia Code*, sec. 31-2908;
- (2) *Laws of Florida*, sec. 228.0561(1);
- (3) *Colorado Revised Statutes*, sec. 22-54-105(2)(b)(I); and Colorado, Department of Education, "Colorado School Finance—Other Funding" (July 25, 2001), <http://www.cde.state.co.us/cdefinance/sfotherf.htm>, December 12, 2001, 2 pp.;

(In 2001, through Amendment 23 funds, the Colorado General Assembly designated 130% of capital money for charter schools. The exact amount, during the 2001-02 school year, is \$322.40 per student. Expenditure of those funds must comply with the same guidelines as established in *Colorado Revised Statutes*, sec. 22-45-103 *et. seq.* Colorado, Department of Education, "Colorado Charter Schools Frequently Asked Questions" (October 14, 2001), <http://www.cde.state.co.us/cdechart/faq.htm>, December 12, 2001, 4 pp.)

- (4) *Minnesota Statutes*, sec. 124D.11, subdivision 4; and

(Footnote continued on next page.)

In the last analysis it is within the judgment and discretion of the legislature to determine the extent to which a local school board should be asked to raise funds for the charter school's capital, repair and maintenance, and utilities needs.

### Withdrawing School Funds Directly (Question 10)

*Question: How can charter schools withdraw funds directly from the state treasury?*

**Response:** The "real" question, as the Bureau understands it, is: "How can charter schools directly control their funds?" Conceptually, this arrangement would enable a charter school to write checks and pay bills (*i.e.*, expend money) without receiving prior approval from the HIDOE.

The Bureau believes that the State could treat charter schools the same way it treats the Hawaii Health Systems Corporation.<sup>7</sup> A charter school could be authorized to deposit any moneys of the charter school in any banking institution within or without the State. A charter school could be authorized to appoint, for the purpose of making deposits, one or more persons to act as custodians of the moneys of the school. If the amount deposited with a banking institution (*e.g.*, \$700,000) will exceed the amount insured under federal law (\$100,000), then the charter school could require the banking institution to collateralize (*i.e.*, secure) the portion of the deposit that exceeds the insured amount (*e.g.*, \$600,000).<sup>8</sup> An example of such a collateralization agreement can be obtained from the Department of Budget and Finance.<sup>9</sup>

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(5) *Arizona Revised Statutes*, secs. 15-185 and 15-961; Arizona Department of Education News, "State Superintendent Applauds Supreme Court Ruling" (July 21, 1998), <http://www.ade.state.az.us/rtc/docs/adeneews/072198.html>, December 12, 2001, 1 p.; and Lori Mulholland, "Arizona Charter School Progress Evaluation" (March 1999), <http://www.ade.state.az.us/charterschools/info/CharterSchoolStatusMainReport3-15-99.pdf>, Morrison Institute for Public Policy, Arizona State University, December 12, 2001, p. 2.

7. See *Hawaii Rev. Stat.*, §323F-7(a)(22), as it relates to the duties and powers of the Hawaii Health Systems Corporation.

8. See *Hawaii Rev. Stat.*, chapter 38, as it relates to securitizing deposits of public funds.

Acceptable securities for the protection of funds deposited by the State Director of Finance in a depository (*i.e.*, a federally insured national or state bank, savings and loan association, or financial services loan company; or a federal or state credit union insured by the National Credit Union Administration) are described in *Hawaii Rev. Stat.*, §38-3. For example, acceptable securities include bonds, notes, bills, or certificates of indebtedness of the United States or of agencies of the United States, for which the payment of the interest and principal is a direct obligation of the United States, in an amount at least equal in their market value, but not to exceed their par value, to the amount of the deposit with the depository.

9. Hawaii, Department of Budget and Finance, Fiscal Services Office, "Agreement for Safekeeping of Securities Deposited to Protect Deposits of Funds of the State of Hawaii" (undated), 12 pp.

## *RESOURCES*

This kind of collateralization arrangement would allow charter schools to insure the safety and liquidity of their funds, while giving them the kind of direct control they desire.

## Chapter 5

### GOVERNANCE

#### Introduction

The purpose of this chapter is to answer the Legislature's questions concerning governance and new century charter schools by applying the information gathered in Chapter 2 to the system of values proposed in Chapter 3.

<b>Governance</b>	Question 7 (giving schools more independence) Question 8 (the legal status of charter schools) Question 9 (the employment status of staff) Question 11 (legal representation for schools) Question 13 (state liability for school debts)
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#### Giving Schools More Independence (Question 7)

**Question:** *How can a new century charter school become more independent from the HIDOE, in terms of funding and regulation, while still remaining a "public school"?*

**Response:** Charter schools in Hawaii *already* operate with a greater degree of independence than public schools. Under the charter school law as set forth in chapter 302A, part IV, subpart D, charter school status includes freedom from various legal constraints limiting the flexibility of public schools in Hawaii, such as allowing the hiring of unlicensed teachers. Moreover, "[w]ith respect to the educational program and the school's daily operation, charter operators have a contractual right to manage their schools within the charter's mandate, but may be left with broad discretion regarding how best to implement their vision to meet the charter's contractual terms."<sup>1</sup>

Legislation can nevertheless be enacted giving Hawaii's charter schools greater independence from the HIDOE while retaining public school status. Other states offer charter schools varying degrees of independence through their implementing legislation. For example, "[i]n states such as Arizona, charter schools are granted maximum autonomy and are considered legally independent entities with a blanket waiver from district and state regulations. Other states, such as New Mexico, only allow existing public schools to convert to charter-school status. These 'conversion' charter schools are considered part of the school district and are

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1. See, e.g., William Haft, "Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest," 30 *Ariz. St. L.J.* 1023, 1035 (Winter, 1998) (footnotes omitted).

granted less freedom over budgets and personnel than charter schools in other states.<sup>2</sup> Arguments in favor of greater independence include both increased innovation and greater flexibility, thereby increasing charter schools' chances of achieving their educational goals.<sup>3</sup>

However, "[i]n exchange for offering charter schools greater independence, charter legislation typically requires evidence that students are performing at the promised level."<sup>4</sup> Accordingly, charter schools are considered "both more autonomous and more accountable than other public schools."<sup>5</sup> Moreover, the fact that charter schools *can* in theory become more independent from the state Department of Education through changes in the charter school law does not require that they in fact do so. Conceptually, the question posed by the Senate Concurrent Resolution presumes that Hawaii's charter schools *should* become more independent from the HIDOE.

The Bureau respectfully disagrees with this presumption at this time. Mutual trust—rather than additional legislation—is needed in order for charter schools to become more independent from the HIDOE, short of becoming truly private.

The Bureau believes that charter schools can become more independent from the HIDOE only if both groups learn to trust one another. The desire to increase the distance between charter schools and the HIDOE appears to be a symptom, rather than the cause, of the mutual distrust that exists between charter schools and the HIDOE. Legislation, by itself, cannot create this trust.

The Bureau suggests that the BOE temporarily bolster the personnel resources of the Public Charter Schools Program Office by contracting with former HIDOE principals and school administrative services assistants (SASAs) to provide "just-in-time" technical assistance (e.g.,

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2. Education Commission of the States and the National Conference of State Legislatures, The Charter School Roadmap, Sept. 1998 (funded by the Office of Educational Research and Improvement, U.S. Department of Education; <http://www.ed.gov/pubs/Roadmap/intro.html>).

According to Dr. Tom Hehir, Director, Office of Special Education Programs, United States Department of Education, "[i]n general, if you are a freestanding LEA [local educational agency], you probably have greater legal obligations than you would if you were part of a local school district." According to Dr. Hehir, these obligations are "analogous, in general, to the obligations that, in a very general sense, a small town school system would have." U.S. Department of Education, "1997 Charter Schools National Conference, Special Education Workshop Session" (November 3, 1997), [http://www.uscharterschools.org/lpt/uscs\\_docs/43](http://www.uscharterschools.org/lpt/uscs_docs/43), May 21, 2001, pp. 6-7.

3. *Id.* at <http://www.ed.gov/pubs/Roadmap/ch1.html>.
4. Haft, *supra* note 1, 30 Ariz. St. L.J. at 1035 (footnote omitted). Haft further notes that "[t]his expectation may seem commonsensical, yet it is one that many school reform advocates believe is absent from the vast majority of schools in the public education system." *Id.*, footnote omitted.
5. Kevin S. Huffman, "Charter Schools, Equal Protection Litigation, and the New School Reform Movement," 73 N.Y.U. L. Rev. 1290, 1295 (Oct., 1998) (footnote omitted).

direction<sup>6</sup> and "lubrication"<sup>7</sup>) to both charter school and department personnel. These former principals and SASAs should have extensive experience in, and a demonstrated commitment to, school/community-based management (SCBM). As previously discussed in Chapter 2, conceptually, all charter schools are SCBM schools.

## The Legal Status of Charter Schools (Question 8)

*Question: What is the legal status of the public charter school?*

**Response:** Legally, charter schools in Hawaii are public entities that come into existence through a contract with the BOE.<sup>8</sup> The state constitution requires the State to "provide for the establishment, support and control of a statewide system of public schools free from sectarian control ...".<sup>9</sup> While it is debatable whether a charter school system contravenes the constitutional requirement of a single "system" under the constitution,<sup>10</sup> charter schools may nevertheless be

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6. Concerning, for example, undocumented institutional policies, practices, procedures, and protocols.

7. To reduce the "friction" between charter school and department personnel that has built up over time.

8. See, e.g., Haft, *supra* note 1, 30 Ariz. St. L.J. at 1034 ("Legally, a charter school is a public school that receives a charter or contract from a public agency or institution.") (footnote omitted); see generally Karla A. Turekian, "Comment: Traversing the Minefields of Education Reform: The Legality of Charter Schools," 29 Conn. L. Rev. 1365 (Spring, 1997); Huffman, *supra* note 5, 73 N.Y.U. L. Rev. at 1294-1298, 1308.

Generally, the legal status of a charter school is defined in a state's implementing legislation; charter schools "are most often either a part of the sponsoring district or an independent entity (often as a nonprofit corporation), with some states defining them as independent school districts. The legal status of the charter school affects its autonomy. Where charter schools are part of the school district, regulations regarding staffing, collective bargaining agreements and so on often apply equally to charter schools and other public schools. Where charter schools hold independent status, they likely have more autonomy in these decisions than do 'traditional' public schools." <http://www.ed.gov/pubs/Roadmap/ch1.html>.

9. Hawaii State Constitution, Art. X, §1 ("Public Education").

10. See, e.g., L. K. Beale, "Charter Schools, Common Schools, and the Washington State Constitution," 72 Wash. L. Rev. 535, 565 (1997) (footnotes omitted):

The extra expense required to offer children special benefits through a separate charter schools system contravenes the constitutional concept of a single, efficient "system." Within the system, each child in each grade should receive substantially the same education, thus allowing a student to transfer between districts without significant loss of standing. Because charter schools ... could construct a unique program of instruction, it is not likely that their students could easily transfer [to] other public schools. If a charter school student were removed to a new school and needed remedial work in some areas, the State would, in effect, be paying for the same education twice.

However, charter school laws have been upheld against Equal Protection Clause challenges "on the grounds that the state has a preeminent interest in financing and managing the public school system, and

*Footnote continued on next page.*

considered to be "public schools" that are funded and controlled by the State to provide education to Hawaii's students.<sup>11</sup>

Although they have a greater degree of autonomy than public schools in Hawaii, charter schools are created by state statute and are therefore public entities, are subject to state regulation (however minimal), receive state funding, and may be closed down by the State. Section 302A-101, *Hawaii Revised Statutes*, defines "new century charter schools" as "the implementation of alternative frameworks with regard to curriculum, facilities management, instructional approach, length of the school day, week, or year, and personnel management, formed under section 302A-1182 ...".<sup>12</sup> Section 302A-1182 specifies the terms of the contract between the charter school and the BOE, while section 302A-1184 exempts charter schools from all applicable state laws except those regarding collective bargaining, discriminatory employment practices, and health and safety requirements.

The definition of a charter school in the *Hawaii Revised Statutes* as "the implementation of alternative frameworks" is vague and of limited usefulness in determining the legal status of Hawaii's charter schools. The Bureau believes that the charter school law should be amended to clarify the legal status of charter schools. At the very least, for purposes of clarity, Hawaii's definition could follow the Oregon statute and state that the entities are elementary and secondary schools, as in the definition of "public charter school" under Oregon law, which defines such a school as "an elementary or secondary school offering a comprehensive instructional program operating under a written agreement entered into between a sponsor and an applicant and operating pursuant to this chapter [relating to public charter schools]."<sup>13</sup>

However, Hawaii's charter school law could also be clarified to specify what *type* of legal entity the charter school may take. For example, California's Education Code states that charter schools "may elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law...".<sup>14</sup> Similarly,

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charter schools, an innovative approach to education, are rationally related to that interest." 68 Am.Jur.2d Schools §3 (2d ed., 2000), p. 310 (footnote omitted).

