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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: Need for Amendment to State Constitution to Allow Use of Public Funds
for Private Early Childhood Education Programs

Dear Governor Abercrombie:

This responds to a request from your office to respond to an assertion made by a testifier at legislative hearings on the Administration's proposal seeking an amendment to article X, section 1 of the Hawai'i Constitution to permit the use of public funds to support or benefit early childhood programs as provided by law who proclaims that a constitutional amendment is not necessary.

As Governor, you have proclaimed that an early childhood education program deserves a preferred position in our hierarchy of values and is necessary in order for our children to develop to their fullest potential at the formative years of brain development. Through your efforts in 2012, the Legislature enacted Act 178 to establish the Executive Office on Early Learning (EOEL) within your office. As the EOEL began to develop its initiatives and programs which called for private-public partnership in the delivery of its programs, our office advised the EOEL that article X, section 1 of the Hawai'i Constitution, which provides, "nor shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution," poses an impediment to this initiative. With our advice, it was determined that a two-track strategy would be effected where legislation (H.B. No. 862 and S.B. 1093) would be proposed to immediately authorize a school readiness program within the early learning system which would focus on physical, cognitive, linguistic, social and emotional development, but will not provide any instructional services that supplant or duplicate the academic program of any public or private school. Because this program would not have a formal and structured academic component we advised that we would be able to defend that it does not violate article X, section 1. However, in order for the EOEL to develop and deliver an early childhood education program that would utilize private providers, H.B. 853 and its companion S.B. No. 1084 proposes the constitutional amendment to allow public funds to be used for private early

childhood education programs as provided by law and H.B. No. 864 and S.B. No. 1095 were proposed as implementing legislation. We advised that a constitutional amendment is necessary in order to obviate constitutional challenges of the use of public funds to pay private providers of early childhood education programs under the statewide early learning system currently being developed pursuant to chapter 302L, Hawaii Revised Statutes (Chapter 302L), entitled "Early Learning System."

THE ISSUE PRESENTED AND SHORT ANSWER

The issue presented is whether an amendment to article X, section 1, of the Hawai'i Constitution is necessary in order to permit the use of public funds to pay private providers of early education programs under the statewide early learning system. As previously communicated to your office, article X, section 1 prohibits the appropriation of public funds to support or benefit private educational institutions. Consequently, we advise that an amendment which carves out an exception allowing public monies to be appropriated for the support or benefit of private early childhood education programs is necessary.

BACKGROUND

With respect to the early education bills, and based on our belief that a constitutional amendment is necessary in order to allow the State to use public funds to pay private early childhood education providers, the administration package also contains bills seeking to amend article X, section 1, of the Hawai'i Constitution by carving out a narrow exception that would permit public funds to be used for early childhood education programs (S.B. No. 1084 and H.B. No. 853). Thus, the early education bills are contingent upon the passage of the constitutional amendment bills.

We believe a constitutional amendment is necessary in connection with the program advanced by the early education bills, but not with respect to the program under the school readiness bills. This is due to the differences in the programs. The school readiness program will prepare children for school by addressing their physical, cognitive, linguistic, social, and emotional development and will not provide any instructional services that supplant or duplicate the academic program of any public or private school. In contrast, the early childhood education program will address all of these needs, plus go the extra step of addressing children's educational needs as well. Specifically, the educational component of the early childhood education program will align with state content and performance standards for grades kindergarten to twelve to facilitate a seamless and high-quality educational experience for children. Thus, the early childhood education program will have an academic component, while the school readiness program will not. As will be explained more fully below, article X, section 1 applies to "private educational institutions," as opposed to institutions focusing on school readiness skills.

Both the school readiness and early childhood education programs are designed to be a public-private partnership. This means that the State intends to contract with both public and private providers under the programs.

Again, it is the early childhood education program that is at issue here. As noted, we believe a constitutional amendment is needed before the State can use public funds to contract with private providers of early childhood education programs.

DISCUSSION

Article X of the Hawai'i Constitution is entitled "Education." Article X, section 1 states as follows:

Section 1. The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefore. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; **nor shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution**, except that special purpose revenue bonds authorized under section 12 of Article VII may be appropriated to finance or assist:

1. Not-for profit corporations that provide early childhood education and care facilities serving the general public; and
2. Not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities. (Bold and underscore emphasis added).

