

NEIL ABERCROMBIE
GOVERNOR



DAVID M. LOUIE
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

April 12, 2013

The Honorable Neil Abercrombie
Governor of Hawai'i
Office of the Governor
State of Hawai'i
State Capitol
415 South Beretania Street
Honolulu, Hawai'i 96813

RE: Whether Early Learning Bills Will Create Legal Grounds for K-12
School Vouchers.

Dear Governor Abercrombie:

We previously provided you with an advice letter dated February 12, 2013, which explained the need for an amendment to article X, section 1 of the Hawai'i Constitution to permit the use of public funds to support or benefit private early childhood education programs. The proposed amendment to article X, section 1 is limited in its application to "early childhood education programs as provided by law." The early childhood programs are intended to serve three and four-year old children. Notwithstanding this limitation we understand that certain legislators and the Hawaii State Teachers Association ("HSTA") are now questioning whether the early learning bills, particularly the constitutional amendment and the early childhood education bill proposed to implement the constitutional amendment, create a legal basis for allowing school vouchers for private schools for grades K-12. Pursuant to a request from your office, we provide you this letter clarifying that the constitutional amendment bill, S.B. No. 1084 and the early childhood education bill, S.B. No. 1095, do not create a legal basis for allowing school vouchers for grades kindergarten through grade twelve (grades K-12).

THE ISSUE PRESENTED AND SHORT ANSWER

The issue presented is whether a legal basis for allowing school vouchers for grades K-12 will be created by either S.B. No. 1084, which proposes an amendment to article X, section 1, of the Hawai'i Constitution to permit the use of public funds to pay for private early education programs or by S.B. No. 1095, which is the implementing legislation for the State's early childhood education program. As used herein, "school vouchers," or a "school voucher system," means a subsidy that is given by the State directly to parents for private tuition to any school of their choice. As will be explained herein, the early learning bills do not apply to educational

programs for grades K-12 and, therefore, do not create a legal basis for allowing school vouchers for those programs. The enactment of another constitutional amendment that would allow vouchers for educational programs for grades K-12 would be required before a voucher program could be implemented, but as further explained below, other legal impediments exist that would stand in the way of the use of vouchers.

BACKGROUND

As explained in our prior advice letter, article X, section 1, of the Hawai'i Constitution currently prohibits the use of public monies to support or benefit private educational institutions. Thus, we advised you that a constitutional amendment, such as the one proposed by S.B. No. 1084, is necessary in order to permit the State to use public funds to contract with private early education programs under the early childhood education bill, S.B. No. 1095.

Thus, the purpose of S.B. No. 1084 is specifically to amend article X, section I, to allow a narrow exception permitting "public funds [to be] appropriated for the support or benefit of private early childhood education programs ... as provided by law." Assuming the amendment is adopted, the State's early education programs will be implemented under the early childhood education bill, S.B. No. 1095. Thus, the early education bill is contingent upon the constitutional amendment being adopted.

The "as provided by law" language of the constitutional amendment is a reference to the early childhood education bill, S.B. No. 1095, through which the legislature retains authority to enact implementing legislation to the constitutional provision. Specifically, through the "as provided by law" provision in the constitution, the legislature has the power to determine what is or is not permitted for the early education programs.

DISCUSSION

Neither the constitutional amendment bill, S.B. No. 1084, nor the early childhood education bill, S.B. No. 1095, proposes or creates any legal grounds for K-12 school vouchers.

With respect to the constitutional amendment bill, S.B. No. 1084, the amendment seeks to permit the appropriation of public funds only for private early childhood education programs, which are pre-kindergarten programs, and not for K-12 programs. Thus, if the State wanted to use public funds for private K-12 programs, a further constitutional amendment to article X, section 1 would be required in order to permit the State to do so. Accordingly, if S.B. No. 1084 is adopted, the State will continue to be prohibited to use public funds for private K-12 programs.

The constitutional amendment is not self-implementing. Because the amendment contains the phrase "as provided by law," subsequent statutes are required to implement the

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constitutional provision. Thus, the legislature, not the state agency, controls what is permissible in administering the early childhood education programs.

Here, the proposed legislation for implementing the early childhood education programs is S.B. No. 1095. The bill only pertains to the development of a State funded pre-kindergarten education program to serve three and four year old children and does not propose the use of a pre-school voucher system. To the contrary, the bill proposes to allow the State, through its executive office on early learning, to contract with eligible private early childhood education providers in order to increase the capacity of the program. Accordingly, S.B. No. 1095 is limited to pre-kindergarten children and does not create any legal grounds for K-12 vouchers, nor does it even propose the use of vouchers for its early childhood education programs.

Even if the State wanted to develop a vouchersing system for K-12, two legal obstacles would have to be overcome. First, because of the Hawai'i Supreme Court's interpretation of article X, section 1 in *Spears v. Honda*, 51 Haw. 1 (1968), which was discussed at length in our earlier letter to you, a further constitutional amendment would be required before the State could use public funds for private K-12 programs. Second, if the State were to attempt to implement a K-12 program by contracting with private schools, such an attempt would be contrary to the ruling in *Konno v. County of Hawaii*, 85 Hawai'i 61 (1997), which held that the privatization of services (the privatization of operation of county landfill) that are customarily and historically provided by civil servants, violates civil service statutes and constitutionally mandated merit principles. Because K-12 services have been customarily and historically provided by teachers and support staff through negotiated collective bargaining agreements, the State would not be able to privatize such educational services under existing constitutional and civil service laws.

CONCLUSION:

Based on the foregoing, it is our advice that S.B. No. 1084 and S.B. No. 1095 do not create any legal grounds that would authorize the use of school vouchers for K-12 programs. Should you have questions, please feel free to contact us.

Very truly yours,



Gary S. Sugaanuma
Deputy Attorney General

APPROVED:



David M. Louie
Attorney General