11. See *id.* at §6, p. 311 (footnotes omitted): "Education is a function of government. The public school system is a department of the government, and the state has the primary responsibility for the maintenance and operation of public schools."
12. The definition of "new century charter schools" also includes a reference to *Hawaii Rev. Stat.*, §302A-1183, which was repealed by Act 209, section 4, Session Laws of Hawaii 2001.
13. *Or. Rev. Stat.*, §338.005(2)(1999).
14. Cal. Educ. Code §47604 (2001). *Hawaii Rev. Stat.*, §302A-1182(c), relating to the establishment of charter schools, provides that as an alternative to a public school converting to a charter school under subsection (a), "any community, group of teachers, group of teachers and administrators, entity recognized as a nonprofit organization under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or any program within an existing school may submit a letter of intent to the board to form a new century charter school, establish a local school board as its governing body, and develop a detailed implementation plan...". In this limited case, almost any group or program, including a nonprofit organization, may submit a letter

*Footnote continued on next page.*

Illinois' School Code provides that charter schools are to be organized as nonprofit corporations.<sup>15</sup> A "Model State Charter School Bill" developed by the Charter Friends National Network provides in section 7 that "[t]he charter school, new or existing shall organize under one of the forms of organization available under the laws of the state, *e.g.*, nonprofit, cooperative, partnership, public benefit corporation, etc. Or a new form may be established for a charter school."<sup>16</sup>

Nevertheless, the Bureau believes that the question posed by the Senate Concurrent Resolution relates less to the legal status of charter schools *per se*, but rather seeks to clarify whether charter schools are to be considered neighborhood, *i.e.*, home schools, or schools of choice. This question, as restated, was discussed in detail in Chapter 3.<sup>17</sup>

Despite its seemingly benign appearance, this question carries a variety of implications ranging from the provision of student transportation, special education and related services, and the granting of priority consideration for geographic exceptions, both at charter schools and at public schools.<sup>18</sup> As previously discussed in Chapter 3, public schools (*i.e.*, Kula Kaiapuni `O Anuenue and other public schools that enroll students on the basis of geographic exceptions) can also be considered schools of choice.<sup>19</sup> Many issues embodied by this question lie below the surface. Except for conversion schools, charter schools are schools of choice. As previously discussed in Chapter 3, conversion schools serve as home schools for all area students, and schools of choice for some area students and all nonresident students. To be considered a home school, a start-up school would need to have a geographic attendance area. To the Bureau's knowledge, no start-up school has such an area.

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of intent to form a charter school. However, this section does not require the resulting charter school itself to have nonprofit status.

15. 105 ILCS §5/27A-5 (West 2000).
16. See <http://www.charterfriends.org/modelbill.html>. The comments to section 7 of the model bill state that the law "may *require* the charter school to become a legal entity or may simply *permit* it...". (Emphasis in original.)
17. According to the HIDOE's Assistant Superintendent for Planning, Budget, and Resource Development, this question seeks to clarify whether charter schools are neighborhood (*i.e.*, home) schools or schools of choice. The HIDOE is not asserting that charter schools are private schools or that charter schools should be treated like private schools. The HIDOE readily acknowledges that the charter schools are "public" schools, albeit public schools that are subject to fewer regulatory requirements than other public schools. Interview with Ms. Laurel Johnston, Assistant Superintendent, Planning, Budget, and Resource Development Office, June 22, 2001.
18. The relationship between school choice and the provision of student transportation, the provision of special education and related services, and the granting of priority consideration for geographic exceptions is discussed in Chapter 3.
19. Consequently, policies that apply to charter schools on the basis of their being considered "schools of choice" would also apply to Kula Kaiapuni `O Anuenue and other public schools that enroll students on the basis of geographic exceptions. Not to belabor the point, the implications of this question are far-reaching and will affect both public schools and charter schools.

In fact, not every public school has a designated geographic attendance area, *e.g.*, Kula Kaiapuni `O Anuenue—a kindergarten to grade 12 Hawaiian language immersion school located on the island of Oahu. Anuenue is a true school of choice in that it has no geographic attendance area and all of its students are enrolled on geographic exceptions. Anuenue, however, is not a charter school.

### **The Employment Status of Staff (Question 9)**

*Question: Are they considered employees of the State or the local school board?*

**Response:** Are charter school personnel considered employees of the BOE or the local school board? The impetus for this question appears to have been the 2000-2001 school year teachers strike, during which time charter school teachers were deemed to be employees of their local school boards and not the BOE. Because charter school teachers were deemed to be employees of their local school boards and not the BOE, they were not permitted to strike.

The charter school statute sheds very little light on whether the employees of a charter school are employees of the State or the local school board. That statute does not expressly state that employees of a charter school shall be employees of the State. However, portions of the charter school statute seem to imply that the charter school employees are employees of the State.

Thus, section 302A-1184, *Hawaii Revised Statutes*, provides:

Schools designated as new century charter schools shall be exempt from all applicable state laws, except those regarding:

- (1) Collective bargaining under chapter 89; provided that:
  - (A) The exclusive representatives defined in chapter 89 may enter into agreements that contain cost and noncost items to facilitate decentralized decisionmaking;
  - (B) The exclusive representatives and the local school board of the new century charter school may enter into agreements that contain cost and noncost items;
  - (C) The agreements shall be funded from the current allocation or other sources of revenue received by the new century charter school; and
  - (D) These agreements may differ from the master contracts;

Thereunder, the statute requires charter schools to observe the collective bargaining law (chapter 89, *Hawaii Revised Statutes*) which is devoted to public employees. This seems to imply that the legislature is treating the charter school employees as public employees.

Section 302A-1187(4) provides:

The employment, appointment, promotion, transfer, demotion, discharge, and job descriptions of all officers and employees of or under the jurisdiction of the new

century charter school shall be determined by the new century charter school and applicable personnel laws and collective bargaining agreements;

Thereunder, the statute clearly states that the officers and employees of the charter school are under the jurisdiction of the charter school board.

The employment status of charter school personnel can be reviewed under general legal principles governing employment relationships.<sup>20</sup> Generally, the "key element" in determining whether there is an employment relationship is "the alleged employer's right to control the employee's conduct...".<sup>21</sup> An employer is the person or organization "for whom the employee performs services according to the employer's right to control what will be done and how it will be achieved. ... In general, employers select and engage the employee, pay wages to the employee, have the power of dismissal, and have power and control over the employee's conduct."<sup>22</sup> Other relevant factors include the alleged employer's provision of fringe benefits; the deduction, withholding, or payment of taxes based on compensation for the work performed; the source of equipment and materials used by the worker; and the duration of the worker's service.<sup>23</sup>

Applying these principles to the case of charter school personnel, the "key element" of the alleged employer's right to "control" the worker's conduct can be reviewed under the first prong of the "ABC test" that has been used by the state Department of Labor and Industrial Relations for defining an independent contractor under Hawaii's employment security (unemployment compensation) law, chapter 383, *Hawaii Revised Statutes*.<sup>24</sup> Specifically, the "control test" in section 383-6(1) requires that the worker show that he or she is free from control or direction over the performance of services, both under the worker's contract of hire and in fact,

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20. The question of whether charter school personnel are state employees, or simply employees of the charter school board acting as an independent contractor by virtue of its written contract with the state Board of Education, and therefore "servants" of that independent contractor, is discussed in response to Question 11 of this report, *infra*.

21. 27 Am.Jur.2d Employment Relationship §1 (2d ed., 1996), p. 552 (footnote omitted).

22. *Id.*, at §4, p. 556 (footnotes omitted).

23. *Id.*, at §1, pp. 552-3 (footnotes omitted).

24. See Linda K. Goto, Definition of an "Independent Contractor" Under Hawaii's Labor Laws (Honolulu: Legislative Reference Bureau, Report No. 1, 1987), p. 62, which recommended "retaining and extending the ABC test to the workers' compensation law"; see also <http://www.dlir.state.hi.us/ind.pdf> ("Independent Contractors: an Abridged Summary"), containing the "ABC test" and IRS 20-Factor Test". Other tests that have been used to distinguish a covered employee from an independent contractor include the common law "master-servant test", the "relative nature of the work" test, and the "economic reality" test. While the independent contractor vs. employee issue is discussed in greater detail in question 11 of this report, the "control test" of the ABC test may be useful in establishing the identity of the employer of charter school personnel, *i.e.*, the state Board of Education or the local school board. Generally, although all three elements of the ABC test must be present to satisfy that test (under *Hawaii Rev. Stat.*, §383-6), for the purposes of this report, only part "A" (section 383-6(1)) is discussed here, relating to the issue of control.

in order to show the existence of an independent contractor relationship.<sup>25</sup> Conversely, in proving the existence of an employment relationship rather than that of an independent contractor, it can be inferred that the employee must show that the worker *was* under the control or direction of the employer with respect to the performance of the worker's services. For purposes of this section, the word "control" means "general control and need not extend to all the details of the performance of service."<sup>26</sup>

Both the state Board of Education and the local school board exert different degrees of control over charter school personnel. The BOE's control arises from its power to issue a charter to the proposed charter school pursuant to section 302A-1182, *Hawaii Revised Statutes*. Upon receiving the recommendation to issue a charter by the new century charter school review panel (of which four of the seven members are BOE members or their designees<sup>27</sup>), "the board [of education] shall issue a charter, and the implementation plan shall be converted to a *written performance contract* between the school and the board...".<sup>28</sup> Thus, the implementation plan, which among other things contained the proposed charter school's "description of employee rights and management issues and a framework for addressing those issues that protect the rights of employees...",<sup>29</sup> is converted into a written contract that specifies the nature of the employment relationship.

Although the state Board of Education therefore exerts a certain degree of control over charter school personnel, the control exerted by the local school board over charter school personnel appears to be of a much more direct and immediate nature. The local school board has the power to actually select and hire the charter school's employees, pay wages to the employees,

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25. *Hawaii Rev. Stat.*, §383-6, provides in relevant part:

**§383-6 Master and servant relationship, not required when.** Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department of labor and industrial relations that:

- (1) The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact...

26. *In re Appeal of Century Metalcraft Corp.*, 41 Haw. 508, 516 (1957).

27. *Hawaii Rev. Stat.*, §302A-1182(e)(1).

28. *Hawaii Rev. Stat.*, §302A-1182(f)(1) (emphasis added). Subsection (g)(1) of that section similarly requires that for amended implementation plans that are approved by the new century charter school review panel, "[i]f a charter is issued, the amended implementation plan shall be converted to a written performance contract between the school and the board [of education] ...". Subsection (h) of that section also provides for the conversion of the implementation plan into a written performance contract if the BOE reverses the denial of an applicant's implementation plan upon an appeal of the denial of that application to the BOE.

29. *Hawaii Rev. Stat.*, §302A-1182(d)(1).

dismiss personnel, and take disciplinary action with respect to employees' conduct. The local school board, as the entity that actually hires and fires the charter school's personnel, may also presumably provide for employee fringe benefits; deduct, withhold, or pay taxes based on employee compensation for the work performed; provide the actual physical work environment and equipment used by the employee; and establish the duration of the employee's service.

Moreover, while the state Board of Education may have general oversight and control over the local school board and its employees through the written performance contract embodying the terms of the detailed implementation plan, one of the overriding principles of charter schools generally is that they are designed to be more autonomous than public schools, including freedom from various legal constraints limiting the flexibility of public schools, as discussed in question 7 of this report. The greater independence and autonomy of charter schools over public schools translates into greater control by the local school board in determining *how* the educational goals of the charter school are to be implemented, free from interference from the state Board of Education. The autonomy granted to charter schools under Hawaii law, in addition to the specific criteria of control discussed earlier, would appear to tip the scales in favor of local school boards, rather than the state Board of Education, retaining greater direct control over charter school personnel. Accordingly, charter school personnel should be considered employees of the local school boards rather than the state Board of Education.

