TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:
H.B. NO. 2279, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 11, 2016 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to seek an appropriation to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

The five (5) claims total $4,753,100.00, not $7,303,100.00. Claim number 3 should be corrected to $4,000,000.00. Four (4) claims are general fund appropriation requests that total $4,103,100.00, and one (1) claim is an appropriation request from a departmental fund that totals $650,000.00. Attachment A provides a brief description of each claim in the bill.

Since the bill was introduced, six (6) new claims have been resolved for an additional $535,736.20. Five (5) claims are general fund appropriation requests for $485,736.20, and one (1) claim is an appropriation request from a departmental fund for $50,000.00. Attachment B provides a brief description of each new claim. We request that the Committee amend the bill to appropriate funds to satisfy the new claims.

Including the new claims, the appropriation request totals $5,288,836.20 allocated among eleven (11) claims. Of this total $4,588,836.20 are general fund appropriation requests and $700,000.00 are appropriation requests from departmental funds.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section 37-77.5, Hawaii

Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We respectfully request passage of this bill with the additional appropriations.

ATTACHMENT "A"

DEPARTMENT OF EDUCATION:

Toguchi v. Matayoshi, et al. **$ 82,500.00** ***(General Fund)***
Civil No. 13-00380 DKW-KSC, USDC **Settlement**

A ninth grade boy committed suicide. The boy was diagnosed with a number of specific disabilities and was eligible to receive special education services from the State of Hawaii. Kathryn Matayoshi, Superintendent of Education ("DOE") was sued in her official and individual capacities, Defendant Gary Gill, Acting Director of the State of Hawaii Dept. of Health ("DOH") was sued in his official capacity, and Defendants Lynn Uyeda, Tim Hill, Scott Shimabukuro, Scott Souza, Amy Akamine, Lia Williams and Lisa Hayashi, employees of either DOE or DOH, were sued in their individual and official capacities. During the boy's eight grade year, DOH provided him with five months of intensive home therapy because he was developing escalating behavioral problems. He began attending Roosevelt High School in the ninth grade, and his mother requested an early Individualized Educational Program ("IEP") because of his difficulty in transitioning. On October 24, 2011, the boy was placed in Kapolei Detention Home Maluhia for repeated failures to attend school. Upon his release from Kapolei Detention Home Maluhia on November 6, 2011, he took his own life. Plaintiffs alleged that DOE and DOH did not provide necessary and adequate special education and therapeutic services to the boy.

DEPARTMENT OF HEALTH:

Mahi v. Department of Health, et al. **$ 20,000.00** ***(General Fund)***
Civil No. 13-1-0250, Fifth Circuit **Settlement**

Plaintiff was an employee of the Department of Health that was hired as a quality assurance specialist in the Child and Adolescent Mental Health Division. She served as the quality assurance specialist at the Kauai Family Guidance Center. Her direct supervisor was the Branch Chief of the Center. Plaintiff's job was based on renewable one year terms of employment starting in July 2008. However, in 2012, she was advised by the Branch Chief that her employment would not be renewed beyond June 30, 2012. Plaintiff then filed a complaint alleging that the reason her term of employment was not renewed was because she complained about the conduct of the Branch Chief, in violation of the Hawaii Whistleblower Protection Act.

DEPARTMENT OF PUBLIC SAFETY:

Persin v. State of Hawaii, et al. **$ 4,000,000.00** ***(General Fund)***
Civil No. 13-1-1571-05, First Circuit **Settlement**

This is a medical negligence case in which the Department of Public Safety physician and nursing staff is alleged to have negligently failed to diagnose and treat the Plaintiff for streptococcal necrotizing fasciitis while he was a pretrial detainee at the Oahu Community Correctional Center (OCCC) from September 30, 2011 to October 5, 2011. The Plaintiff developed a severe bacterial infection as a result of an open wound on his arm. When he was first presented to the medical personnel at OCCC during morning sick call, he had severe flu-like symptoms, i.e., a high fever, rapid heart rate, blood pressure that was dropping, dizziness, nausea

and vomiting. Testing indicated that he probably had a bacterial infection, but follow up swabs were not taken of his throat and sent for analysis. The medical personnel also did not immediately obtain laboratory analysis of his blood to determine if Plaintiff was suffering from a viral or bacterial infection.

