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GOVERNOR



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CHAIRPERSON

STATE OF HAWAII  
**STATE PUBLIC CHARTER SCHOOL COMMISSION**  
**(‘AHA KULA HO‘ĀMANA)**

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FOR: House Concurrent Resolution 166 HD1  
DATE: April 15, 2024  
TIME: 4:15 P.M.  
COMMITTEE: Committee on Education  
ROOM: Conference Room 225 & Videoconference  
FROM: Ed H. Noh, Ed. D., Executive Director  
State Public Charter School Commission

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Chair Kidani, Vice Chair Mercado Kim, and members of the Committee:

The State Public Charter School Commission (“Commission”) appreciates the opportunity to provide **COMMENTS on HCR 166/HD1** which urges the state public charter school commission to work with stakeholders to develop and adopt administrative rules, including rules governing the negotiation process between the commission and public charter schools.

The Commission currently has in place administrative rules that outline the process for requesting the Commission to adopt, amend, or repeal any rule. The applicable Hawaii Administrative Rule is below:

- §8-503-5, Hawaii Administrative Rules (HAR), allows for any interested person, organization, or agency to petition the Commission for the adoption, amendment, or repeal of any rule, which is designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements of the Commission.

A copy of these [administrative rules](#) is available on the Commission’s website for the committee’s reference and review.

Charter schools, as well as any interested stakeholder, can already apply the process provided and request an existing administrative rule update. There is precedence as this process has been utilized for review of a petition for administrative rules for a negotiation process between

the commission and public charter schools. Past [meeting minutes](#) are available on the Commission's website for the committee's reference and review.

The Commission keeps lines of communication open with stakeholders and engages in dialogue in efforts to grow in its capacity as an authorizer and support chartering in Hawaii.

Thank you for the opportunity to provide this testimony.

**HCR-166-HD-1**

Submitted on: 4/11/2024 9:39:28 AM

Testimony for EDU on 4/15/2024 4:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Marion K A Kapuniai	Testifying for Governing Board/Kanu O Ka 'Aina NCPCS	Support	Written Testimony Only

Comments:

To be seriously considered and passed!

Thank you,

Marion K A Kapuniai, Governing Board Chairman



April 14, 2024

## **Senate Committee on Education, Hearing April 15, 2024 Testimony on Agenda Item I in Strong Support of HCR 166**

Aloha Chair Kidani, Vice Chair Mercado Kim and members of the Senate Committee on Education:

The Hawaii Public Charter Schools Network sincerely appreciates this opportunity to testify on an issue that has impeded the development of charter schools in Hawaii since 2012. The law (§302D-5(a)(4) clearly says, “(a) Authorizers are responsible for executing the following essential powers and duties: (4) Negotiating and executing sound charter contracts with each approved charter applicant and with existing public charter schools.” A “Charter contract” is defined by §302D-1 as “a fixed-term, bilateral, renewable contract between a public charter school and an authorizer that outlines the roles, powers, responsibilities, and performance expectations for each party to the contract.” The latest iteration of the Contract, 4.0, adds to the statutory definition with, “in addition to the definition set forth in HRS §302D-1, the Terms and Conditions, and Exhibits.”

Our Network, and its member schools, have raised serious concerns regarding Charter School Contract 4.0 and previous versions. Our concerns encompass the following issues:

- 1) *Violations of statutory or regulatory provisions.*
- 2) *Excessive exercise of authority or jurisdiction by the Commission.*
- 3) *Unlawful procedures.*
- 4) *Arbitrary or capricious actions, characterized by an abuse of discretion or a clearly unwarranted exercise of digression.*
- 5) *Conflicts with or contradicts national best practices.*
- 6) *Does not outline the roles and responsibilities of the Commission.*

School leaders have unanimously expressed their dissatisfaction with the contract, finding it confusing, burdensome, and inconsistent with national best practices (§302D-3). The National Association of Charter School Authorizers (NACSA) is recognized as the leading authority on best practices for charter authorizers. NACSA supports State Education Policy that is “part of the solution to address our public education system’s greatest problem: too many children lack access to a transformative school. When done well, authorizing is a catalyst for charter school quality and growth. Yet the quality of charter laws and authorizing institutions varies across the country, which can lead to uneven charter quality and authorizing that creates barriers to access, innovation, and growth. Getting authorizing policy right is critical because good authorizing has the power to transform the lives of not just a few children, but millions.”