Further, an analogy can be drawn to the Hawaii National Guard Youth Challenge program, which has been in existence for some years. If tenured teachers employed by the Hawaii National Guard Youth Challenge Program<sup>30</sup> are considered employees of the Department of Defense, then tenured teachers employed by charter schools should be considered employees of the local school boards. Conversely, if tenured teachers employed by the Hawaii National Guard Youth Challenge Program are considered employees of the BOE, then tenured teachers employed by charter schools should be considered employees of the BOE. As of this writing, tenured teachers employed by the Youth Challenge Program are considered employees of the state Department of Defense. As discussed in Chapter 3, while participating in the Youth Challenge Program, a teacher is under the direction, supervision, and control of the Hawaii National Guard, which has authority over all program requirements and working conditions.<sup>31</sup>

While the memorandum of understanding between the BOE and the Hawaii State Teachers Association concerning the Youth Challenge Program clearly states that the memorandum does not set any precedent, there appears to be little reason why tenured teachers

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30. The purpose of the Department of Defense Hawaii National Guard Youth Challenge Program is to provide 16-18 year-old youths "at-risk" a second chance to obtain their high school diploma and become productive citizens. Hawaii, Department of Defense, "Hawaii National Guard Youth Challenge Academy—Mission" (August 30, 2001), <http://www.dod.state.hi.us/hingyca/mission.htm>, November 27, 2001.

31. Hawaii, *Agreement Between The Hawaii State Teachers Association And The State Of Hawaii Board Of Education, July 1, 1995 – June 30, 1999*, p. 77. This agreement was still in effect on August 16, 2001, when the BOE approved the issuance of the three remaining charters.

employed by charter schools should not be treated in the same manner as tenured teachers employed by the Youth Challenge Program.

### Legal Representation for Schools (Question 11)

**Question:** *Do charter schools have legal counsel from the Attorney General's Office? If yes, does this create a conflict of interest in representing the BOE, the HIDOE, and the local school board of the charter school?*

**Response:** Members of local school boards of new century charter schools are entitled to legal representation by the Attorney General "in any civil action for which immunity is conferred...".<sup>32</sup> Alternatively, a local school board member "may retain counsel of the member's own choice at the member's own expense", although the State will not indemnify the member from liability even though the member would have been entitled to indemnification, and the member may compromise or settle a claim at the member's own expense.<sup>33</sup>

In response to the Bureau's request for clarification of the issues presented by this question, the Attorney General issued a letter opinion regarding the provision of legal representation for new century charter schools, including the issue of who handles legal representation if there is a conflict of interest, which is contained in Appendix D of this report. The Attorney General concluded that charter schools are entitled to legal representation from the Attorney General in the state and federal courts if asked to provide these services, which must be provided in the same manner and to the same extent as legal services and representation are provided to other public schools in the State. The Attorney General "can satisfy this

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32. *Hawaii Rev. Stat.*, §26-35.5(e). Subsection (a) of that section was amended in 2000 to include "members of the local school board of any new century charter school established under section 302A-1182..." in the definition of "member". (Act 187, section 2, Session Laws of Hawaii 2000.) Section 26-35.5(e) requires the Attorney General to "represent and defend a member in any civil action for which immunity is conferred under subsection (b)" of that section, and the member has submitted a written request for representation to the Attorney General. Subsection (b) states that "no member shall be liable in any civil action founded upon a statute or the case law of this State, for damage, injury, or loss caused by or resulting from the member's performing or failing to perform any duty which is required or authorized to be performed by a person holding the position to which the member was appointed, unless the member acted with a malicious or improper purpose, except when the plaintiff in a civil action is the State."

33. *Hawaii Rev. Stat.*, §26-35.5(f), (g). If the Attorney General denies representation to the member and the member proceeds to judgment in the action, "the member may commence an action against the State ... in the circuit court to recover reasonable costs and fees incurred by the member in defending against that action, including attorney's fees, court costs, investigative costs, and expert witness fees." §26-35.5(h). Alternatively, if the attorney general denies representation to the member and the member negotiates a compromise or settlement without an entry of judgment in the action, "the member may seek to introduce a bill in the legislature to secure an appropriation to reimburse the member for the amount of the settlement or that portion which constitutes a reasonable settlement, and for reasonable costs and fees incurred by the member in defending against that action, including attorney's fees, court costs, investigative costs, and expert witness fees."

responsibility by assigning deputy attorneys general or special deputy attorneys general retained through contracts to provide legal services for the new century charter schools.<sup>34</sup>

However, according to the Attorney General, charter schools are not required to obtain legal services from the Attorney General, and are free to contract for these services from private attorneys without the approval or participation of the Attorney General or the Governor. In the event of an unavoidable conflict of interest, "the Attorney General would have to recuse the office and all deputy attorneys general involved from continuing to participate in the matter...", at which point the charter school and all other state agencies involved in the matter would need to retain their own private legal representation.<sup>35</sup>

Finally, the Attorney General noted that there is no provision in the charter school law that directly addresses how charter schools and local school boards are expected to deal with lawsuits, for example, whether charter schools may use state funds to initiate or defend against a lawsuit, which should be addressed by the Legislature as a matter of policy:<sup>36</sup>

Even if the Legislature concludes that charter schools ought to be able to sue and be sued, specific attention should be given to whether the Legislature intended that charter schools be able to sue the State. Individual non-charter public schools have never been able to sue the Board or Superintendent of Education, or the State to resolve differences they may have. If the very broad exemption from applicable laws conferred upon charter schools by Haw. Rev. Stat. §302A-1184 is not amended, charter schools would not be similarly limited.

The Bureau agrees that it is incumbent upon the Legislature to determine, as a matter of policy, whether new century charter schools can sue and be sued, and whether they should be permitted to sue the State. If charter schools are to be treated on the same basis as non-charter public schools, they should not be able to initiate litigation against the State. Conversely, if charter schools are permitted to sue the State, then non-charter public schools should presumably be given this power. The Bureau accordingly recommends that the charter school laws be amended to state:

- (1) Whether new century charter schools may sue and be sued, and, if so, whether litigation may be initiated by the local school board collectively, by individual board members, by charter school personnel, or by each of these groups;

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34. Letter from Deputy Attorney General Charlene M. Aina to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, dated January 10, 2002, p. 3.

35. *Id.* at 4. The Attorney General noted, however, that "not every situation in which multiple state agencies or officials participate through different deputy attorneys general who present separate, if not opposing points of view or positions on their respective behalf, necessarily amounts to a 'conflict of interest'...", nor is there anything unusual "about multiple state agencies or officials espousing or defending the position the law assigns them to present or protect through separate and independent deputy attorneys general assigned to present or defend them on the agencies' or officials' behalf." *Id.*

36. *Id.* at 5.

- (2) Whether new century charter schools may use funds received from the State to initiate or defend against lawsuits;
- (3) Whether new century charter schools may initiate litigation against the State, and, if so, under what circumstances a court has jurisdiction to hear such a dispute, *e.g.*, if the State fails to provide adequate funding to a charter school; and
- (4) If the Legislature determines that charter schools should not be permitted to sue and be sued, whether some alternative form of dispute resolution or grievance procedure is appropriate, and whether an adversely affected party may seek judicial review in the circuit courts.

### State Liability for School Debts (Question 13)

**Question:** *If the local school board of the charter school mismanages its funds and incurs debt, is the HIDOE liable for payment?*

**Response:** Certain requirements in the charter school law are designed to ensure the fiscally responsible management of those schools while retaining a measure of autonomy. For example, charter schools, while exempt from the state procurement code, are obligated to "develop internal policies and procedures for the procurement of goods, services, and construction, consistent with the goals of public accountability and public procurement practices."<sup>37</sup> Charter schools must also "account for funds expended for the procurement of goods and services, and this accounting shall be available to the public."<sup>38</sup> The detailed implementation plan also requires charter schools to develop a comprehensive plan to assess students, administrative support, and teaching personnel performance that, among other things, provides for program audits and annual financial audits.<sup>39</sup> As noted earlier, the implementation plan is converted into a written performance contract between the charter school and the BOE.

If, after the BOE initiates an independent evaluation of the charter school and the BOE determines that the charter school "is not fiscally responsible," the charter school is to be "placed on probationary status and shall have one year to ... improve the school's fiscal accountability."<sup>40</sup> If the charter school "fails to meet its probationary requirements, or fails to comply with any of the requirements of ... [section 302A-1186, HRS], the board [of education], upon a two-thirds majority vote, may then deny the continuation of the new century charter school."<sup>41</sup> The charter

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37. *Hawaii Rev. Stat.*, §302A-1184.

38. *Id.*

39. *Hawaii Rev. Stat.*, §302A-1182(d)(4)(D).

40. *Hawaii Rev. Stat.*, §302A-1186(b).

41. *Id.*

school must also agree to similar fiscal accountability requirements in submitting its detailed implementation plan.<sup>42</sup>

Thus, pursuant to both the charter school statute and a charter school's detailed implementation plan—and subsequently its written performance contract—the charter school is required to be fiscally accountable. Accordingly, if the charter school mismanages its funds and incurs debt, it would appear that the school is in violation of both the statute and its contract with the BOE, and is subject to probationary status to improve its fiscal accountability. If it fails in this regard, it may be closed down upon a two-thirds majority vote of the BOE.

As previously discussed in Chapter 3, the playing field is considered "level" between public schools and charter schools when, among other things, the only substantive differences between charter schools and other public schools are charter schools' development of internal procurement policies and procedures, consistent with the goals of public accountability and public procurement practices. If a charter school develops procurement policies and procedures that circumvent the checks and balances (*e.g.*, pre-audit) which apply to public schools, then the local school board of the charter school should be liable for payment. Conversely, if a charter school uses procurement policies and procedures that apply to public schools, then the HIDOE should be liable for payment to the same extent that the department would be liable for payment on behalf of a public school.

As previously discussed in Chapter 2, a school's charter gives the school autonomy over its operation and frees it from many of the state laws and rules that public schools must follow. In exchange for the flexibility afforded by the charter, however, the charter school is held accountable for achieving the goals set out in the charter and adhering to terms of the charter contract. In other words, the price of flexibility is greater accountability.

Operationally, public schools—and not the HIDOE—are responsible for settling their debts at the end of each fiscal year. Consequently, public schools must use all legal means at their disposal, including the transferring of funds between program accounts, in order to settle their debts. Although the HIDOE has come to the assistance of public schools in the past, for

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42. See, *e.g.*, Hawaii Department of Education, New Century Public Charter School Detailed Implementation Plan, p. 19 ("Detailed Implementation Plan Assurances, Section 302A-1181 to 1188, HRS") (Honolulu: 2000), which provides in pertinent part:

The New Century Charter School understands that upon a determination by the Board of Education that ... the school is not fiscally responsible, the New Century Charter School shall be placed on probationary status and shall have two years to ... improve the school's fiscal accountability. If the new century charter school fails to meet its probationary requirements, or fails to comply with any of the requirements of this section, the board upon a two-thirds majority vote, may then deny the continuation of the New Century Public Charter School.

The two-year probationary period was subsequently changed to a one-year period by Act 209, section 3, Session Laws of Hawaii 2001.

example, when a rise in electricity costs caused many schools to incur substantial debts by the end of 1995-1996 fiscal year,<sup>43</sup> such assistance probably should be considered "the exception" rather than "the rule".

If the HIDOE refuses to accept responsibility for any debts incurred by public schools, then the department should refuse responsibility for any debts incurred by charter schools. Conversely, if the HIDOE accepts responsibility for certain debts incurred by public schools, then the department should similarly accept responsibility for the same debts incurred by charter schools.

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43. See Act 72, Session Laws of Hawaii 1996.

## Chapter 6

### COMPLIANCE

#### Introduction

The purpose of this chapter is to answer the Legislature's questions concerning compliance and new century charter schools by applying the information gathered in Chapter 2 to the system of values proposed in Chapter 3.

<b>Compliance</b>	Question 3 (assistance without compliance) Question 6 (IDEA, section 504, ADA, and <i>Felix</i> ) Question 14 (monitoring schools for compliance)
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#### Assistance Without Compliance (Question 3)

**Question:** *How can the Board of Education (BOE) provide technical assistance to a new century charter school without requiring the school to comply with the rules of the HIDOE?*

**Response:** The BOE, through the Superintendent of Education, could instruct district and complex resource teachers to provide formal support and training to charter schools located within their respective departmental school districts and school complexes. To alleviate the increased workload in certain districts and complexes, the Superintendent could arbitrarily assign some charter schools to neighboring districts and complexes, redistribute existing district and complex resource teacher positions, or create additional resource teacher positions. For example, although Kula Kaiapuni `O Anuenue (located in the back of Palolo Valley) is physically located in the Kaimuki complex, it is considered part of the Roosevelt complex for administrative purposes.

