

Date of Hearing: Monday, February 2, 2009

Committee: House Committee on Education

Board: Education

Person Testifying: Garrett Toguchi, Chairperson, Board of Education

Title of Bill: H.B. No. 12, Relating to the Board of Education

Purpose of Bill: Authorizes the Board of Education (Board) to appoint or retain attorneys who are independent of the Attorney General (AG), to provide legal services for the Board. Specifies that nothing precludes the Board from requesting and securing legal services from the Attorney General and the Department of the Attorney General for the Board, its members, or employees.

Board's Position: Chairperson Takumi, Vice Chairperson Berg, and members of the House Committee on Education, thank you for this opportunity to submit testimony in **strong support** of H.B. No. 12.

With the enormity and complexity of issues affecting public education, the Board must often consult with legal counsel to address and make policy decisions in areas of legal significance and consequence. This includes areas related to the employment of personnel, privacy rights of students, labor negotiations, student discipline, civil rights, and board powers and immunities, to name a few.

The Board finds that the current arrangement of relying on the legal services of deputy attorneys general to provide legal services and representation for all Board legal matters does not allow the Board to handle issues in the most efficient and timeliest manner. There have also been occasions where the Board has disagreed with the advice provided by the Department of the Attorney General, but were unable to pursue other alternatives.

With the multitude of legal services that deputy attorneys general must provide to other agencies and the complexity of legal issues they must handle, attending to Board requests often takes more time than is reasonable or desired, and causes delays in attending to time-driven deadlines.

This bill proposes to allow the Board to retain or hire attorneys who are independent of the AG, thereby allowing the Board to attend to and address educational matters and issues in a more sound, timely, and effective manner. H.B. No. 12 would enable the Board to pursue independent legal advice and independent legal scrutiny aside from the services provided by the AG.

Allowing the Board to hire attorneys without the AG's approval will improve the response time and provide necessary support to pursue legal action when the Board's interests diverge from the rest of the Executive Branch.

The Board requests the latitude to hire independent legal counsel to address problems and issues affecting our public schools and public libraries in a more expedient and effective manner.

Thank you for the opportunity to testify in **strong support** of H.B. No. 12.



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:

H.B. NO. 12, RELATING TO THE BOARD OF EDUCATION.

BEFORE THE:

HOUSE COMMITTEE ON EDUCATION

DATE: Monday, February 2, 2009 **TIME:** 2:00 PM

LOCATION: State Capitol, Room 309
Deliver to: State Capitol, Room 324, 5 Copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Charleen M. Aina, Holly T. Shikada, or Gary K. H. Kam,
Deputy Attorneys General

Chair Takumi and Members of the Committee:

The Attorney General does not oppose the Board of Education being able to hire its own attorneys, but does not support this bill, in its present form.

This measure would authorize the Board of Education to hire its own attorneys who would be independent of the Department of the Attorney General. These attorneys would be appointed or retained by the Board of Education.

However, the measure would also require the Department of the Attorney General to continue to provide legal services to the Board of Education upon mutual agreement.

It is the position of the Attorney General that should the Board of Education be given the autonomy to hire or retain its own in-house attorneys, then generally all of the legal matters of the Board and the Department of Education should be handled by the attorneys hired by the Board. Also, money settlements or judgments arising out of actions brought against the Board or Department, or their members or employees, should be the responsibility of the Board and Department if they are to have legal representation

autonomous from the Attorney General. We have attached a revised measure for the Committee's consideration.

Essentially, the revised measure would require that all claims arising solely out of the acts or omissions of the Board or the Department, or their members or employees, may be asserted only by a suit brought against the Board or the Department, or their members or employees. Any monetary settlement or judgment from such a suit shall be solely the liability of the Board and the Department and not the State, unless the Legislature appropriates money to pay the liability. All non-monetary terms of any settlement of such a suit require the prior approval of the Attorney General.

The revised measure also provides for service of process upon the Board's general counsel. The revised measure establishes a general counsel position who is appointed by the Board. The general counsel shall provide legal representation to the Board and the Department in all matters. The attorneys employed by the general counsel shall not be deputy attorneys general. The revised measure allows, but does not require, the Attorney General to provide legal services to the Board or Department at the Attorney General's discretion. The Attorney General also retains the authority to determine if Board members or Department employees, who are sued in their individual capacities, will receive legal representation under section 662-16, Hawaii Revised Statutes. However, once the Attorney General decides that the member or employee is entitled to legal representation, the Attorney General may delegate the responsibility for providing the legal representation of the member or employee to the general counsel.

