

# **FEASIBILITY OF A NONCONTIGUOUS CHARTER SCHOOL DISTRICT**

**Pacific Resources for Education and Learning**

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## **FOREWORD**

This report has been prepared in response to Act 134, Session Laws of Hawaii 2004, which requests the Legislative Reference Bureau to conduct a study regarding the feasibility of establishing a noncontiguous host culture charter school district and a noncontiguous charter school district in the State in order to solidify existing host culture focused charter schools, increase charter school autonomy, and provide opportunities for additional federal funding.

The Bureau would like to thank those persons and organizations that provided information or assistance with this study.

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Acting Director

January 2005

# FACT SHEET

## Highlights

1. There is nothing in the federal definition of local educational agency (LEA) (typically a school district) to prohibit the establishment of a geographically noncontiguous LEA, whether for charter schools or otherwise. Other states have authorized the creation of charter school districts.
2. A decision would need to be made about whether membership in a separate charter school LEA is mandatory or voluntary. It cannot be assumed that all charter schools will want to participate in a separate LEA.
3. Even with the creation of a charter school LEA, the DOE will retain its role as the state educational agency (SEA) and bear the ultimate responsibility for important educational objectives, such as ensuring the provision of a free appropriate public education for children with disabilities.
4. Creation of a charter school LEA would not, in and of itself, resolve any of the current questions and debates concerning financial allocations to charter schools. Creation of a charter school LEA only implies changes to the Hawai'i charter school law that are needed to authorize this new structure.
5. Charter schools currently have the option of receiving a wide variety of services from the DOE, from food services to special education services. Creation of a new charter school LEA would not necessarily imply the cessation of such services.
6. Designation of the charter schools as their own LEA means that they will assume entirely new duties and responsibilities under federal formula grants such as NCLB and IDEA. For instance, under IDEA, Part B, the charter school LEA would be responsible for providing all assistance and services dictated by the IEPs of children with disabilities (although DOE could be contracted to provide the services). In the event of expensive services that were unanticipated and not budgeted for, such as residential placement, the charter LEA could be forced to cut back on other cost items to find the money.
7. A charter school or host culture charter school LEA will likely withstand constitutional equal protection scrutiny as long as the admissions policy does not facially discriminate based upon a protected class (such as race or religion) or further discriminatory motives.

8. A charter school LEA would achieve more autonomy, particularly in establishing eligibility for and administering federal education grants and sub-grants, but could still remain tied to the DOE (with the concurrence of both the LEA and the SEA) for the provision of selected services.
9. A charter school LEA will not necessarily mean that additional federal funds are made available to the schools unless an effective development program is put in place.
10. Creation of a charter school LEA is not a panacea for the charter schools, but is a potentially meaningful educational reform strategy that should not be dismissed. Yet, there are too many issues that need to be resolved to confidently recommend the creation of a charter school district or LEA at this time.
11. If the Legislature seeks to create a charter school LEA, a definitive legal opinion should be obtained from the Attorney General as to whether the creation of the new LEA would violate the requirement of Article X of the State Constitution for "a statewide system of public schools...."
12. Separate from the establishment of a charter school LEA, the Legislature can assist the charter schools efforts to seek outside funding by providing funds for the Charter School Administrative Office to hire a development officer to identify and pursue federal and private funding opportunities for the charter schools.

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# Chapter 1

## INTRODUCTION

Act 134, Session Laws of Hawaii 2004, requests the Legislative Reference Bureau (LRB) to conduct a feasibility study regarding the establishment of a noncontiguous host culture charter school district and a noncontiguous charter school district in the State of Hawai'i (see Appendix A). Specifically, the bill requires the study to analyze: (1) the financial and administrative implications of creating these additional school districts and of establishing Local Educational Agency (LEA) status for them for the purpose of obtaining additional federal funding; (2) how the new districts would interact administratively with the Hawai'i State Board of Education (BOE) and the existing charter school administrative structure in the Hawai'i State Department of Education (DOE); and (3) whether the proposed districts would violate the 14th amendment to the U.S. Constitution. The questions to be considered in this report include:

- What is the federal definition of an LEA?
- What is the legal status of an LEA and how would one be authorized in Hawai'i?
- What is the definition of a "host culture" charter school?
- How would the proposed new charter school district or LEA be organized and administered?
- What are the administrative implications of the additional district or LEA in relation to the DOE and BOE?
- What would be the relationship of the new district or LEA with other state agencies?
- What are the financial implications of creating the new district or LEA?
- Would the creation of a host culture charter school district violate the 14th amendment to the U.S. Constitution or Article I, Section V of the Hawai'i State Constitution?