Working closely with our member schools, we have consistently communicated concerns about how schools’ contracts are negotiated to the Commission and the Attorney General's Office since 2012. The Commission has consistently insisted that a bilateral contract simply means that the

contract is between two parties. Our position is that the legal definition of a bilateral contract includes mutual promises. Bilateral contracts differ from the unilateral contracts schools have been forced to sign or their funding will be cut. Our charter schools must make promises defined by the Commission with no negotiation. Legally, bilateral contracts are supposed to be a “meeting of the minds” where both parties agree to the same terms and conditions. Regrettably, despite our persistent efforts, this fundamental issue has not been adequately addressed or resolved. Your support urging the Commission to develop administrative rules could begin the process of bringing monumental change to a rogue state agency with overreaching authority.

In a memo dated May 12, 2021, the then Charter School Deputy Attorney General Ushiroda formally presented several contract issues to Commission Deputy AG Kuwabe. However, no substantive changes were made to the contract to address the concerns raised by the schools or AG Ushiroda. Here are some highlights of our specific concerns regarding the following provisions of Contract 4.0:

Article III: Definitions - *Excessive exercise of authority or jurisdiction by the Commission. Conflicts with or contradicts national best practices.*

- “Governing Board”- *The definition is inappropriately expanded beyond HRS §302D-1, misquotes HRS to recodify the statute.*
- “Known or “Knowledge” - *not realistically possible, places unacceptable liability on the governing boards.*
- “Applicable Law” -*The commission shall be the ultimate authority regarding what laws apply to the charter schools it has authorized and the extent to which they apply.*
- “Educational Service Provider” - *This definition is inappropriate as national language defines an “educational service provider/management provider” as a third-party contractor who provides comprehensive services that are all or substantial portions necessary to manage and operate the School.*

Article IV: Section 4.2 State Code of Ethics and Code of Conduct – *Excessive exercise of authority or jurisdiction by the Commission; the commission has not developed a Code of Conduct in accordance with BOE Policy 201-1.*

Article IV: Sections 4.3(a) and (b) Governing Board Membership - *Excessive exercise of authority or jurisdiction by the Commission; it is up to the governing board to determine its process for selecting board members. There are no “individual standards” requirements in HRS §302D-12(b).*

Article V: Section 5.1 Performance Frameworks - *Excessive exercise of authority or jurisdiction by the Commission. Conflicts with or contradicts national best practices; arbitrary, gives Commission authority to unilaterally amend a charter school’s performance framework without the school’s agreement and without providing a reason/rationale and removes the right to due process during revocation.*

Article V: Section 5.3 Data and Reports – *Arbitrary or capricious actions, characterized by an abuse of discretion or a clearly unwarranted exercise of digression; requires charters complete HODOE reports with **any** commission determined deadline or face a material violation.*

Article 6.5 Virtual and Blended Programs - *Excessive exercise of authority or jurisdiction by the Commission; usurps the school boards authority under 302D-1 Definition. "Charter School". Recodifies the statute with the inappropriate definition change in Article III: Definitions – "Governing Board".*

Article VI: Section 6.6 Students with Disabilities and Section 6.7 Special Education Guidelines - *Violations of statutory or regulatory provisions; these provisions are especially concerning and creates a potential risk to the State of Hawaii and school governing boards. The Commission, Charter Schools and the DOE are required to follow the Hawaii State charter schools' law defining the responsibilities of the department relating to special education services at charter schools (§302D-30). The statute begins with, "(a) The department shall collaborate with each authorizer to develop a system of technical assistance related to compliance with federal and state laws and access to federal and state funds."*

*DOE Guidelines* clarify the following "When students with disabilities (SWD) are enrolled in a PCS, or any other public school, the Hawaii State Department of Education (HIDOE), as authorized by the Board of Education (BOE), is required to ensure the implementation of the Individuals with Disabilities Education Act of 2004 (IDEA). Public Law Number 108-446. See 34 Code of Federal Regulations (CFR) §300.149; § 302D-30, Hawaii Revised Statutes (HRS)."

*Does not outline the roles and responsibilities of the Commission; no evidence of the Commission collaborating in or participating in the development of "a system of technical assistance related to compliance with federal and state laws and access to federal and state funds."*

Article VI: Section 6.8 Section 504 - *Excessive exercise of authority or jurisdiction by the Commission; There is no provision that would require charters to adopt DOE curriculum or DOE plan to accommodate a 504 student.*

Article VII: Section 7.2 Organizational Performance Evaluation - *Excessive exercise of authority or jurisdiction by the Commission; "to enforce "the requirements of other entities".*

Article VIII: Section 8.1 Finance Responsibilities – *Excessive exercise of authority or jurisdiction by the Commission; broadens compliance requirements beyond HRS §302D.*