We respectfully request that should this measure be passed, it be passed in the form of the revised measure attached to this testimony.

A BILL FOR AN ACT

RELATING TO THE BOARD OF EDUCATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that a growing number of
2 public school systems nationwide have hired in-house legal
3 counsel to address, monitor, and manage the vast amounts of
4 legal work generated by the operation of public schools in their
5 respective school districts. Most of the ten largest school
6 districts in the United States have a legal department or office
7 of general counsel to handle the legal affairs of schools.

8 Act 51, Session Laws of Hawaii 2004 ("Act 51"), known as
9 the "Reinventing Education Act of 2004," comprehensively
10 reformed Hawaii's public schools. Section 1 of the Act that
11 stated in part:

12 The legislature finds that significant changes
13 need to be made to enhance Hawaii's public education
14 system to ensure the success of that journey.

15 Although the State's students, parents, teachers,
16 school administrators, departmental staff, and other
17 educational stakeholders strive to achieve excellence,
18 their efforts will never be completely successful

1 until various aspects of the system around them are
2 improved.

3 The legislature has supported and will continue
4 to support efforts by the department of education to
5 improve Hawaii's schools as a means of enhancing the
6 academic achievement, safety and well being, and civic
7 commitment of students, to meet the evolving needs of
8 today's communities.

9 The legislature further finds that as landmark and complex
10 legislation Act 51 requires a dedicated legal staff if the
11 department of education is to be effectively supported in its
12 implementation of that act's provisions.

13 The purpose of this Act is to allow the board of education
14 to hire attorneys who are independent of the attorney general to
15 assist the board and the department of education in implementing
16 Act 51.

17 SECTION 2. Chapter 302A, Hawaii Revised Statutes, is
18 amended by adding the following new sections to part IV, to be
19 appropriately designated and to read as follows:

20 1. "§302A- Suits; service of process. (a)
21 Notwithstanding any other law to the contrary, all claims
22 arising entirely out of the acts or omissions of the board of

.B. NO.

1 education or its members in their official capacities, or the
2 department of education or its officers or employees in their
3 official capacities, including claims permitted against the
4 State under chapter 661, part I, and claims for torts permitted
5 against the State under chapter 662, may be asserted only by a
6 suit brought against the board of education or its members, or
7 the department of education or its officers or employees, and
8 not against the State. Suit must be brought in the manner
9 provided for suits against the State, including section 661-11.
10 All defenses available to the State, as well as all limitations
11 on actions against the State, shall be applicable to all suits
12 brought under this section.

13 (b) Any monetary settlement or judgment entered into or in
14 a suit brought under this section shall be solely the liability
15 of the board or department of education and not the State, and
16 may constitute a general obligation of the State only if the
17 legislature appropriates money to pay that liability. All non-
18 monetary terms of any settlement shall be binding only after the
19 board or department of education secures the review and
20 concurrence of the attorney general.

21 (c) Rights and remedies conferred by this section shall be
22 exclusive and shall not be construed to authorize any other

____.B. NO. _____

1 claim, suit, or action against the State. In addition, a
2 judgment, compromise, or settlement, entered in a suit brought
3 against the board of education or its members, or the department
4 of education or its officers and employees under this section,
5 shall constitute a complete bar to any action brought by the
6 same plaintiff, by reason of the same subject matter, against
7 the State, or a member of the board, or officer or employee of
8 the department in the member's, officer's, or employee's
9 individual capacity.

10 (d) The board of education or the department of education
11 may purchase insurance to cover claims anticipated under this
12 section.

13 (e) Service of process upon the board of education,
14 department of education, or a member of the board, or officer or
15 employee of the department sued in the member's, officer's, or
16 employee's official capacity shall be made by serving a filed
17 and certified copy of the summons and the complaint on the
18 department's general counsel, in accordance with applicable
19 court rules and chapter 634, or any attorney in the office of
20 the department's general counsel, and delivering a copy of the
21 summons and complaint to every member, officer, or employee who
22 is sued in the member's, officer's or employee's official

1 capacity. A copy of the complaint and summons shall also be
2 served upon the attorney general."