## Background

As previously documented in legislative testimony and LRB reports, there has been continuing dissatisfaction with perceived inequities in funding for and roadblocks

to effective administration of charter schools in the State of Hawai'i. As stated in a 2002 LRB report on the status of the charter school movement in Hawai'i, the DOE "has been characterized as being stingy, obstructionist, and unsupportive of the charter school movement."<sup>1</sup> Members of the Native Hawaiian Charter Schools Association (NHCSA), also known as Na Lei Na'auao, have continued to advocate for more autonomy from the DOE. They have been frustrated with the agency's bureaucratic procedures and dissatisfied with its method of calculating per pupil allocations to charter schools. The NHCSA believes that a separate host culture charter school district or LEA would provide Native Hawaiian charter schools with more access to federal funding sources, assure them of an equitable allocation of state funds, and provide them with more autonomy regarding their overall operations.

The initial impetus for Act 134, which was introduced as S.B. No. 3148 (Regular Session of 2004), was an effort by the NHCSA to promote the creation of a new school district or LEA consisting of charter schools that emphasize the host culture (i.e., Native Hawaiian) language, culture, and history in order that these schools might attain a more productive level of autonomy and self-sufficiency. However, other charter schools have also expressed a desire to form their own district or LEA to achieve the same goals as those articulated by the NHCSA. Accordingly, S.B. No. 3148 (S.D. 2, H.D. 3, C.D. 1) was amended in Conference to request that the LRB conduct a study of the feasibility of establishing separate districts or LEAs for both host culture and non-host culture charter schools.

## **Strategy and Methodology**

In September 2004, LRB contracted with Pacific Resources for Education and Learning (PREL) to research and prepare the feasibility study required by Act 134. In turn, PREL subcontracted with the Honolulu law firm Goodsill Anderson Quinn & Stifel to prepare Chapter 8 of the report, which considers whether the creation of a host culture charter school district or LEA would violate the 14th amendment to the U.S. Constitution.

Based on the intent of Act 134, the questions listed above were identified as the leading issues in preparing this report. Among other sources of information used in preparing the report, PREL researchers reviewed federal and Hawai'i state laws, rules, and regulations pertaining to charter schools, BOE policies, other states' laws on charter schools, and recent analyses of the status of charter schools in Hawai'i. PREL researchers also conducted interviews with key stakeholders in Hawai'i charter schools and the DOE to ensure that their viewpoints were represented in the final report.

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<sup>1</sup> Hawaii, Legislative Reference Bureau, *On the Level? Policy, Law and the Charter School Movement* (Honolulu, Hawaii: Legislative Reference Bureau, February 2002), p. 3.

## Definitions

This report contains a number of technical educational terms. Six particularly important terms used throughout the report are defined below.

**Local Educational Agency.** The U.S. Code defines a Local Educational Agency in the following manner:

(A) In general

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(B) Administrative Control and Direction

The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.<sup>2</sup>

**State Educational Agency.** The U.S. Code defines a State Educational Agency (SEA) as:

[T]he State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.<sup>3</sup>

In Hawai'i the SEA is the Board of Education, while the DOE is the agency established to administer programs of education and public instruction throughout the State under the policy direction of the BOE.<sup>4</sup>

**Charter Schools.** In the State of Hawai'i, a charter school is "a public school that comes into existence through a contract with the State Board of Education (BOE). The charter—or contract—establishes the framework within which the school operates and provides financial and other public support for the school for up to four years."<sup>5</sup> A

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<sup>2</sup> 20 U.S.C. 7801(26)(A-B).

<sup>3</sup> 20 U.S.C. 1401(28)

<sup>4</sup> *Hawaii Rev. Stat.*, §26-12.

<sup>5</sup> Hawaii, Legislative Reference Bureau, *On the Level? Policy, Law and the Charter School Movement*, p. 6.

more generic and expansive definition of charter schools is provided by a leading charter schools website.