Article VIII: Section 8.20 Transfer of Funds to Affiliated Non-Profit or Educational Services Provider - *Excessive exercise of authority or jurisdiction by the Commission. Arbitrary or capricious actions, characterized by an abuse of discretion or a clearly unwarranted exercise of digression; broadens compliance requirements beyond HRS §302D.*

Article VIII: Section 8.24 Per-pupil Funding: Funding Subject to Appropriation - *Excessive exercise of authority or jurisdiction by the Commission. Unlawful procedures; "this charter contract shall terminate on the last day of the fiscal year for which sufficient funds are available".*

Article IX: Section 9.8 Right to Retain - *Excessive exercise of authority or jurisdiction by the Commission; there is no commission policy and the laws referenced are HIDOE not applicable to charters.*

Article XI: Educational Service Provider – *Excessive exercise of authority or jurisdiction by the Commission. Conflicts with or contradicts national best practices; the Charter Commission is overstepping the bounds of its authority by inserting itself into the contracting process between a charter school and an education service provider. The Charter Commission does not have any authority to dictate what terms must be in a contract between a charter school and a third-party. This article is particularly egregious when one considers the fact that the Charter Commission is not a party to the contract it seeks to have authority over – indeed, it goes so far as to insist that it is indemnified by a third-party contractor (which is going to cause problems when charter schools negotiate contracts with third-parties).*

ARTICLE XIV: Section 14.2 Occupancy Rights - *Excessive exercise of authority or jurisdiction by the Commission; redundant and unnecessary*

ARTICLE XIV: Section 14.5 Non-Emergency Relocation or Expansion of Facilities - *Excessive exercise of authority or jurisdiction by the Commission. Conflicts with or contradicts national best practices; the Charter Commission is aware that one of the major issues facing charter schools is finding suitable premises to lease for school operations. This section, as written, is unnecessarily onerous and heavy-handed, and it will make an already challenging process even more challenging and difficult.*

Article XV: Section 15.3 Collective Bargaining - *Excessive exercise of authority or jurisdiction by the Commission; shall comply with the master contract – there are provisions of the HSTA contract that conflict with HRS §302D additionally this provision violates employee rights as established in the Janus v. AFSCME case). The State’s collective bargaining statute (HRS, Chapter 89) applies to charter schools. Most charter school positions are assigned to specific bargaining units as provided for in HRS §89-6(a), while some positions are specifically excluded from any bargaining unit as provided for in HRS §89-6(f). The school may enter into supplemental collective bargaining agreements with applicable public unions, and if that occurs, the School shall provide a copies thereof to the Commission and the HIDOE. Any questions about bargaining unit status, the applicability or application of any particular collective bargaining agreement, or any other matter regarding collective bargaining and/or employment issues should be referred to the Employment Law Division of the AG’s office.*

Article XVII: Section 17.3 Access to Records - *Violations of statutory or regulatory provisions; this provision is inconsistent with FERPA protections, and the response timeline is unrealistic and procedure improper.*

Article XVII: Section 17.4 Right to Review - *Excessive exercise of authority or jurisdiction by the Commission; “immediate access” the response timeline is unrealistic and improper.*

Article XVII: Section 17.6 Site Visits - *Excessive exercise of authority or jurisdiction by the Commission; this will violate union contracts regarding observations; requires the school board to commit to situations it does not control; the response timeline is unrealistic and procedure improper.*



ARTICLE XVIII: Section 18.5 Termination by the Commission - *Excessive exercise of authority or jurisdiction by the Commission; needs to identify the “associated administrative rules”, “sufficient progress” should be addressed.*

ARTICLE XVIII: Section 18.6 Other Remedies - *Excessive exercise of authority or jurisdiction by the Commission; overly broad, vague and ambiguous, HRS §302D-17 addresses “corrective action plans.”*

ARTICLE XIX: Section 19.1 Entire Contract - *delete as “Amendments” are covered in Section 19.2.e*

EXHIBIT B: Financial Performance Framework - Enrollment Variance - *Conflicts with or contradicts national best practices; unrealistic to expect a 5% variance in enrollment. Total Margin - accrual financing requirement does not work appropriately for charter schools with other grant funding sources.*

OVERALL CONTRACT:

- *Renewal process is not in accordance with HRS and Administrative Rules.*
- *The contract does not outline the roles and responsibilities of the Commission.*
- *Ignores specific provisions of language, culture, traditional practice and the appropriate language of instruction, specifically for Hawaiian language and heritage see Hawaii Constitution Article X Section 4, Article XII Section 7, Article XV, Section 4 and HRS 346-152, HRS 304A, HRS 302H, HRS 302L-1.6, HRS 346-181*
- *“Promptly” is defined as immediate access, adherence to this timeframe will be considered prompt.*
- *“Material” is any and all changes*