The foregoing presents a clear constitutional prohibition on the use of public monies to support or benefit private educational institutions. What qualifies as a "private educational institution" is not defined in the Constitution, nor are we aware of any judicial interpretation of that phrase. While it is clear that private kindergarten to grade 12 programs fall within the definition based on the Spears v. Honda decision discussed below, it is less clear with respect to private preschools.

The question then is whether public funds can be used to pay for private providers needed to implement the early childhood education program. It is our understanding that the majority of these early childhood education providers will be private preschools. Thus, if private preschools and other early education providers are deemed to be "private educational institutions" as the phrase is used in article X, section 1, then a constitutional amendment of the type that is

currently before both houses of the Legislature is indeed required. Rather than delivering a program with the constant uncertainty that it may face a legal challenge that it violates article X, section 1, amending article X, section 1 to clearly permit the use of public funds to contract with private providers to deliver some of the early childhood education programs eliminates that legal challenge.

In interpreting a phrase in the Constitution, "[t]he general rule is that, if the words used in a constitutional provision ... are clear and unambiguous, they are to be construed as they are written[.]" Nelson v. Hawaiian Homes Commission, 127 Hawai'i 185, 197, 277 P.3d 279, 291 (2012) (internal quotation marks omitted) (quoting Spears v. Honda, 51 Haw. 1, 6, 449 P.2d 130, 134 (1968)). Furthermore, "[t]he words in a constitutional provision are also 'presumed to be used in their natural sense.'" Nelson, 127 Hawai'i at 198 (quoting Employees' Retirement System v. Ho, 44 Haw. 154, 159, 352 P.2d 861, 864 (1960)).

As far as we can tell, the phrase "private educational institution" is not defined in any dictionary. The first term of the phrase, "private," naturally means something other than a public or governmental program, institution, etc. The remaining terms of the phrase, "educational institution," is defined as "an institution dedicated to education," (see Webster-dictionary.org, dictionary.reference.com, thefreedictionary.com), or an "establishment dedicated to educating people" (see babylon.com). Thus, in the natural sense, the phrase "private educational institution" means a private institution (i.e., a non-public or non-governmental institution) that is dedicated to education. Although private preschools participating in the early childhood education program would appear to fit squarely within this natural interpretation of the phrase "private educational institution," this alone does not tell us whether the framers of the Constitution intended such an interpretation.

"In such a situation, we may look to the history of 'the times and the state of being when the constitutional provision was adopted.'" Nelson, 127 Hawai'i at 198 (quoting State v. Kahlbaun, 64 Haw. 197, 202, 638 P.2d 309, 315 (1981)). "In doing so, 'the object sought to be accomplished and the evils sought to be remedied should be kept in mind by the courts.'" Nelson, 127 Hawai'i at 198 (quoting Hawaii Gov't Employees' Ass'n v. County of Maui, 59 Haw. 65, 81, 576 P.2d 1029, 1039 (1978)). "In order to give effect to the intention of the framers and the people adopting a constitutional provision, an examination of the debates, proceedings and committee reports are useful." Nelson, 127 Hawai'i at 198 (quoting Kahlbaun, 64 Haw. at 204, 638 P.2d at 316).

The controlling authority in Hawai'i with respect to interpreting the framers' purpose or intent behind article X, section 1 of the Hawai'i Constitution is Spears v. Honda, 51 Haw. 1, 449 P.2d 130 (1968), in which the Hawai'i Supreme Court ruled unconstitutional two statutory provisions and an administrative rule which authorized subsidies to private and sectarian school students for bus transportation to and from school. The Spears court determined that the bus subsidies constituted "support or benefit" of private schools in violation of article IX of the

Hawai'i Constitution (article IX was later renumbered to article X during the Constitutional Convention of 1978).

At the outset of this discussion of Spears, we point out that the case is not directly on-point with our situation. First, Spears dealt with the interpretation of the phrase "support or benefit," which is not at issue here. In addition, the case dealt with the constitutionality of a public bus subsidy for private school students, grades kindergarten to grade 12. Notwithstanding this, the decision is highly instructive with respect to the framers' intent behind article X, which can assist us determine whether the phrase "educational institution" also includes private preschools that provide education to children.