The BOE, through the Superintendent, would be responsible for identifying training that charter school personnel need to attend and training that charter school personnel do not need to attend. Similarly, the BOE would be responsible for identifying supports that charter school personnel could refuse and supports that charter school personnel could not refuse. For example, charter school personnel should be required to attend, and should not be allowed to refuse, training and supports dealing with collective bargaining, discriminatory employment practices, health and safety requirements, implementation of the *Hawaii Content and Performance Standards II*, and federal disability law<sup>1</sup> (*i.e.*, IDEA, section 504, ADA, and *Felix*). As

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1. This assumes, for the time being, that charter schools will choose to comply with the requirements of federal disability law by implementing chapter 8-53 (Provision of a Free Appropriate Public Education for Students with a Disability Under Section 504, Subpart D) and chapter 8-56 (Provision of a Free Appropriate Public Education for a Student with a Disability), Hawaii Administrative Rules.

previously mentioned in Chapter 3, charter schools are not exempt from these state and federal laws.

Charter schools, while exempt from many state laws, are still subject to laws and rules relating to collective bargaining, discriminatory employment practices, and health and safety requirements. In addition, charter schools must observe the requirements of the charter school law. The BOE must continue to provide technical assistance to charter schools with respect to these laws and rules which continue to be applicable to them.

### **IDEA, Section 504, ADA, and *Felix* (Question 6)**

**Question:** *How can a new century charter school comply with the requirements of the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Felix consent decree?*

**Response:** Charter schools, like all public schools, are required to provide equal educational opportunity to all students with a disability regardless of the nature and severity of the disabilities.<sup>2</sup> Charter schools can comply with the requirements of federal disability law and the *Felix* consent decree by implementing chapter 8-53 (Provision of a Free Appropriate Public Education for Students with a Disability Under Section 504, Subpart D) and chapter 8-56 (Provision of a Free Appropriate Public Education for a Student with a Disability), Hawaii Administrative Rules.

As previously mentioned in Chapter 3, the existence of a level playing field implies that a student who is eligible for special education and related services ("eligible student") should be allowed to attend a charter school of the student's own choosing subject to the availability of space at the school and the ability of the school to provide reasonable accommodations for the student. It also implies that special education and related services should be coordinated by and provided at an eligible student's charter school. Conceptually, charter school students should be treated like public school students who attend a school located outside their home school's geographic attendance area—as practitioners of school choice.

If a charter school cannot provide reasonable accommodations for an eligible student, then the charter school could return the student to the student's home school, or assist the HIDOE in placing the student—through the IEP process—in a public school or charter school that can provide these accommodations (*e.g.*, access to an elevator if the student has a health impairment that makes climbing difficult).

If a charter school cannot provide reasonable accommodations for an eligible student, then the student could:

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2. Hawaii Administrative Rules, section 8-53-1(a) (Department of Education; Provision of a Free Appropriate Public Education for Students with a Disability Under Section 504, Subpart D).

- (1) Attend the student's home school;
- (2) Request a geographic exception to attend a public school located outside the home school's geographic attendance area;
- (3) Apply to another charter school that could possibly provide these accommodations; or
- (4) Request a change in the student's IEP to include accommodations that the charter school can provide (e.g., extra time to get from one class to another if the student has a health impairment that makes walking difficult).

The HIDEOE can and should assist charter schools in complying with the requirements of federal disability law and the *Felix* consent decree—just as it would any public school. District special education resource teachers could provide formal support and training to licensed regular education teachers serving special education, section 504, and *Felix* class students if charter schools are unable to hire licensed special education teachers. These district resource teachers would be responsible for ensuring that a student's caregivers (e.g., teachers, counselor, and educational assistants) receive any supports necessary for them to adequately perform the roles they play in the student's life so that risks are reduced, functioning is improved, and desired outcomes are achieved by the student.<sup>3</sup> This seems consistent with the *Felix vs. Cayetano* revised consent decree, which states:<sup>4</sup>

Any school with less than 50% licensed or certified special education teachers in the classroom must have formal arrangements for extra supports delivered to each school by November 1, 2001.

### Monitoring Schools for Compliance (Question 14)

**Question:** *What is the appropriate monitoring role of the HIDEOE and what ongoing regulatory processes are available to ensure that the school is meeting all its responsibilities?*

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3. See Hawaii, Felix Monitoring Project, "Coordinated Services Review Protocol for Examination of Comprehensive, Collaborative, Coordinated Services Provided for Special Need Children and their Caregivers" (CSR—Version 1.1—1998-99), p. 36, concerning the support of a student's caregivers.
  4. See *Felix vs. Cayetano* (CV. No. 93-00367 DAE), "Order Granting In Part Defendants' Motion For Extension Of The Revised Consent Decree Filed On August 3, 2000, The Stipulation Regarding The Plans For Strengthening And Improving The System Of Care And Order Filed On July 21, 2000, And The Stipulation Approving The Monitor's Recommendations And Orders Filed August 3, 2000, And To Establish New Compliance Dates And Deadlines, And Granting In Part Plaintiffs' Cross-Motion For Order To Show Cause, For Appointment Of Receiver And Other Relief", September 7, 2001, p. 6, concerning the support of unlicensed special education teachers.

Although the court monitor (Dr. Ivor Groves) has exempted charter schools from the service testing provisions of the *Felix* consent decree, they are still subject to due process hearings if they fail to implement students' individualized education programs (under IDEA) or modification plans (under section 504). Interview with Ms. Debra Farmer, Educational Specialist, Department of Education Special Education Section, October 10, 2001.

## COMPLIANCE

**Response:** With respect to monitoring charter schools' compliance with the requirements of the IDEA, section 504, and the ADA, the HIDOE could "service test" charter schools to determine how well service planning and services being provided address a student's social, emotional, behavioral, and educational needs and how well these services produce desired results. The HIDOE could use the school-based and coordinated services review protocols developed for the Felix Monitoring Project to service test public schools. The HIDOE would report charter schools' compliance with the requirements of the IDEA, section 504, and the ADA to the BOE in the same manner that the Felix Monitoring Project reports public schools' compliance to the federal court.

In addition, the charter school law sets forth several provisions relating to HIDOE supervision and monitoring of charter school affairs. HIDOE may oversee the implementation plan (section 302A-1182, *Hawaii Revised Statutes*); conduct an independent evaluation (section 302A-1186, *Hawaii Revised Statutes*); provide guidelines (section 302A-1186, *Hawaii Revised Statutes*); and provide overall administrative supervision (section 302A-1186, *Hawaii Revised Statutes*).

## Chapter 7

### STARTUP/SHUTDOWN

#### Introduction

The purpose of this chapter is to answer the Legislature's questions concerning the startup and shutdown of new century charter schools by applying the information gathered in Chapter 2 to the system of values proposed in Chapter 3.

<b>Startup/ Shutdown</b>	Question 4 (appealing the denial of a charter) Question 12 (revoking a school's charter) Question 15 (converting existing public schools)
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#### Appealing the Denial of a Charter (Question 4)

**Question:** *How can an applicant for a charter to operate a new century charter school appeal the decision of the BOE to not approve the applicant's completed implementation plan?*

**Response:** Before responding to this question and question 12, it is necessary to understand the procedural requirements of Hawaii's charter school law relating to the denial of an implementation plan.

Under Hawaii's charter school law, the new century charter school review panel is given sixty working days to review a completed implementation plan. Within forty-five working days, the panel must issue a report of its preliminary findings to the state Board of Education and the local school board.<sup>1</sup> If the panel finds that the implementation plan fails to meet the requirements of the charter school law, it must notify the local school board of the finding in writing "to enable the local school board to appropriately amend the plan to resolve the conflict", and may submit a recommendation to the state Board of Education to issue a provisional approval for a charter "if the panel determines that the applicant may reasonably be expected to expeditiously resolve any remaining conflict or conflicts impeding the issuance of a charter."<sup>2</sup> The provisional charter is effective for one year, which may be extended by the Board.

The local school board must submit an amended implementation plan within thirty days of receiving notice from the panel. The Board may deny the issuance of a charter if the amended plan is not submitted within that time period. Upon subsequent review by the panel, if the amended plan "[f]ails to resolve any conflicts to the panel's satisfaction or involves new and

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1. *Hawaii Rev. Stat.*, §302A-1182(f).

2. *Hawaii Rev. Stat.*, §302A-1182(f)(2)(A) and (B).

different issues of conflict ..., the panel shall deny issuance of a charter."<sup>3</sup> An applicant for a charter whose application is denied by the panel may file an appeal of that denial with the panel. Upon filing the appeal, the panel must forward the implementation plan and appropriate documentation to the state Board of Education. Within thirty working days, the Board must "issue a report of its findings and final determination to the local school board."<sup>4</sup> The Board may presumably either deny or approve the implementation plan.<sup>5</sup>

The Hawaii Supreme Court has held that the right to appeal an adverse administrative action—in this case the denial of an applicant's completed implementation plan—is limited by the Hawaii Administrative Procedure Act.<sup>6</sup> The applicable provision of that Act, section 91-14(a), *Hawaii Revised Statutes*, provides that "[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter...".<sup>7</sup> Therefore, it is necessary to first determine whether an applicant for a charter whose application has been denied by the Board of Education has met the requirements of that Act. In determining whether these requirements are met, the Hawaii Supreme Court has set forth the following four-part test:<sup>8</sup>

- (1) The proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing—*i.e.*, a hearing that was 1) "required by law" and 2) determined the "rights, duties, and privileges of specific parties";
- (2) The agency's actions must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief;

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3. *Hawaii Rev. Stat.*, §302A-1182(g)(2).

4. *Hawaii Rev. Stat.*, §302A-1182(h).

5. *Hawaii Rev. Stat.*, §302A-1182(h), provides that if the Board of Education approves the implementation plan, the board must issue a charter, and the implementation plan is to be converted into a written performance contract between the school and the Board. However, that section does not state that the Board may deny the implementation plan or provisionally approve the plan.

6. *In re Eric G.*, 65 Haw. 219, 222, 649 P.2d 1140 (1982).

7. *Hawaii Rev. Stat.*, §91-4(a) ("Judicial review of contested cases"). Subsection (a) further provides that "[n]otwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency." Thus, even assuming that the local school board is entitled to a contested case hearing, the board would appear to have standing to seek judicial review as a "person aggrieved" if the board is found to be an "agency" and meets other relevant standing requirements.

8. *Pub. Access Shoreline v. Cty. Planning Comn.*, 79 Haw. 425, 431, 903 P.2d 1246 (1995), *cert. denied*, 517 U.S. 1163, 116 S.Ct. 1559, 134 L.Ed.2d 660 (1996) (hereinafter, "PASH").

- (3) The claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and
- (4) The claimant's legal interests must have been injured—*i.e.*, the claimant must have standing to appeal.

It appears that an applicant for a charter fails to pass the first prong of this test, namely, that the unfavorable agency action must have been a contested case hearing. First, the charter school law does not provide for an "agency hearing", as required under the definition of "contested case" in the Hawaii Administrative Procedure Act, but rather only a review of the implementation plan by the new century charter school review panel and the state Board of Education.<sup>9</sup> Even though the panel must notify the local school board in writing to allow the local school board to amend the plan to resolve the conflict, and allows for the issuance of a provisional approval for a charter, there is no actual hearing required under the charter school law at which the applicant is given an opportunity to be heard on the issues presented by the panel or the Board of Education.

However, the Hawaii Supreme Court has ruled that in order for a hearing to be "required by law", it may be required by "statute, agency rule, or constitutional due process."<sup>10</sup> Thus, "despite the absence of a statutory or regulatory mandate, '[t]he adjudicatory procedures of the Hawai'i Administrative Procedure Act apply to hearings which an agency is constitutionally required to provide."<sup>11</sup> Because there are no statutes or rules adopted by the Board or Department of Education requiring a hearing in which the panel or the Board may consider the denial of an application of a charter, the applicant would be entitled to an agency hearing only if a hearing is mandated under the United States or Hawaii Constitution.