HRS Chapter §302D outlines a clear process for charter renewals. Importantly, the law does not support the current practice of renewal being dependent on accepting new terms or a new contract (§302D-18(g) and Hawaii Administrative Rules §8-505-10, 12, 17). Both Chapter 302D and the Commission's existing administrative rules consistently view the charter renewal process as a decision to renew the existing charter contract, rather than determining new contract terms (§302D-18; §302D-1 defines "authorizer" as an entity with the authority to authorize, renew, deny renewal, or revoke charter contracts; §8-505-12). The Commission's rules and statute do not permit the Commission or any other authorizer to withhold charter renewals based on a school's refusal to agree to new terms.

The Commission's practice of conditioning per-pupil funding allocations on accepting a new charter contract prevents schools from effectively challenging the new contract terms. In our opinion, if a decision has already been made to renew a school's charter, the Charter Commission should, at the very least, renew the existing contract and provide the initial 60 percent per-pupil allocation by July 20 (§302D-28(f)). Currently, charter schools are forced to accept the new contract before receiving funding for the following year. This "take-it-or-leave-it" approach makes it impossible for schools to appeal or challenge the imposed contract terms. They are forced to accept an objectionable contract or risk closing their doors to students due to lack of funds while challenging the Commission's decision. The adhesiory nature of the Commission's offered Contract 4.0 offends well-settled principles of contract law in addition to violating the intent and spirit of Hawaii's Charter School system.



Finally, §302D-5 (a)(4) mandates one of the “duties of the Commission is to negotiate and execute sound charter contract with each...existing charter school.” Our governing boards have not been given the opportunity to negotiate any provision of the contract terms since 2012. Our schools would like to exercise this right to ensure successful implementation and a clear understanding of the contract. The negotiation of terms is a fundamental aspect of a bilateral contract. Since a bilateral contract hinges on mutual promises, both parties have the right to discuss, propose, and hopefully agree on the specific details of the agreement before it becomes binding. Negotiation allows both parties to ensure the contract terms are fair and reflect their interests. Through discussion, both sides can clarify expectations and avoid misunderstandings later. Negotiation helps identify potential issues and allows for addressing them before signing the contract.

The concept of negotiation is supported by several legal principles that ensure a fair and enforceable contract. Generally, within the boundaries of the law, people have the right to enter into, or avoid, contracts freely. This implies the right to negotiate the terms before agreeing. The law expects parties entering a contract to do so in good faith. This includes fair dealing and open communication, which necessitates some level of negotiation. A valid contract requires a "meeting of the minds," meaning both parties agree to the same terms. Negotiation is crucial to establish this mutual understanding. Administrative rules can be a powerful tool to help restructure the Commission by defining roles and responsibilities; standardizing procedures; and establishing performance metrics. We realize that there will be resistance to change by most commissioners. We have faith in the new executive director, Dr. Ed Noh, and believe that he can be instrumental in promoting a culture of compliance and ethical behavior. Again, HPCSN stands firm in our support for the passage of HCR 166. We truly appreciate this opportunity to testify and urge your committee to pass this significant concurrent resolution.

Mahalo ā nui

**HCR-166-HD-1**

Submitted on: 4/11/2024 8:24:18 PM

Testimony for EDU on 4/15/2024 4:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
LYDIA TRINIDAD	Testifying for Kualapuu Public Charter School, (Conversion School, Molokai)	Support	Written Testimony Only

Comments:

On behalf of Kualapuu Public Charter School, I support the HCR 166. This resolution will allow schools to represent their communities, constiuents, and families in the education of their children.

Lydia Trinidad

Principal, Kualapuu Public Charter School

Molokai

**HCR-166-HD-1**

Submitted on: 4/11/2024 2:45:09 PM

Testimony for EDU on 4/15/2024 4:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Laura Rehmert	Individual	Support	Written Testimony Only

Comments:

My name is Laura Rehmert and I am a parent to four children that have either attended, graduated, or are currently attending a Hawai'i State Public Charter School. I **STRONGLY SUPPORT** both HCR166 and HR145.

**HCR-166-HD-1**

Submitted on: 4/14/2024 3:23:24 PM

Testimony for EDU on 4/15/2024 4:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Nicole C. Ryan	Individual	Support	Written Testimony Only

Comments:

Our charter schools and children deserve a fair negotiation process to honor the intentional, unique missions of each of our schools. Administrative rules are critical to ensuring this process.