On the evening of his admission, nursing personnel called the on-call physician who ordered that Plaintiff's blood be drawn the following morning for laboratory testing. The blood draw was done the following morning and the blood samples were sent to the lab for analysis on a routine basis. At the time of his blood draw, Plaintiff's symptoms continued to be severe. His blood pressure was continuing to drop, indicating that he was becoming septic. Plaintiff pointed out the infected open sore on his arm and the physician noted the infection in Plaintiff's throat. By the time Plaintiff was examined by the physician, his fever was actually dropping to within normal limits. The physician prescribed a broad spectrum antibiotic which was not effective.

After spending the night in the infirmary and being examined by the physician the following morning, Plaintiff was sent back to his module by the physician. The Plaintiff was then sent back to the infirmary because Plaintiff was physically unable to stand for afternoon head count in the module. Coincidentally, the lab results were received by the infirmary during the time Plaintiff was back at the infirmary. Those lab results showed that Plaintiff's kidneys were not functioning and showed other indications of a septic infection. The physician then ordered that Plaintiff be sent to Queen's Medical Center Emergency Department for a higher level of care.

Shortly after Plaintiff arrived in the Emergency Department of Queen's Medical Center, he was going into septic shock. In order to combat the dropping blood pressure and keep him alive, the medical staff at Queen's administered large volumes of vasopressors, i.e., medications that cause the body's blood supply to leave the extremities and concentrate in the body's core so that the vital organs can continue to function. This ischemia of the extremities, in turn, caused Plaintiff to develop dry gangrene in his hands and feet. Plaintiff had both legs amputated below the knee and all of his fingers and most of his thumbs of both hands amputated because of gangrene. Plaintiff was hospitalized at Queen's for two months.

The total settlement in this case is $7,200,000. The State's insurance carrier has paid $3,200,000. The $4,000,000 requested appropriation amount represents the self-insured retention amount that the State is responsible to pay before the State's insurer is obligated to pay any coverage amount.

MISCELLANEOUS CLAIMS:

Kasey M. Dowling **$ 600.00** ***(General Fund)***

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Le v. Turtle Bay Resort, LLC, et al. **$ 650,000.00** ***(Department***
Civil No. 13-1-1885-07, First Circuit **Settlement** ***Appropriation)***

Plaintiff was walking along Kamehameha Highway when she fell, approximately fifteen feet, into a concrete drainage culvert that runs underneath the Oio Stream Bridge. She and her brother-in-law were trying to return to the entrance of the Turtle Bay Resort, to retrieve their family members that had been inadvertently left at the Turtle Bay entrance. Plaintiff and her family had attended the 2011 Fourth of July event at Turtle Bay Resort. Plaintiff fell because she did not see the drop off into the culvert. As she approached the Oio Stream Bridge there was a barricade; but rather than walk close to traffic, Plaintiff walked along the outside of the barricade on what she described as a grassy pathway. It was dark and Plaintiff did not see the steep drop off into the concrete drainage culvert.

The State owns the land where Plaintiff fell, as it is within the right-of-way of Kamehameha Highway. The State installed the subject culvert in the 1930s to drain agricultural properties. Since its installation, it has remained essentially unchanged, except that because it no longer supports any agriculture, it remains dry except during heavy rains. Even though the State owns the culvert, Turtle Bay controls the area as part of its resort development. Turtle Bay routinely cut the grass along the road shoulder, and hung lights along its fencing. Plaintiff alleged that the condition of the road shoulder made it seem like an intended pathway back to the Turtle Bay entrance. Plaintiff suffered fractures in her back and foot and was rushed to the emergency room for surgery. As a result of her fall she continues to suffer from urinary and bowel incontinence and associated emotional trauma. The case proceeded to mediation which resulted in settlement of $650,000.