Both the United States and Hawaii Due Process Clauses essentially provide that no person shall be deprived of life, liberty, or property without due process of law.<sup>12</sup> In this case, the claim to a due process right to a hearing "requires that the particular interest which the claimant seeks to protect be 'property' within the meaning of the due process clauses of the

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9. *Hawaii Rev. Stat.*, §91-1(5), defines "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Paragraph (6) of that section defines an "agency hearing" as referring "only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14."
  10. PASH, *supra* note 8, 79 Haw. at 431; see also In re Water Use Permit Applications, 94 Haw. 97, 119-120 n. 15, 9 P.3d 409 (2000); Alejado v. City & County of Honolulu, 89 Haw.App. 221, 226, 971 P.2d 310 (1998).
  11. Bush v. Hawaiian Homes Com'n, 76 Haw. 128, 135, 870 P.2d 1272 (1994), quoting Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 478, 522 P.2d 1255, 1256 (1974); see generally 2 Am.Jur.2d Administrative Law §423 (2d ed., 1994), p. 419 ("constitutional right to review").
  12. U.S. Const. amend. XIV, §1; Haw. Const. art. I, §5.

federal and state constitutions."<sup>13</sup> Moreover, the Hawaii Supreme Court has held: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."<sup>14</sup> Moreover, "[a] person's interest in a benefit constitutes a 'legitimate claim of entitlement' if it is supported by contractual or statutory language that might be invoked at a hearing."<sup>15</sup>

Does an applicant for a charter have a property interest in such an application for purposes of the Due Process Clause? The answer is most likely no. The applicant who prepares a detailed implementation plan has no legal expectation that the plan will be accepted by the new century charter school review panel or the state Board of Education. Nor does the applicant have a legitimate claim of entitlement based on any contractual or statutory language. Therefore, unless, for example, the panel or Board engaged in some fraudulent or other illegal activity in denying an application that may be independently reviewable in a court of law, or "other means of review, relief, or trial de novo" are provided by law,<sup>16</sup> it would appear that judicial review in the circuit court cannot be obtained with respect to the denial of the applicant's completed implementation plan, since the court would not have subject matter jurisdiction pursuant to section 91-14(a), *Hawaii Revised Statutes*, of the Hawaii Administrative Procedure Act.<sup>17</sup>

Nevertheless, the charter school law does give the applicant some opportunity to amend the implementation plan to address shortcomings identified by the new century charter school review panel. While this does not appear to comply with the basic elements of procedural due process, namely, "notice and an opportunity to be heard at a meaningful time and in a meaningful manner",<sup>18</sup> the applicant has no property interest in a completed implementation plan that entitles the applicant to these rights in the first place. If the Legislature believes that this is insufficient to protect the interests of applicants for charters, it may seek to amend the charter school law to provide for a contested case hearing before the Board of Education and the opportunity for judicial review pursuant to the Hawaii Administrative Procedure Act.

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13. Bush, *supra* note 11, 76 Haw. at 136 (citation omitted).

14. *Id.*, quoting Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989) (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972)).

15. Alejado, *supra* note 10, 89 Haw.App. at 227, quoting Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

16. *Hawaii Rev. Stat.*, §91-14(a), provides that "nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law."

17. See, e.g., Bush, *supra* note 11, 76 Haw. at 136.

18. Fujimoto v. Au, 95 Haw. 116, 164, 19 P.3d 699 (2001), quoting Bank of Hawaii v. Kunimoto, 91 Haw. 372, 388, 984 P.2d 1198, 1214 (1999) (quoting Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 243, 953 P.2d 1315, 1341 (1998)).

## Revoking a School's Charter (Question 12)

**Question:** *Does the BOE have the authority to revoke a charter?*

**Response:** As discussed in Chapter 3, while charter schools are exempt from several state laws, they are still subject to laws regarding collective bargaining, discriminatory employment practices, health and safety requirements, and implementation of the *Hawaii Content and Performance Standards II*. Consequently, if a charter school violates, and continues to violate, health and safety requirements, as determined by the state or county agency that enforces these requirements, then the BOE has the authority to revoke the school's charter. Similarly, if a charter school violates, and continues to violate, collective bargaining laws and laws prohibiting discriminatory employment practices, as determined by the state or county agency that enforces these laws, then the BOE has the authority to revoke the school's charter.

If a charter school fails to implement, and continually fails to implement, the *Hawaii Content and Performance Standards II*, as determined by the BOE,<sup>19</sup> then the BOE has the authority to "deny the continuation of the new century charter school" (*i.e.*, revoke the school's charter) in accordance with section 302A-1186(b), *Hawaii Revised Statutes*. Similarly, if a charter school is not fiscally responsible, and continues to act in a fiscally irresponsible manner, as determined by the BOE, then the BOE has the authority to deny the continuation of the charter school in accordance with section 302A-1186(b), *Hawaii Revised Statutes*.

Operationally, the role of the BOE is to determine whether or not:

- (1) A charter school is in compliance with statewide student content and performance standards and fiscal accountability;
- (2) A charter school should be placed on probation, and—if necessary—to determine the terms of the school's probationary requirements;
- (3) A charter school has met its probationary requirements, including BOE specified benchmarks and outcomes; and
- (4) A school's charter should be revoked if the school fails to meet its probationary requirements.

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19. *Hawaii Rev. Stat.*, §302A-1186(b), requires the BOE to initiate an independent evaluation of each charter school annually for the first two years after its establishment and every four years thereafter to assure compliance with statewide student content and performance standards and fiscal accountability.

Although the BOE is not required to initiate an independent evaluation in order to determine that student achievement within a charter school does not meet the student performance standards, or that the school is not fiscally responsible, it may be easier for the BOE to defend such a determination if it was based on an independent evaluation.

If a charter school fails to meet its probationary requirements, or fails to comply with any of the requirements of section 302A-1186, *Hawaii Revised Statutes*, then the BOE, upon a two-thirds majority vote, has the statutory authority to revoke the charter.

### Converting Existing Public Schools (Question 15)

**Question:** *What are the most significant impediments to conversions of existing public schools?*

**Response:** Section 302A-1182(b), *Hawaii Revised Statutes*, covers conversion of public schools to charter schools. Section 302A-1182(b)(2), *Hawaii Revised Statutes*, requires a public school's detailed implementation plan to form a conversion school to be approved by sixty per cent of the public school's existing administrative, support, and teaching personnel, and parents. Consequently, the approval of both school personnel and parents is necessary to form a conversion school. The Bureau's response to this question, however, focuses on teachers (rather than administrative and support personnel, and parents) for three reasons:

- (1) The HIDOE has developed *draft* personnel guidelines for Bargaining Unit 5 teachers employed by charter schools;<sup>20</sup>
- (2) Teacher salaries represent the single largest expense for a school; and
- (3) No school can conduct business without teachers.

As previously discussed in Chapter 3, the charter school law creates school-level salary caps based on the product of per pupil expenditure and student enrollment. The imposition of a salary cap could discourage experienced public school teachers from transferring to charter schools or discourage tenured teachers from staying at charter schools for more than just a few years, or both. All other things being equal (*e.g.*, holding a bachelor's degree in education and a teaching license issued by the Hawaii Teacher Standards Board), veteran teachers earn more than beginning teachers. Consequently, public schools with large proportions of experienced teachers may find these school-level salary caps to be a substantial impediment to conversion.

As previously discussed in Chapter 3, preliminary indications from the BOE are that tenured public school teachers who transfer to a charter school will not earn and accrue service credits while the charter school employs them. The inability to continually earn and accrue service credits affects all tenured public school teachers because job loss in the event of a staff reduction due to a drop in enrollment is controlled primarily by service time: tenured teachers with the least number of years of service are eliminated (*i.e.*, displaced) first. Tenured teachers

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20. Hawaii, Department of Education, "Draft Personnel Guidelines for BU 5 Teachers Employed by New Century Public Charter Schools (K-12)", June 29, 2001, 5 pp. *Note: this document was marked "Draft".*

in nonshortage fields may be especially reluctant to transfer to a charter school if they cannot earn and accrue service credits while the charter school employs them. Thus, this situation appears to be a serious impediment to conversion of public schools.

As previously discussed in Chapter 3, preliminary indications from the BOE are that probationary public school teachers who transfer to a charter school—whether a conversion school, a school-within-school, or a start-up school—will not earn any probationary credit toward tenure. In addition:<sup>21</sup>

- (1) Untenured teachers will not gain HIDOE tenure status at a charter school; and
- (2) Untenured teachers with less than four semesters of probationary credit will not retain their probationary credit upon returning to the HIDOE from a charter school.

Preliminary indications are that untenured HIDOE teachers who transfer to a charter school will be essentially severing their employment with the Department.<sup>22</sup> If a public school's detailed implementation plan must be approved by sixty per cent of the school's existing administrative, support, and teaching personnel, then the support of untenured HIDOE teachers—or the lack thereof—could determine whether or not the school's plan is approved. Consequently, public schools with large proportions of untenured HIDOE teachers may find:

- (1) The inability of these teachers to earn probationary credit toward tenure or to gain tenure status at a charter school, or both; or
- (2) The inability of these teachers to retain probationary credit upon returning to the Department from a charter school (except in one instance),

to be a substantial impediment to conversion.

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21. Untenured teachers who have completed four satisfactory semesters of probation with the HIDOE prior to employment with a charter school, however, will be granted tenure upon returning to the HIDOE from a charter school. Hawaii, Department of Education, "Draft Personnel Guidelines for BU 5 Teachers Employed by New Century Public Charter Schools (K-12)", June 29, 2001, p. 4. *Note: this document was marked "Draft"*.

22. Untenured HIDOE teachers serving in a charter school will not be entitled to further employment with the Department; employment will be specifically with the charter school. In addition, untenured HIDOE teachers who wish to return to the Department will have to complete an application and be selected for a position. Hawaii, Department of Education, "Draft Personnel Guidelines for BU 5 Teachers Employed by New Century Public Charter Schools (K-12)", June 29, 2001, p. 4. *Note: this document was marked "Draft"*.

An untenured HIDOE teacher's decision to stay put at a conversion school is the functional equivalent of transferring to a charter school.

Report Title:

New Century Charter Schools; Funding, Regulation; LRB Study

THE SENATE

S.C.R. NO. 113

TWENTY-FIRST LEGISLATURE, 2001

H.D. 1

STATE OF HAWAII

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# SENATE CONCURRENT

# RESOLUTION

requesting the Legislative Reference Bureau to study the funding and regulation of new century charter schools.

WHEREAS, the concept of new century charter schools represented a new paradigm of reforming the public education system, improving student performance, and increasing accountability on the part of the community, parents, teachers, and school administration; and

WHEREAS, shortly after the law authorizing the establishment of new century charter schools (formerly known as student centered schools) took effect, there were complaints from charter schools about inadequate amount of funds being allocated by the Department of Education for their support; and

WHEREAS, shortly after the law authorizing the establishment of up to twenty-five new century charter schools took effect, there were complaints from the Department of Education about the inadequate amount of funds being appropriated by the Legislature for the support of these additional charter schools; and

WHEREAS, after the law authorizing the establishment of up to twenty-five new century charter schools took effect, there were no applications for conversions of existing public schools to charter schools; and

WHEREAS, since their inception, new century charter schools have been alternately praised as a meaningful departure from traditional pedagogics and "business as usual", and vilified as a drain on other schools' operating budgets and the equivalent of an underfunded legislative mandate; and

WHEREAS, the Department of Education, which has been characterized as being stingy,

obstructionist, and unsupportive of the charter school movement, has itself complained about the burden that twenty-three additional charter schools will create for the rest of the public school system; and

WHEREAS, there is a need to identify incentives and remove disincentives to convert existing public schools to charter schools, especially those public schools with poor student performance or higher percentages of special needs, such as special education, higher rates of poverty, and immigrant and refugee populations; and

WHEREAS, dissatisfaction with the new century charter school law, the Department of Education, and the Legislature suggests that the funding and regulation of charter schools may need to be changed in order to better support charter schools and the rest of the public school system; now, therefore,

BE IT RESOLVED by the Senate of the Twenty-first Legislature of the State of Hawaii, Regular Session of 2001, the House of Representatives concurring, that the Legislative Reference Bureau is requested to study the funding and regulation of new century charter schools; and

BE IT FURTHER RESOLVED that in its study, the Legislative Reference Bureau is requested to consider the following issues:

- (1) How much of a new century charter school's operating, capital investment, and research and development budgets should be raised by the local school board on its own and how much should the Department of Education fund;
- (2) How the state general fund allocation to be received by a new century charter school can be computed so as to not adversely impact the overall budget of the Department of Education;
- (3) How the Board of Education can provide technical assistance to a new century charter school without requiring the school to comply with the rules of the Department of Education;
- (4) How an applicant for a charter to operate a new century charter school can appeal the decision of the Board of Education to not approve the applicant's completed implementation plan;
- (5) How much of a new century charter school's repair and maintenance, and utilities budgets should a local school board raise on its own and how much should the Department of Education fund;
- (6) How a new century charter school can comply with the requirements of the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Felix consent decree; and
- (7) How a new century charter school can become more independent from the Department of Education, in terms of funding and regulation, while still remaining a "public school";
- (8) Other issues raised in testimony on this Concurrent Resolution before legislative standing committees by the Superintendent of Education concerning the legal status, legal representation, funding, and oversight of charter schools;

and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau and the Department of Education are requested to identify the most significant impediments to conversions of existing public schools; and

BE IT FURTHER RESOLVED that the Auditor, Department of Education, Department of Budget and Finance, Department of the Attorney General, Department of Health, and University of Hawaii

SCR113 HD1

College of Education, are requested to assist the Legislative Reference Bureau in studying the funding and regulation of new century charter schools and the issuance of charters to operate new century charter schools; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau is requested to submit its findings and recommendations to the Legislature not less than twenty days prior to the convening of the Regular Session of 2002; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Director of the Legislative Reference Bureau, Auditor, Chairperson of the Board of Education, Superintendent of Education, Director of Finance, Attorney General, Director of Health, Chairperson of the Board of Regents of the University of Hawaii, President of the University of Hawaii, and Dean of the University of Hawaii College of Education.