3 2. "§302A- General counsel. (a) The board of
4 education may appoint a general counsel and appoint, or retain
5 by contract one or more additional attorneys to provide legal
6 services for the board, and the department of education,
7 including:

8 (1) Representation of the board or department, or a board
9 member, or a department officer or employee, in any
10 action brought by or against the board of education or
11 the department of education, or a board member, or
12 department officer or employee, in the member's,
13 officer's, or employee's official capacity, either
14 directly, or through the acts or omissions of the
15 board's member, or the department's officer or
16 employee;

17 (2) Advice and assistance to ensure the lawful and
18 efficient administration and operation of the board,
19 and the department of education; and

20 (3) Any other legal services the board, or the department
21 of education requires.

22 The general counsel shall supervise the work of the additional

____.B. NO. _____

1 attorneys appointed or retained by contract. All attorneys
2 appointed by the board shall serve at the pleasure of the board,
3 and shall have their compensation fixed by board. Attorneys
4 appointed, or retained by contract shall be exempt from the
5 civil service and excluded from collective bargaining, and shall
6 not be subject to the provisions of chapters 76 and 89. All
7 attorneys appointed, or retained by contract pursuant to this
8 section shall be independent of the attorney general and shall
9 not be deputy attorneys general, but may represent the State
10 when the State is a party to a civil action in which the board
11 or department, or board member, or department officer or
12 employee in the member's, officer's, or employee's official
13 capacity is a party, and the attorney general and the general
14 counsel mutually agree to their representation of the State.

15 (b) Notwithstanding any other law to the contrary, the
16 attorney general may, but shall not be required to, provide
17 legal services to the board of education and its members, and
18 the department of education and its officers and employees.

19 (c) Nothing in this section shall limit, reduce, or
20 otherwise preclude the attorney general's authority to perform
21 all of the duties and responsibilities assigned to the attorney
22 general by the Constitution and laws of the State of Hawaii.

1 (d) Nothing in this section authorizes the general counsel
2 or the other attorneys appointed, or retained by contract under
3 this section to represent members of the board of education or
4 officers and employees of the department who are sued in their
5 individual capacities, provided that the attorney general may
6 delegate that responsibility to the general counsel at the sole
7 discretion of the attorney general when the attorney general
8 determines that representation should be provided under section
9 662-16."

10 SECTION 3. Section 28-8.3, Hawaii Revised Statutes, is
11 amended by amending subsection (a) to read as follows:

12 "(a) No department of the State other than the attorney
13 general may employ or retain any attorney, by contract or
14 otherwise, for the purpose of representing the State or the
15 department in any litigation, rendering legal counsel to the
16 department, or drafting legal documents for the department;
17 provided that the foregoing provision shall not apply to the
18 employment or retention of attorneys:

19 (1) By the public utilities commission, the labor and
20 industrial relations appeals board, and the Hawaii
21 labor relations board;

22 (2) By any court or judicial or legislative office of the

____.B. NO. _____

- 1 State;
- 2 (3) By the legislative reference bureau;
- 3 (4) By any compilation commission that may be constituted
- 4 from time to time;
- 5 (5) By the real estate commission for any action involving
- 6 the real estate recovery fund;
- 7 (6) By the contractors license board for any action
- 8 involving the contractors recovery fund;
- 9 (7) By the trustees for any action involving the travel
- 10 agency recovery fund;
- 11 (8) By the office of Hawaiian affairs;
- 12 (9) By the department of commerce and consumer affairs for
- 13 the enforcement of violations of chapters 480 and 485;
- 14 (10) As grand jury counsel;
- 15 (11) By the Hawaiian home lands trust individual claims
- 16 review panel;
- 17 (12) By the Hawaii health systems corporation, or its
- 18 regional system boards, or any of their facilities;
- 19 (13) By the auditor;
- 20 (14) By the office of ombudsman;
- 21 (15) By the insurance division;
- 22 (16) By the University of Hawaii;

____.B. NO. _____

- 1 (17) By the Kahoolawe island reserve commission;
- 2 (18) By the division of consumer advocacy;
- 3 (19) By the office of elections;
- 4 (20) By the campaign spending commission;
- 5 (21) By the Hawaii tourism authority, as provided in
- 6 section 201B-2.5; [~~o~~]
- 7 (22) By the board of education or the department of
- 8 education to the extent provided in section _____ ; or
- 9 [~~(22)~~] (23) By a department, in the event the attorney general,
- 10 for reasons deemed by the attorney general good and
- 11 sufficient, declines, to employ or retain an attorney
- 12 for a department; provided that the governor thereupon
- 13 waives the provision of this section."

14 SECTION 4. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 5. This Act shall take effect upon its approval.

17

18

INTRODUCED BY: _____

19

BY REQUEST