ATTACHMENT "B"

DEPARTMENT OF EDUCATION:

Hawaii Government Employees Association, et al. v. State of Hawaii, et al., Civil No. 09-1-1430-06 SSM, First Circuit — **$ 100,000.00** ***(General Fund)*** **Settlement**

This case was filed in 2009 and is situated as a class action with two distinct categories of plaintiffs: (a) individual class representatives who represent current and former Physical Therapists and Occupational Therapists ("PTs" and "OTs") employed by DOE during the period from June 22, 2007 onward, and (b) HGEA which is the exclusive representative of PTs, OTs and also DOE Speech and Language Pathologists ("SLPs"). The genesis of this case dates back to when the Legislature adopted House Concurrent Resolution No. 203 (2004), requesting that DHRD conduct a study to determine whether there should be "parity" between OT/PTs and SLPs. At that time, PTs and OTs not only worked two extra months each year; they were paid less than SLPs as well, and two of the things that the legislature requested DHRD to study was both the pay disparity and whether or not OTs and PTs should be placed on a 10-month work schedule similar to SLPs. DHRD then conducted its study and concluded that OTs and PTs did in fact perform work that was "similarly situated" to SLPs and made several recommendations on that basis, including introducing pay parity with SLPs. However, DHRD did not make any recommendations with regard to placing PTs and OTs on a 10-month schedule. DOE then adopted the findings of the DHRD study and duly amended the job specifications and classifications of PTs/OTs to reflect parity with SLPs. However, when DOE declined to also place PTS and OTs on a 10-month schedule, the Plaintiffs filed the instant Complaint, which asserts that DOE's decision violates the "merit principle"; the concept of "equal pay for equal work"; and the right to "equal protection under the laws" protected by the Fourteenth Amendment of the US Constitution, and article 1, section 5, of the State Constitution.

For sound operational reasons, placing PTs and OTs on a 10-month schedule is simply not an option for DOE, so settling on this issue has always been a complete non-starter. On the other hand, were the Plaintiffs to prevail on any one of their three causes of action, the resulting monetary award could have been extensive. However, the parties have agreed to settle the case in its entirety in the following manner. First, all PTs and OTs shall remain on 12-month work schedules, unless and until decided otherwise by DOE. In return, (a) the State shall pay the sum of $100,000 to the client trust fund of plaintiffs' legal counsel through ATG-1, settling in full all claims made on behalf of the members of the class action who have retired since the class was certified, and (b) DOE will implement across the board shortage differential increases of $331 per month for current and future DOE PTs and OTs, prorated as appropriate, and payable entirely out of DOE's budget.

DEPARTMENT OF HAWAIIAN HOME LANDS:

Darnell v. County of Hawaii, et al. Civil No. 09-1-0146, Third Circuit — **$ 200,000.00** ***(General Fund)*** **Settlement**

This case arises out of a one-car accident that occurred on April 21, 2007, on a rainy evening in Hilo, Hawaii. Plaintiff was a passenger in a pick-up truck driven by his friend. They were

traveling east on Railroad Avenue. They testified that they were driving slowly because they were looking for a street along the south side of the road (to their right) to turn onto in order to get back to the highway. The road curves to the left. There is a rock berm at the end of the road. Pursuant to the Department of Hawaiian Home Lands (DHHL) subdivision plans, there should have been reflective signs to indicate the berm, along with a guardrail in front of the berm. Both men testified that neither traffic control device was present at the time of the accident. The driver said that he was not aware that the road curved to the left, or that the road ended at a rock berm. He said that he was driving at 35 mph or less at the time the truck approached the berm, and 20-35 mph when the truck struck and ramped over the berm. The truck landed on the other side of the berm.