## Appendix B

Date: April 19, 2001

Committee House Education, Legislative Management, Health and Higher Education

Department: Education

Person Testifying: Paul G. LeMahieu, Ph.D., Superintendent of Education

Title: SCR 113, Requesting the Legislative Reference Bureau to Study the Funding and Regulation of New Century Charter Schools

Purpose: To study the funding and regulation of new century charter schools.

Department's Position: The Department supports the intent of SCR 113 to study the funding and regulation of charter schools. HRS 302A 1182-1188 leaves much open to interpretation and we believe that a study is necessary to make informed recommendations to the 2002 Legislature to tighten up the language of the law. The term "technical assistance" is not clearly defined and we recommend that the study define the terms of technical assistance to be provided whether the school is required to follow Department rules or is exempt from those rules. Regarding issue #4 "How an applicant for a charter to operate a new century charter school can appeal the decision of the BOE to not approve the applicant's completed implementation plan, currently the Board cannot disapprove a submitted implementation plan. They can only return it to the applicant for revision until the plan meets the established criteria that

defines a “complete” implementation plan.

We recommend the following issues be included in order to clarify the language of the law:

- What is the legal status of the public charter school?
- Are they considered employees of the State or the local school board?
- Enabling legislation to enable charter schools to withdraw funds directly from the state treasury?
- Do charter schools have legal counsel from the Attorney General's Office? If yes, does this not create a conflict of interest in representing the Board, the Department and the local school board of the charter school?
- Does the Board of Education have the authority to revoke a charter?
- If the local school board of the charter mismanages its funds and incurs debt, is the Department liable for payment?
- What is the appropriate monitoring role of the Department and what ongoing regulatory processes are available to ensure that the school is meeting all its responsibilities?

In closing, the Department acknowledges that this study is urgently needed and supports the passage of SCR 113.

## Appendix C

### COMPUTATION OF PUBLIC SCHOOLS' PER PUPIL EXPENDITURES BY EDUCATIONAL LEVEL AND FUNCTION

The purpose of this appendix is to describe the Bureau's methodology for computing public schools' per pupil expenditures, for school year 1999-2000, by educational level<sup>1</sup> (*i.e.*, elementary, middle, high, and multi-level) and function<sup>2</sup> (*i.e.*, instruction and instructional support).

Public schools' expenditures for school year 1999-2000 were first arrayed and summed by educational level and function (see related table). The Bureau analyzed school-by-school data, rather than cumulative data, in order to positively exclude expenditures for new schools without enrollments and special schools with transient enrollments.<sup>3</sup> Pohukaina, Hawaii Center for the Deaf and the Blind, and Jefferson Orthopedic Unit were excluded from the Bureau's analysis because they serve a population of students who require a unique array of special education and related services. Waialae Elementary (Public Charter) School and Lanikai (Public Charter) School were included in the Bureau's analysis because they are conversion schools and serve as home schools for all area students.

The Bureau computed the enrollment for public elementary schools, for school year 1999-2000, by dividing the total expenditure for public elementary school "instruction", "instructional support", "leadership", "operations", and "other commitments", by the respective per pupil expenditure for the same. The abovementioned procedure was repeated for public middle schools, high schools, and multi-level schools. Minor variations in the inferred

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1. For the purposes of this report, the Bureau refers to "combined" schools (*e.g.*, K-9, 7-12, and K-12) as "multi-level" schools. Hawaii, Department of Education, "1999-2000 Per Pupil Expenditures by Schools/Functions", [http://165.248.10.76/insight00/insight00\\_page3g.asp](http://165.248.10.76/insight00/insight00_page3g.asp), November 8, 2001.
  2. The other functional categories are "leadership", "operations", and "other commitments". Hawaii, Department of Education, "Hawaii School Expenditure Reporting System (HSERS)", Fiscal Year 1999-2000 (October 9, 2001), [http://165.248.10.76/insight00/insight00\\_main.htm](http://165.248.10.76/insight00/insight00_main.htm), October 24, 2001.
  3. Expenditures for new schools without enrollments (*e.g.*, Kapolei High School and Kamakaha Middle School) and special schools (*e.g.*, Shriner's Hospital School and Hale Olomana) with transient enrollments are included, but not specifically identified, in Hawaii School Expenditure Reporting System cumulative data entitled "1999-2000 Total Expenditures by Educational Level" ([http://165.248.10.76/insight00/insight00\\_page3f.asp](http://165.248.10.76/insight00/insight00_page3f.asp), November 8, 2001) and "1999-2000 Act 199 Expenditure Reporting" ([http://165.248.10.76/insight00/insight00\\_page3a.asp](http://165.248.10.76/insight00/insight00_page3a.asp), November 8, 2001). Telephone interview with Mr. Chris Ito, Director, Department of Education Business Services Branch, November 1, 2001.

Expenditures for these schools were excluded from the Bureau's computations as they could skew the calculation of the amounts of moneys allocated to public schools (with stable enrollments) on an annual basis. The exclusion of these schools' expenditures is consistent with the exclusion of expenditures for capital improvement projects and debt service.

enrollment counts caused by rounding (*i.e.*,  $\pm 1$  student) were resolved by selecting the median value for a specific educational level (*e.g.*, public elementary schools).

The sum of the inferred enrollments for public elementary schools (95,931 students), middle schools (27,599 students), high schools (45,581 students), and multi-level schools (15,925 students), as computed by the Bureau, equaled 185,036 students—which also happened to be the official public school enrollment count for school year 1999-2000.<sup>4</sup>

The enrollment count for public elementary schools was adjusted downward by excluding Jefferson Orthopedic Unit (10 students), and the enrollment for public multi-level schools was adjusted downward by excluding Pohukaina (4 students) and Hawaii Center for the Deaf and the Blind (64 students). These exclusions produced an adjusted public elementary school, middle school, high school, and multi-level school enrollment count of 184,958 students.

The Bureau computed public schools' per pupil expenditures for school year 1999-2000 (*e.g.*, \$2,910 per pupil for multi-level schools—instruction), by dividing the adjusted expenditure for a specific function (*e.g.*, multi-level schools—instruction, \$46,154,845.82) by the adjusted enrollment count for the respective educational level (multi-level schools, 15,857 students).

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4. Hawaii, Department of Education, Planning, Budget, and Resource Development Office, *The Superintendent's Eleventh Annual Report on School Performance and Improvement in Hawaii, 2000* (April 2001), RS 01-1129, <http://arch.k12.hi.us/pdf/report/2000/SuptRept2000.pdf>, October 30, 2001, p. 2.

The figure 185,036 includes special education students but excludes preschool students.

**Table 2**

**SUMMARY OF PUBLIC SCHOOL EXPENDITURES (SY 1999-2000)  
by Function and Educational Level**

	<b>Elementary Schools<sup>1</sup></b>	<b>Middle Schools<sup>2</sup></b>	<b>High Schools<sup>3</sup></b>	<b>Multi-Level Schools<sup>4</sup></b>	<b>Public Schools<sup>5</sup></b>
Expenditures for Instruction	\$284,605,974.45	\$77,693,633.85	\$121,601,223.53	\$46,314,655.48	<i>\$530,215,487.31</i>
Enrollment	95,921	27,599	45,581	15,857	<i>184,958</i>
Per Pupil Expenditure	\$2,967	\$2,815	\$2,667	\$2,920	<i>\$2,866</i>
Expenditures for Instructional Support	\$76,819,332.00	\$20,659,168.29	\$44,763,218.04	\$19,275,186.14	<i>\$161,516,904.47</i>
Enrollment	95,921	27,599	45,581	15,857	<i>184,958</i>
Per Pupil Expenditure	\$800	\$748	\$982	\$1,215	<i>\$873</i>
Expenditures for Instructional Support	\$361,425,306	\$98,352,802	\$166,364,442	\$65,589,842	<i>\$691,732,391.78</i>
Enrollment	95,921	27,599	45,581	15,857	<i>184,958</i>
Per Pupil Expenditure	\$3,767	\$3,563	\$3,649	\$4,136	<i>\$3,739</i>

1. Excludes Jefferson Orthopedic Unit and charter schools.
2. Excludes Kamakahahei Middle School.
3. Excludes Kapolei High School.
4. Excludes Hawaii Center for the Deaf and the Blind, Pohukaina, and charter schools.
5. Excludes all of the above.

## Appendix D

BENJAMIN J. CAYETANO  
GOVERNOR



EARL I. ANZAI  
ATTORNEY GENERAL

THOMAS R. KELLER  
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
425 QUEEN Street  
HONOLULU, HAWAII 968 13  
(808) 586- 1500

January 10, 2002

Mr. Wendell K. Kimura  
Acting Director, Legislative Reference Bureau  
State Capitol  
Honolulu, Hawaii 96813

Dear Mr. Kimura:

RE: S.C.R. 113, H.D. 1 (2001), Requesting LRB to Study the  
Funding and Regulation of New Century Charter Schools

You have asked us to assist in answering the following questions regarding the provision of legal representation for new century charter schools in Hawaii, more particularly,

- (1) Who represents new century charter schools before the state and federal courts, e.g., the Attorney General, private counsel retained by the school, or some other entity or special deputy appointed for that purpose?
- (2) Who handles the legal representation of new century charter schools if there is a conflict of interest such that the Attorney General or other legal counsel could no longer represent the school?

For the reasons outlined in greater detail below, we answer briefly that under state law, the Attorney General is responsible for providing legal services and representation for all state agencies and officials. Because new century charter schools are public schools and, as such, agencies of the State, the Attorney General, through his deputy attorneys general or special deputy attorneys general, must provide legal services to new century charter schools, including representation in the state and federal courts, if a charter school asks the Attorney General to provide those legal services. The services must be provided in the same manner and to the same extent as legal services and representation are provided to the rest of the State's public schools. However, because the new century charter schools are not required to obtain their legal services from the Attorney General, and are "exempt from all applicable

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state laws, except those regarding .... [c]ollective bargaining, ... [d]iscriminatory practices under section 378-2; and ... [h]ealth and safety requirements," see, Haw. Rev. Stat. § 302A-1184, they are free to contract for legal services from private attorneys without the Attorney General's or Governor's approval or participation. Similarly, should it be necessary for the Attorney General to recuse himself and all of his deputy attorneys general from serving or continuing to serve as counsel for a new century charter school because of a conflict of interest, the charter school is authorized by that exemption to contract for the services of private counsel without the approval or participation of the Governor or the Attorney General-

### Discussion

New century charter schools were initially established as part of the State's public school system in 1999 in Act 62, Haw. Sess. Laws 77 (1999). Section 1 of Act 62 describes the charter schools as follows:

The legislature finds that as long as a public school complies with the requirements that it be free to all attending students, that its admissions policies be nondiscriminatory, and that it comply with statewide performance standards, a school should otherwise be free from statutory and regulatory requirements that tend to inhibit or restrict a school's ability to make decisions relating to the provision of educational services to the students attending the school.

To nurture the ideal of more autonomous and flexible decision-making at the school level, the legislature supports the concept of new century charter schools.

The legislative history to Act 62 indicates that the Legislature authorized the limited establishment of new century charter schools as a means of providing an "alternative for public school reform." Conf. Com. Rep. 119, Haw. H.J. 964 (1999).