In Spears, the need to ensure the success of public schools is expressed as the reason for article X, section 1's prohibition against the use of public funds to support and strengthen private schools. The Hawai'i Supreme Court found that "the intent of the framers of our Constitution regarding the nature of appropriations constituting 'support or benefit' to sectarian and private schools is clear from the proceedings of our Constitutional Convention of 1950[.]" Spears, 51 Haw. at 7. The court noted that the Committee on Education's report presenting article IX to the Committee of the Whole was "permeated with a strong recognition of the importance and unique function of public education in a democratic state, as compared with nonpublic education." Id.¹ The court further noted that the Committee on Education had indicated it was "acting in accordance with the will of the electorate of Hawai'i in placing major emphasis on public education through a separate article on that subject in the Constitution rather than tacking or telescoping it into the article on general welfare." Id. The court believed that the emphasis on public education could be:

[L]argely attributed to the fact that, at that time, nonpublic schools in this jurisdiction were considered better able to provide education than public schools, although the latter had shouldered the burden of educating the bulk of the populace and of assimilating vast numbers of offspring or immigrants into the mainstream of American life, despite somewhat shabby treatment by the legislature.

Spears, 51 Haw. at 7. The court pointed out that "[t]he gap in the quality of education provided by public schools and the quality of education provided by private schools" was still apparent at the time of its decision in Spears. Id. at 7, n. 5.

The Spears court determined that any use of public monies resulting in the building-up or strengthening of a private school is prohibited by Article X. The court explained:

¹ Citing Standing Committee Report No. 52, The Proceedings of the Constitutional Convention Hawaii, Vol. I, 201-206 (1950).

The mechanics of the bus subsidy program at issue indicate that the fears of the framers were well-founded. The subsidy does 'build up, strengthen and make successful' the nonpublic schools. ... Also, ... the subsidy induces attendance at nonpublic schools, where the children are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school. Finally, to the extent that the State pays out funds to carriers owned by the nonpublic schools or agents thereof, the State is giving tangible 'support and benefit' to such schools.

Id. at 12-13.

The Spears court concluded that the bus subsidy violated article X and could not be lawfully reinstated unless the Constitution was amended.

As pointed out by the discussion of the historical bases of our Constitution, this state has tied its own hands regarding appropriations for the 'support or benefit' of nonpublic schools. ... [W]here the Legislature has not been granted the power by the people, under the State Constitution, to pass certain legislation, it cannot validly pass such legislation. Rather, the Legislature must return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks[.]

Having decided that the Hawaii Constitution ties the hands of the Legislature and prohibits it from making any appropriation aiding a sectarian or private school, including subsidies for bus transportation, we are compelled to conclude that [the bus subsidy law] violate[s] Article IX, Section 1, to the extent that they authorize appropriations to sectarian and private schools.

Id. at 15 (bracketed language added).

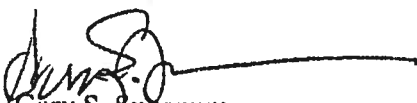
CONCLUSION:

It is clear from the Spears decision that the Hawai'i Supreme Court has determined that the framers' intent behind article X, section 1 was to create a broad prohibition on the use of public monies to benefit or support private schools. Indeed, using public monies merely to subsidize the cost for bus transportation to and from private schools was determined to be prohibited because it would have the effect of building-up, strengthening and making the private schools successful as against the public schools.

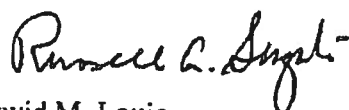
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Under this reasoning, we believe article X, section 1 of the Hawai'i Constitution prohibits the use of public funds to pay for private early childhood education programs. As noted above, it is anticipated that the majority of the participating private early childhood education programs will be private preschools. Such private programs would be in direct competition with those public schools that currently have preschool, pre-kindergarten, or junior kindergarten programs.² Using public monies to help build-up and strengthen such private preschools to the detriment of public preschool programs is precisely what the framers intended to prevent. Moreover, public monies going to private preschools that are attached to, or affiliated with, a private K-12 program, could also be deemed to be benefit or support of the attached private K-12 programs. Consequently, we believe an amendment to article X, section 1 of the Hawai'i Constitution carving out an exception to permit the use of public funds to pay private providers of early education programs under the statewide early learning system would be needed in order to use public funds to pay for these private providers. Should you have questions, please feel free to contact us.

Very truly yours,


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Deputy Attorney General

APPROVED:


David M. Louie
Attorney General

² Although recently enacted law will repeal junior kindergarten starting in the 2014-2015 school year, there is nothing preventing the legislature from either extending junior kindergarten beyond the current repeal date, or to reinstate the program at some time in the future.