The passenger did not have his seatbelt on. He sustained a burst fracture at L-1, and was rendered an incomplete paraplegic. He will likely need improvements to his apartment, and need continued medical assistance throughout his life. His future special damages were estimated in excess of $1,000,000.

Railroad Avenue was originally an abandoned right-of-way for which the DLNR assumed ownership after WWII. DHHL owns the property on three sides of the road. In 1990, DHHL developed its property as the Panaewa Subdivision. Railroad Avenue was built as part of that subdivision. The rock berm may have been the cut material from the construction of the road. Pursuant to the design plans, at the end of Railroad Avenue, a metal guardrail with reflective strips, and two "high intensity reflectorized red" signs were to be installed before the berm. Because DHHL could not find the as-built plans, we can only assume, but not confirm, that the traffic control devices were installed when the road was built. Neither the Department of Land and Natural Resources (DLNR) nor DHHL has any records to indicate that they kept records regarding the accident history of the road, or that they maintained the road at all.

Although DLNR owns the road, and DHHL built it, the County of Hawaii had control of the road. Since 1999, the County of Hawaii had repeatedly requested that DLNR convey ownership of Railroad Avenue. However, DLNR did not follow through with the conveyance. Despite the failure to convey ownership of the road, since 2000, the County has been maintaining the road, street lights, and replacing missing traffic control devices, including but not limited to signs. The County's contribution toward settlement is $500,000.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

EPA Notice of Violation of Safe Drinking Water Act To DLNR **$ 50,000.00** ***(General Fund)*** **Settlement**

Large capacity cesspools were required to be closed by April 5, 2005, pursuant to the Safe Drinking Water Act, 42 U.S.C. § 144.88. DLNR worked to identify existing large capacity cesspools on DLNR property and to close and/or convert them to comply with the new law. Sixty large capacity cesspools were identified and scheduled for closure by DLNR between 2005 and 2015. Six cesspools at the Waianapanapa State Park were not originally identified by DLNR as falling under the definition of large capacity cesspools. The EPA notified DLNR in 2011 that these cesspools were considered large capacity cesspools and that they were non-compliant with the Safe Water Drinking Act. A Notice of Violation was issued by the EPA to DLNR in February 2015.

Isele-DeVita, et al. v. State of Hawaii, et al. **$ 135,000.00** ***(General Fund)***
Civil No. 13-1-548K, Third Circuit **Settlement**

Plaintiff fell in the parking lot at the Hapuna Beach State Park on Hawaii Island because of a large pothole that was obscured by a car that was parked next to her rental vehicle. Plaintiff, who had multiple pre-existing medical conditions, suffered a hip fracture and required immediate hip replacement surgery in Hawaii. After returning to Michigan, Plaintiff claimed that her hip replacement caused her other medical conditions to worsen and that the injury significantly altered her and her husband's emotional well-being. The case proceeded to mediation, which resulted in the settlement.

MISCELLANEOUS CLAIMS:

Judy M. Takano **$ 736.20** ***(General Fund)***

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General's office and, for good cause shown, the Department of the Attorney General recommends payment of this claim pursuant to section 37-77, Hawaii Revised Statutes.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Faith Action for Community Equity, et al. v. **$ 50,000.00** ***(Department***
Hawaii Department of Transportation, et al. **Settlement** ***Appropriation)***
Civil No. 13-00450 SOM RLP, USDC

In September 2013, Faith Action for Community Equity sued the Hawaii Department of Transportation for failing to offer the driver's license test in Chuukese and Marshallese. At that time, the Department was in the process of offering the driver's license test in those and other languages, but did not actually release the translated exams until March 17, 2014. In addition to Chuukese and Marshallese, the Hawaii Department of Transportation also offers the driver's license test in Hawaiian, Spanish, Ilocano, Tagalog, Japanese, Mandarin, Korean, Vietnamese, Samoan, Tongan, and English. The plaintiffs settled for injunctive relief and no money, but the issue of attorneys' fees was subject to a later decision by Judge Mollway, who awarded FACE's attorneys $50,000.