Although the charter schools are exempt from most of the state laws applicable to the public schools, see Haw. Rev. Stat. §§ 302A-901, 302A-1184 and 302A-1187(3), and neither the Superintendent nor Board of Education has the power to supervise or control the charter schools' exercise of their functions, duties, and powers under subpart D of part IV of Haw. Rev. Stat. ch. 302A, see Haw. Rev. Stat. § 302A-1187(5), new century

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charter schools are still public schools. If the new century charter school law itself does not make this clear, subsequently enacted legislation requiring your office to study various issues relating to them, i.e. S.C.R. No. 113, H.D. 1, make it clear. See S.C.R. No. 113, H.D. 1 (2001)("the concept of new century charter schools represented a new paradigm of reforming the public education system, ...;" in commissioning the LRB to study the funding and regulation of new century charter schools, the LRB was specifically "requested to consider ... (7) [h]ow a new century charter school can become more independent from the Department of Education, in terms of funding and regulation, while still remaining a 'public school'").<sup>1</sup>

It is well-established that the Attorney General of the State of Hawaii is legal counsel for the State, its instrumentalities, and its agencies. Haw. Rev. Stat. §§ 26-7 and 28-4. See, In re Water Use Permit Applications, 94 Haw. 97, 125 (2000), and Chun v. Board of Trustees of the Employees' Retirement System, 87 Haw. 152, 169 (1998). As the State's legal counsel, the Attorney General is required to represent the State in the federal and state courts when it is sued directly or through its instrumentalities, agencies, or officials. Haw. Rev. Stat. § 28-1. Accordingly, because the new century charter schools are public schools, and public schools are instrumentalities of the State of Hawaii, the Attorney General is responsible under state law to represent the new century charter schools when they or their officials are sued in the federal or state courts- Consistent with that responsibility, the Attorney General must provide them with the same legal services the State's other public schools receive from the Attorney General. At the Attorney General's discretion, and unless a charter school opts to retain private counsel itself, the Attorney General can satisfy this responsibility by assigning deputy attorneys general or special deputy attorneys general retained through contracts to provide legal services for the new century charter schools. Haw. Rev. Stat. § 28-8.

Because Haw. Rev. Stat. § 302A-1184 exempts new century charter schools from most state laws applicable to other public schools, including Haw. Rev. Stat. §§ 28-8.3 and 103D-304 of the State Procurement Code, charter schools may engage a contract for legal services with a private attorney directly, with or

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<sup>1</sup> Subsequently enacted legislation can be used to determine a legislature's original underlying intent in enacting a statute. State v. Bolosan, 78 Haw. 86, 91, 890 P.2d 673, 678 (1995).

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without the existence of a conflict of interest, and without consulting or securing the concurrence or approval of the Attorney General or the Governor.

If a conflict of interest which the Attorney General is unable to avoid by assigning deputy attorneys general from separate legal service divisions to provide independent representation for a new century charter school and any other state agency official that may be involved with the charter school, the Attorney General would have to recuse the office and all deputy attorneys general involved from continuing to participate in the matter. See Chun, 87 Haw. at 173, quoting from State v. Klattenhoff, 71 Haw. 598, 605 (1990). The new century charter school and all of the other state agencies involved would have to secure legal services for themselves from private attorneys.

It needs to be noted, however, that not every situation in which multiple state agencies or officials participate through different deputy attorneys general who present separate, if not opposing points of view or positions on their respective behalf, necessarily amounts to a "conflict of interest." The Hawaii Supreme Court has recognized that the legislature may make a single official responsible for functions that are inherently inconsistent and repugnant to each other, and that when this occurs what would ordinarily constitute a "conflict of interest" is not a conflict, and must be regarded as appropriate, unless particular facts establish the existence of an actual conflict, of interest. In re Water Use Permit Applications, 94 Haw. at 120-1. The court has also allowed two deputy attorneys general to participate in a single proceeding as independent counsel to the decision maker and to the official presenting the case respectively, as long as the deputy attorney general who serves as counsel to the decision maker "had no part in the adversary hearing," White v. Board of Education, 54 Haw. 10, 16 n. 7 (1972), and permitted a deputy attorney general to prosecute an official criminally even though another deputy attorney general had represented the official in his personal capacity in an earlier federal civil proceeding, Klattenhoff, supra.

There is nothing unusual about multiple state agencies or officials espousing or defending the position the law assigns them to present or protect through separate and independent deputy attorneys general assigned to present or defend them on the agencies' or officials' behalf. This occurs regularly in administrative proceedings before the State Land Use Commission and judicial appeals from the LUC's resulting orders, and is the situation every time a writ of mandamus is heard in the Hawaii

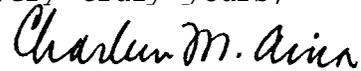
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Supreme Court from a circuit court order granting or denying a prosecutor's motion to discover confidential governmental records\_ When an individual's tax returns are sought by the Attorney General's Criminal Justice Division, three deputy attorneys general may appear -- the prosecuting deputy attorney general seeking the returns, the deputy attorney general representing the Director of Taxation who is charged by law to keep tax returns confidential, and the deputy attorney general representing the circuit court judge/respondent against whom the writ is sought. All assert separate, if not opposing positions, but none must recuse themselves for a conflict of interest.

Finally, because there is a growing penchant today to rely on litigation to resolve disagreements, and no provision in subpart D, part IV of ch. 302A, the new century charter school statutes, which directly addresses how charter schools and their local boards are expected to deal with lawsuits, we suggest that your study point out that the Legislature needs to determine, as a matter of policy, how charter schools are to handle the reality of litigation, and amend the charter school law accordingly, to reflect and further the policy objectives that are chosen.

Particularly because concerns have already been raised about the resources available to charter schools, we believe the charter school law needs to reflect the Legislature's thinking on such issues as whether charter schools may or may not use funds they receive from the State to initiate or to defend against lawsuits\_ Even if the Legislature concludes that charter schools ought to be able to sue and be sued, specific attention should be given to whether the Legislature intended that charter schools be able to sue the State\_ Individual non-charter public schools have never been able to sue the Board or Superintendent of Education, or the State to resolve differences they may have\_ If the very broad exemption from applicable laws conferred upon charter schools by Haw. Rev\_ Stat. § 302A-1184 is not amended, charter schools would not be similarly limited\_

Very truly yours,



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APPROVED:



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## Appendix E

### POSSIBLE AMENDMENTS TO THE STATE'S CHARTER SCHOOL LAW

*The following are some suggestions for amendments to the Charter School Law. These suggestions for statutory language are provided for further review, consideration, and discussion by the Legislature. The Bureau does not necessarily advocate the substantive merits of these proposals. Comments to the suggestions are included.*

#### 1. Purpose of the Charter School Law.

##### (OPTION 1)

The purposes for establishing charter schools are:

- (1) To stimulate the development of innovative programs within public education;
- (2) To provide opportunities for innovative learning and assessments;
- (3) To provide parents and students with greater options in choosing schools within and outside their school districts;
- (4) To provide teachers with a vehicle for establishing schools with alternative, innovative methods of educational instruction and school structure and management;
- (5) To encourage performance-based educational programs;
- (6) To hold teachers and school administrators accountable for students' educational outcomes; and
- (7) To provide models for replication in other public schools.

##### (OPTION 2)

It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:

- (1) Improve pupil learning;
- (2) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving;

- (3) Encourage the use of different and innovative teaching methods;
- (4) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site;
- (5) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system;
- (6) Hold the schools established under this part accountable for meeting measurable pupil outcomes and provide the schools with a method to change from rule-based to performance-based accountability systems; and
- (7) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools.

*(Comment: Option 1 is taken from the Massachusetts law, while Option 2 is taken from the California law. It may be useful for the Legislature to articulate its intent respecting charter schools by setting forth its statement of purpose for the law.)*

### **(OPTION 3)**

The purpose of the new century charter school program is to enhance student achievement in the public schools by creating the kind of internal and external forces that will cause the public schools to change. The new century charter school program is a success if public schools adopt charter schools' designs for school governance and management, and student learning.

### **(OPTION 4)**

The purpose of the new century charter school program is to enhance student achievement by creating schools that serve the unique needs of students who, for reasons other than a disability, are unable to benefit from public school pedagogy and meet the educational standards of the department. The new century charter school program is a success if student demand for charter schools is positive or stable, as evidenced by such measures as enrollment level, acceptance and matriculation rates, attrition or retention rate, and academic reputation.

*(Options 3 and 4 are discussed in chapter 2 of this report, and are founded on the theoretical bases of the charter school movement.)*

## **2. Establishment of Charter Schools.**

### **(OPTION 1)**

A new century charter school shall be a public school, operated under a charter granted by the board of education, which operates independently of any school district and is managed by a local school board. A charter school shall be deemed a state agency. The board of a new century charter school, upon receiving a charter from the board of education, shall be deemed to be public agents authorized by the State to supervise and control the new century charter school.

### **(OPTION 2)**

A charter school shall be organized and managed under the Hawaii nonprofit corporation act. The board of directors of a charter school shall be deemed public agents authorized by the state board of education to control the charter school, but shall function independently of the department of education, except as provided in the charter. A charter school shall be considered a public school for all purposes and shall comply with all audit reporting requirements and shall annually file financial and statistical reports. For the purposes of section , a charter school created pursuant to this chapter shall be deemed a governmental entity. Pursuant to the provisions of section , sales to or purchases by a public charter school are exempt from payment of the general excise tax.

In the event of a conflict between chapter 302A and chapter 441D, chapter 302A shall control.

*(Comment: At present, the law does not expressly describe the legal status of a charter school. It may be desirable to provide an express description of the nature of a charter school.)*

## **3. Powers of Charter Schools.**

A charter school established under a charter granted by the board shall be a body politic and corporate with all powers necessary or desirable for carrying out its charter program, including the power to:

- (1) Adopt a name and corporate seal; provided, however, that any name selected must include the words "charter school";

- (2) Sue and be sued; provided that a new century charter school may bring no suit against the State unless the State expressly consents thereto;
- (3) Make and execute, enter into, amend, supplement, and carry out contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this subpart, subject to section 302A-1184;
- (4) Hire employees, prescribe their duties and qualifications, and fix their salaries, subject to section 302A-1184(1);
- (5) Acquire, own, lease, hold, clear, improve, and rehabilitate real, personal, or mixed property for the new century charter school; provided that:
  - (A) New century charter schools may not acquire property by eminent domain; and
  - (B) All property acquired by a new century charter school shall remain the property of that school, subject to section 302A-1185(c);
- (6) Secure insurance for liability and property loss;
- (7) Pledge, assign, or encumber the assets of the new century charter school to be used as collateral for loans or extensions of credit, subject to section 302A-1185(c);
- (8) Accept and expend gifts or grants in any form from any public or private source; and
- (9) Subject to applicable federal, state, and county law and the charter of the new century charter school, do any and all things necessary or convenient to carry out its purposes and exercise the powers given and granted in this subpart.

*(Comment: It may be desirable to clarify the scope and extent of the powers of a charter school.)*

#### **4. General Provisions Relating to Charter Schools.**

Every new century charter school shall ensure the following:

- (1) Compliance with all applicable federal, state, and county statutes, rules, and regulations. The board of education, with the assistance of the attorney general, shall publish a list of relevant statutes, rules, and regulations to notify new century charter schools of their responsibilities under this paragraph;

- (2) Charter schools shall be nonsectarian in their programs, admission policies, employment practices, and all other operations. Charter schools shall be open to all students, on a space available basis, and shall not discriminate on the basis of race, color, national origin, creed, sex, ethnicity, sexual orientation, mental or physical disability, age, ancestry, athletic performance, special need, or proficiency in the English language or a foreign language, and academic achievement. Charter schools may limit enrollment to specific grade levels and may structure curriculum around particular areas of focus such as mathematics, science, or the arts;
- (3) Charter schools shall provide a comprehensive program of instruction for at least a kindergarten program or any grade between grades one and twelve, except that a school may offer this curriculum with an emphasis on a specific learning philosophy or style or certain subject areas such as mathematics, science, fine arts, performance arts, or foreign language;
- (4) Charter schools shall design a method to measure pupil progress, toward the general learner outcomes adopted by the board of education, including participation in state and federal standardized testing;
- (5) Compliance with all federal and state laws relating to the education of children with disabilities in the same manner as schools established and maintained by the department;
- (6) Charter schools shall provide for a governing body for the new century charter school that is responsible for the policy decisions of the school; and
- (7) Compliance with all other requirements imposed upon the school by the board of education, and all applicable federal, state, and county laws, to ensure the health and safety of all of the students at the school, compliance with statewide student content and performance standards and fiscal accountability, and all other requirements in the school's charter.