Charter schools are nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools. The "charter" establishing each such school is a performance contract detailing the school's mission, program, goals, students served, methods of assessment, and ways to measure success. The length of time for which charters are granted varies, but most are granted for 3-5 years. At the end of the term, the entity granting the charter may renew the school's contract. Charter schools are accountable to their sponsor—usually a state or local school board—to produce positive academic results and adhere to the charter contract. The basic concept of charter schools is that they exercise increased autonomy in return for this accountability. They are accountable for both academic results and fiscal practices to several groups: the sponsor that grants them, the parents who choose them, and the public that funds them.<sup>6</sup>

Statutorily, there are 2 types of charter schools in Hawai'i. The majority of the 27 charter schools in Hawai'i (23) are "new century charter schools," which are schools that are created or started as charter schools. The others are "conversion charter schools."

**Conversion Charter School.** A conversion charter school is a DOE public school that existed prior to Hawai'i's charter school legislation, has applied to the Board of Education for charter school status, and has been approved to convert to charter status in accordance with section 302A-1191, *Hawaii Revised Statutes*. There are currently four conversion charter schools in the State of Hawai'i. Section 302A-1191, *Hawaii Revised Statutes*, allows for up to 25 conversion charter schools. None of the four conversion charter schools is a host culture charter school.

Charter schools in Hawai'i are also distinguished as "host culture charter schools" and "non-host culture charter schools."

**Host Culture Charter School.** As used in this report, a host culture charter school is a public charter school authorized under section 302A-1182 or section 302A-1191, *Hawaii Revised Statutes*, that meets the following criteria:

- is initiated by a Hawaiian community;
- is supported by the Hawaiian community in which the school is located;
- offers Hawaiian culture-based curriculum, instruction, and assessment;
- is committed to perpetuating Hawaiian culture, language, values, and tradition;

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<sup>6</sup> Available from [www.uscharterschools.org/lpt/uscs\\_docs/311](http://www.uscharterschools.org/lpt/uscs_docs/311); Internet; accessed 8 October, 2004.

## INTRODUCTION

- supports charter school ideals, including education reform and culturally-compatible educational experiences serving Hawaiians;
- is willing to share, actively participate, and collaborate with other Hawaiian-focused charter schools in an effort to initiate systemic educational reform for Hawai'i's indigenous student population.<sup>7</sup>

There are currently 13 host culture charter schools in the State of Hawai'i, of which 12 are members of the Native Hawaiian Charter School Association (NHCSA), also known as Na Lei Na'auao. All of the host culture schools are new century charter schools as described under section 302A-1182, *Hawaii Revised Statutes*.

**Non-Host Culture Charter School.** A non-host culture charter school is a public charter school that has been approved (chartered) by the Board of Education as specified in section 302A-1182 or section 302A-1191, *Hawaii Revised Statutes*, but does not have Hawaiian culture, language, and values as its central theme of instruction. Currently, these charter schools include ten new century charter schools and four conversion charter schools.

**Non-Contiguous District or LEA.** Traditionally, school districts or LEAs have defined geographical boundaries, and the schools that make up the district or LEA are located within those boundaries. A non-contiguous charter school district or LEA would be one in which the schools making up the district or LEA are drawn from geographically dispersed areas.

### School Districts and LEAs

As noted earlier, Act 134 requests an analysis of the feasibility of establishing a charter school district, including a school district with LEA status. At the outset of this report, it is important to understand the meaning of the terms "school district" and "LEA." This requires a brief examination of the structure of public education in the U.S.

Throughout most of the U.S. mainland, school districts are the most fundamental unit in the organization of public education. School districts may range in size from very small entities serving a single high school, middle school, and elementary school to entities that incorporate hundreds of schools such as the Los Angeles Unified School District. What the thousands of school districts in the U.S. have in common is that they are directly responsible for operating and managing the schools under their authority. Most school districts derive a large percentage of their operating funds from local property taxes, although it is not uncommon for a district to receive more revenue from state allocations than from property taxes. Because school districts are established by the laws of the state in which they exist, their definition may vary slightly from one

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<sup>7</sup> Email from Dr. Ku Kuhakalau, Director/Principal, Kanu o ka 'Aina New Century Public Charter School, 25 September, 2004.

jurisdiction to the next. However, Oregon's definition of a school district as a "taxing district providing public elementary or secondary education, or any combination thereof, within this state"<sup>8</sup> is typical of many other states' definitions.