*(Comment: It may desirable for the charter school law to expressly set forth the general requirements and limitations applicable to charter schools. The foregoing is illustrative of some of the provisions that may be considered.)*

**5. New Century Charter Schools; Representation by Attorney General.**

New century charter schools are entitled to legal services and representation from the attorney general in state and federal courts. The attorney general, upon request, shall provide legal services and representation to new century charter schools in the same manner and to the same extent as the attorney general provides legal services and representation to public schools.

**6. Evaluation of Charter Schools.**

The auditor shall conduct an evaluation of the effectiveness of the charter school approach authorized under this part. The auditor shall report directly to the legislature and the governor with recommendations to modify, expand, or terminate the charter school approach. The evaluation of the effectiveness of the charter school approach shall include the following factors:

- (1) If available, the pre- and post-charter school test scores of pupils attending charter schools and other pupil assessment tools;
- (2) The level of parental satisfaction with the charter school approach compared with schools within the district in which the charter school is located;
- (3) The impact of required parental involvement;
- (4) The fiscal structures and practices of charter schools as well as the relationship of these structures and practices to school districts, including the amount of revenue received from various public and private sources;
- (5) An assessment of whether or not the charter school approach has resulted in increased innovation and creativity;
- (6) Opportunities for teachers under the charter school approach;
- (7) Whether or not there is an increased focus on low-achieving and gifted pupils;
- (8) Any discrimination and segregation in charter schools;
- (9) The governance, fiscal liability and accountability practices and related issues between charter schools and the board of education;
- (10) The manner in which the board of education monitors the compliance of the conditions, standards, and procedures entered into under a charter;

- (11) The extent of the employment of noncredentialed personnel in charter schools;
- (12) An assessment of how the exemption from laws governing schools allows charter schools to operate differently than schools operating under those laws;
- (13) A comparison in each departmental school district that has a charter school of the pupil dropout rate in the charter schools and in the noncharter schools; and
- (14) The role and impact of collective bargaining on charter schools.

*(Comment: This suggested provision relates to the evaluation process for charter schools, and sets forth the criteria to be considered. This provision, taken from the California law, is intended to provide the Legislature with information relating to the charter school approach.)*

#### **7. New Century Charter Schools; Students.**

(a) Every student, including a student who is eligible for special education and related services, shall have the chance to attend the new century charter school of the student's own choosing subject to the availability of space and the ability of the school to provide reasonable accommodations for the student. Special education and related services shall be coordinated by and provided at a new century charter school if the school has space available and can provide reasonable accommodations for the student.

(b) A student who attends a new century charter school established pursuant to section 302A-1182(a)(1) or (3) is attending a school of choice. A student who attends a new century charter school established pursuant to section 302A-1182(a)(2) is attending a school of choice if the student is required to obtain a geographic exception to attend the school.

(c) A student who is required to attend a new century charter school established pursuant to section 302A-1182(a)(2) shall be granted priority consideration for a geographic exception to attend another school; provided that the reasons for priority consideration shall not be ranked and shall each be given equal consideration.

*(Comment: There is a need to clarify the situation of students being eligible to attend charter schools and the subsequent treatment of those students.*

*This suggested provision is discussed in chapter 3 of this report, and considers charter schools to be "schools of choice".)*

## **8. Employment Status.**

### **(OPTION 1)**

(a) All employees of a charter school shall be deemed public employees.

(b) Except as otherwise provided in this subsection, the provisions of the collective bargaining agreement entered into by the board of education apply to the terms and conditions of employment of employees of the charter school who are on a leave of absence from the department of education, including, without limitation, any provisions relating to representation by the employee organization that is a party to the collective bargaining agreement of the Department of Education in a grievance proceeding or other dispute arising out of the agreement. The provisions of the collective bargaining agreement apply to each employee for the first three years that the employee is on leave of absence from the department of education. After the first three years that the employee is on a leave of absence:

- (1) If the employee is subsequently reassigned by the department of education, the employee is covered by the collective bargaining agreement of the department of education; or
- (2) If the employee continues employment with the charter school, the employee is covered by the collective bargaining agreement of the charter school, if applicable.

(c) Except as otherwise provided in subsection (b), the governing body of a charter school may make all employment decisions with regard to its employees, unless a collective bargaining agreement entered into by the governing body contains separate provisions relating to the discipline of licensed employees of a school.

(d) Except as otherwise provided in this subsection, if the written charter of a charter school is revoked or if a charter school ceases to operate as a charter school, the employees of the charter school must be reassigned to employment within the department of education in accordance with the applicable collective bargaining agreement. The department of education is not required to reassign an employee of a charter school pursuant to this subsection if the employee:

- (1) Was not granted a leave of absence by the department of education to teach at the charter school pursuant to subsection (e); or
- (2) Was granted a leave of absence by the department of education and did not submit a written request to

return to employment with the department of education in accordance with subsection (e).

(e) If the department of education manages a plan of group insurance for its employees, the governing body of the charter school may negotiate with the department of education to participate in the same plan of group insurance that the department of education offers to its employees. If the employees of the charter school participate in the plan of group insurance managed by the department of education, the governing body of the charter school shall:

- (1) Ensure that the premiums for that insurance are paid to the department of education; and
- (2) Provide, upon the request of the department of education, all information that is necessary for the department of education to provide the group insurance to the employees of the charter school.

*(Comment: The foregoing is adapted from the Nevada law. It covers the applicability of collective bargaining agreements, the reassignment upon revocation of charter or cessation of operation, and eligibility of benefits.)*

## **(OPTION 2)**

**Transfer of public school teachers.** (a) The board of education, in accordance with chapter 89, shall negotiate with the exclusive representative of optional bargaining unit 5 to provide tenured and probationary public school teachers who transfer to new century charter schools with the benefits described in subsections (b) and (c).

(b) Tenured public school teachers who transfer to new century charter schools shall:

- (1) Continue to earn and accrue service credits as if they were in their regular teaching positions; and
- (2) Be placed in the appropriate range/step of the salary schedule as if they had remained in service when they return to the department.

(c) Probationary public school teachers who transfer to new century charter schools shall be allowed to earn up to four semesters of probationary credit toward tenure; provided that:

- (1) Tenure shall be granted only upon a probationary teacher's return to a public school; and
- (2) New century charter schools shall not be allowed to grant tenure to probationary public school teachers.

*(Comment: The foregoing provision is limited to the matter of dealing with transfers of public school teachers to charter schools.*

*Option 2 is discussed in chapter 3 of this report, and is based on the collective bargaining agreement for teachers. Although this agreement does not set precedence with respect to charter schools, it is still informative.)*

**(OPTION 3)**

(a) An employee of a charter school shall be an employee of the local board formed to operate the charter school and not an employee of the department of education. An employee of a charter school shall be deemed to be a public employee solely for purposes of the civil service law and for no other purpose unless otherwise specified in this chapter.

(b) The local board of a charter school shall employ and contract with necessary teachers, administrators, and other school personnel. Such teachers shall be certified in accordance with the requirements applicable to other public schools.

(c) The board of a charter school shall require, for purposes of a criminal history record check, the fingerprinting of all prospective employees. Prior to initiating the fingerprinting process, the prospective employer shall furnish the applicant with the form described and shall obtain the applicant's consent to the criminal history records search. Every set of fingerprints taken pursuant to this paragraph shall be promptly submitted to the board of education for purposes of clearance for employment.

(d) The board of a charter school shall upon commencement and termination of employment of an employee by the charter school, provide the board of education with the name of and position held by such employee.

(e) The school employees of a charter school that has been converted from an existing public school who are eligible for representation under chapter 89, shall be deemed to be included within the negotiating unit containing like titles or positions, if any, for the department of education and shall be subject to the collective bargaining agreement covering the department of education; provided, however, that a majority of the members of a negotiating unit within a charter school may modify, in writing, a collective bargaining agreement for the purposes of employment in the charter school with the approval of the board of the charter school.

(f) The employees of a charter school that is not a conversion from an existing public school shall not be deemed members of any existing collective bargaining unit representing employees of the department of education, and the charter school and its employees shall not be subject to any existing

collective bargaining agreement between the department of education and its employees.

(g) The employees of the charter school may be deemed employees of the department of education for the purpose of providing retirement benefits, including membership in the employees' retirement system and other retirement systems open to employees of public schools. The financial contributions for such benefits shall be the responsibility of the charter school and the school's employees. The department of education, in consultation with the comptroller, shall develop regulations to implement the provisions of this paragraph in a manner that allows charter schools to provide retirement benefits to its employees in the same manner as other public school employees.

*(Comment: The foregoing has been adapted from the New York charter school law.)*

## **9. Liability for Debts.**

Charter school sponsors and this State are not liable for the debts or financial obligations of a charter school or persons who operate charter schools.

*(Comment: The above is taken from the Arizona law.)*

## **10. Admission Requirements.**

(a) A charter school shall enroll all eligible pupils who submit a timely application, unless the number of applications exceeds the capacity of a program, class, grade level, or building. A charter school shall give enrollment preference to pupils returning to the charter school in the second or any subsequent year of its operation and to siblings of pupils already enrolled in the charter school. A charter school that is converted from a public school shall give enrollment preference to eligible pupils who reside within the boundaries of the school district where the charter school is physically located. If capacity is insufficient to enroll all pupils who submit a timely application, the charter school shall select pupils through an equitable selection process such as a lottery except that preference shall be given to siblings of a pupil selected through an equitable selection process such as a lottery.

(b) Except as provided in subsection (c), a charter school shall not limit admission based on ethnicity, national origin,

gender, income level, disabling condition, proficiency in the English language, or athletic ability.

(c) A charter school may limit admission to pupils within a given age group or grade level.

(d) A charter school may refuse to admit any pupil who has been expelled from another educational institution or who is in the process of being expelled from another educational institution.

*(Comment: Taken from Arizona charter school law.)*

## **11. Rent or Lease for Charter School Facilities.**

### **(OPTION 1)**

In no event shall a charter school be required to pay rent for space which is deemed available, as negotiated by contract, in department of education facilities. All other costs for the operation and maintenance of the facilities used by the charter school shall be subject to negotiation between the charter school and the department of education.

*(Comment: Taken from Colorado charter school law.)*

### **(OPTION 2)**

(a) A charter school may negotiate and contract with the department of education or any other public or for-profit or nonprofit private entity for:

- (1) The use of a school building and grounds or any other real property or facilities that the charter school desires to use or convert for use as a charter school site;
- (2) The operation and maintenance thereof; and
- (3) The provision of any service, activity, or undertaking that the charter school is required to perform in order to carry out the terms of its charter.

Except as provided in subsection (b), the department of education may charge a charter school reasonable rent for the use of the district's buildings, grounds, and facilities. Any services for which a charter school contracts with the department of education shall be provided by the department of education at cost.

(b) In no event shall a charter school that is established by converting an existing school or attendance center to charter

school status be required to pay rent for space that is deemed available, as negotiated and provided in the charter agreement, in department of education facilities. However, all other costs for the operation and maintenance of school district facilities that are used for the operation and maintenance of school district facilities that are used by the charter school shall be subject to negotiation between the charter school and the department of education and shall be set forth in the charter.

*(Comment: Taken from Illinois charter school law.)*

### **(OPTION 3)**

(a) Facilities subsidies shall be made available to new century charter schools on the basis of equity and equality. This section shall be liberally construed to carry out the purposes of this subpart.

(b) New century charter schools that pay rental fees shall receive facilities subsidies to pay their actual rental fees, up to the maximum amount established by the product of the per pupil facilities subsidy and a charter school's official enrollment count. Except as provided in subsection (c), new century charter schools that do not pay rental fees shall not receive facilities subsidies.

(c) Notwithstanding subsection (b) to the contrary, facilities subsidies may be applied to mortgage payments if new century charter schools build their own facilities or substantially renovate rented facilities. New century charter schools that build their own facilities or that substantially renovate rented facilities shall receive facilities subsidies to pay their actual mortgage payments, up to the maximum amount established by the product of the per pupil facilities subsidy and a charter school's official enrollment count.

(d) The facilities subsidy shall be determined by the legislature through the general appropriations act and, as necessary, the supplemental appropriations act; provided that:

- (1) Nothing in this section shall be construed to create a continuing appropriation in violation of article VII, section 11 of the state constitution; and
- (2) This section shall be subject to the availability of funds appropriated for the specific purpose of providing facilities subsidies to new century charter schools.

*(Option 3 is discussed in chapter 3 of this report, and is analogous to the per pupil debt service payments made by the State on behalf of public schools for construction and renovation projects.)*