Much like Hawai'i's single, statewide public education system, local school districts on the U.S. mainland are usually governed by an elected board of directors or board of trustees consisting of residents of the geographic area that the district serves. While the board is responsible for establishing broad policies and regulations for the operation of the district, the superintendent, who is hired by and accountable to the board, manages the day-to-day operations of the district. In addition to hiring the district superintendent, boards of local school districts usually:

- identify learning goals for the district's students;
- adopt academic and performance standards that must meet or exceed the content and performance standards established for the state as a whole;
- create measures, including statewide tests, to determine student progress in mastering the district content and performance standards;
- approve the annual district budget;
- ensure that district accounts are audited annually and publish an end-of-year financial report to the community;
- issue bonds, levy taxes, and ensure that taxes are collected;
- set the district's tax rate;
- approve purchases of property;
- approve contracts with employee groups;
- approve plans for renovating and building school facilities.<sup>9</sup>

States with multiple school districts usually have another administrative entity called the educational service agency (ESA) or educational service district (ESD). The purpose of the ESA is to provide services to districts within its area that any individual district would find difficult to contract for or afford. For instance, the ESA could provide

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<sup>8</sup> *Oregon Rev. Stat.*, §330.003(2).

<sup>9</sup> Education Commission of the States, *The Roles and Responsibilities of School Boards and Superintendents: A State Policy Framework* (Denver, Colorado: Education Commission of the States, September 2002); available from [www.ecs.org/clearinghouse/41/26/4126/pdf](http://www.ecs.org/clearinghouse/41/26/4126/pdf); Internet; accessed 19 October, 2004.

## INTRODUCTION

technical assistance to districts wishing to revise their curricula in light of new standards or offer professional development workshops for district teachers. ESAs typically operate at a regional or county level.

Unlike the term "school district," which is defined in states' statutes along with often detailed provisions for establishing district boundaries and identifying the powers and prerogatives of district boards of directors, the term "local educational agency" is used almost exclusively in the context of federal education legislation as a means of distinguishing between the state and local levels of public schools governance. In fact, because most states' school districts meet the federal definition of LEA, the two terms are often used interchangeably depending on the context. It should be noted, however, that although an LEA is quite often a school district, the federal definition does permit other kinds of entities to qualify as LEAs. For instance, if a city or county government runs its own elementary and secondary schools, it would clearly qualify as an LEA under the federal definition provided above. Similarly, an educational service agency could qualify as an LEA under the cited definition.

Of course, the governance of public education in Hawai'i is quite different than on the U.S. mainland. Specifically, Hawai'i is the only state in which there are no local school districts and in which the state educational agency (SEA)—i.e., the BOE—also serves as the state's one and only school district and LEA. This fact is important when considering the feasibility and implications of establishing a charter school district or LEA in Hawai'i. Put simply, if Hawai'i wishes to establish a charter school governance structure that meets the federal definition of LEA, it will need to establish a charter school district with powers and prerogatives similar to local school districts on the U.S. mainland. Conversely, if Hawai'i establishes a charter school district with powers and prerogatives similar to local school districts on the U.S. mainland, it will automatically have established a charter school LEA.

The interchangeability of the terms school district and LEA is important to bear in mind because in Hawai'i, with its different governance system for public education, the term "district" is sometimes used with a different meaning than on the U.S. mainland. For instance, the Hawai'i public education system has recently transitioned from a structure in which there were 7 district offices, each headed by a District Superintendent, to one consisting of 43 school complexes (each complex consisting of one high school and its feeder schools) headed by 14 Complex Area Superintendents whose staffs each provide services to multiple complexes. However, the former Hawai'i district offices were not school districts in the U.S. mainland sense of the term, since they did not *manage* or *operate* the schools within their respective geographic areas. Instead, they served as administrative units of the single, statewide district or LEA to facilitate the delivery of services to schools within their geographic service areas. To avoid confusion about the meaning of the phrase "charter school district," this report uses the phrase to denote a local school governing authority with powers and responsibilities like those exercised by school districts on the U.S. mainland. Arrangements that are designed simply to facilitate the work of Hawai'i's single,

statewide school district (e.g., the former district offices or the current complex areas) will be referred to as administrative units.

Because of the unique structure of the Hawai'i public education system, the implications of establishing a charter school district in Hawai'i are significant. Put simply, the creation of a charter school district that meets the federal definition of LEA (i.e., one that controls and directs the schools within the district) would be unprecedented. It has been suggested, for instance, that Article X of the Hawai'i State Constitution establishes a single statewide LEA and that creation of a second LEA of any nature or description would require an amendment to the State Constitution. This issue is discussed further in Chapter 5 of the report.

### **Limitations**

This study is limited to a discussion of the feasibility of establishing a charter school district or LEA in Hawai'i and the organizational, administrative, financial, and constitutional implications of establishing such a district or LEA.

### **Disclaimer**

The authors recognize that there are many issues involved in the creation of a charter school district or LEA in Hawai'i. Many individuals and organizations have taken positions on how the state educational system needs to be structured or restructured, but those debates are beyond the scope of this study. There needs to be continuing discussion of the future of the entire educational system and how best to meet the educational needs of Hawai'i's youth.



## Chapter 2

### OVERVIEW AND HISTORY OF CHARTER SCHOOLS

#### History and Origins of Charter Schools in the U.S.

The charter school movement in the U.S. has grown rapidly in the past 10-15 years. As the historical descendant of a number of other educational reform ideas that arose during the 1970s and 1980s (e.g., school community-based management, magnet schools, and alternative schools), charter schools are often viewed as an effort to free teaching and learning from the lack of innovation and responsiveness in mainstream public education. A succinct description of charter schools is provided on the U.S. Charter Schools website:

Charter schools are nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools. The "charter" establishing each such school is a performance contract detailing the school's mission, program, goals, students served, methods of assessment, and ways to measure success. The length of time for which charters are granted varies, but most are granted for 3-5 years. At the end of the term, the entity granting the charter may renew the school's contract. Charter schools are accountable to their sponsor—usually a state or local school board—to produce positive academic results and adhere to the charter contract. The basic concept of charter schools is that they exercise increased autonomy in return for this accountability. They are accountable for both academic results and fiscal practices to several groups: the sponsor that grants them, the parents who choose them, and the public that funds them.<sup>1</sup>

In other words, a charter school is a publicly funded school that operates under an agreement (charter) with a local or state board of education to provide educational services to students in a particular geographic area. In exchange for its commitment to achieve the negotiated learning outcomes for its students, the school is exempted from many of the bureaucratic constraints normally found in state or local school districts. It is up to each state to define how its charter schools are approved and operate. However, most charter schools seek to:

- Articulate an educational philosophy and vision for student performance;
- Achieve learner outcomes consistent with that vision;
- Encourage innovative teaching practices in support of the vision;
- Emphasize accountability for results in student learning;

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<sup>1</sup> Retrieved on 20 November 2004 from: [www.uscharterschools.org/pub/uscs\\_docs/o/index.htm](http://www.uscharterschools.org/pub/uscs_docs/o/index.htm).

- Customize teaching practices to the needs of the students and community;
- Create choice for parents and students within the public education system;
- Create new and innovative professional development opportunities for teachers; and
- Encourage community and parent involvement in public education.

In 1991, Minnesota passed the first charter school law, with California following suit in 1992. By 1995, 19 states had signed laws allowing for the creation of charter schools. By 2003 the number had increased to 40 states, Puerto Rico, and the District of Columbia. Charter schools are one of the fastest growing innovations in education policy, enjoying broad bipartisan support from governors, state legislators, and past and present U.S. Secretaries of Education. In his 1997 State of the Union Address, former President Clinton called for the creation of 3,000 charter schools by the year 2002. In 2002, President Bush called for \$200 million to support charter schools. His proposed budget called for another \$100 million for a new Credit Enhancement for Charter Schools Facilities Program. Since 1994, the U.S. Department of Education has provided grants to support states' charter school efforts, starting with \$6 million in fiscal year 1995.<sup>2</sup>

### **Origins of the Charter School Movement in Hawai'i**

Hawai'i's centralized public education system, consisting of a single LEA in the form of the SEA, has often been criticized as a system that impedes and inhibits local control of schools and politicizes the educational process. In the early 1990s, under State Superintendent of Education Charles Toguchi, a concerted effort was made by the DOE to decentralize authority to the school level through a process called School Community-Based Management (SCBM) whereby local schools would have more control over their curriculum, personnel, and budgets. While the effort was noble, implementation of the program did not live up to expectations.

The SCBM vision was to promote broad local participation and to be the vehicle for innovation in the State of Hawai'i's public schools. Expectations were perhaps excessively high, both in the way of reform of education and higher student achievement. Previous assessments, evaluations, and audits regarding SCBM have reported mixed results. None of the reports was able to document any relationship between student achievement and SCBM, and there was widespread dissatisfaction that SCBM was not living up to its expectations.<sup>3</sup>

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<sup>2</sup> Retrieved on 8 October 2004 from: [www.uscharterschools.org/pub/uscs\\_docs/o/history.htm](http://www.uscharterschools.org/pub/uscs_docs/o/history.htm).

<sup>3</sup> Pacific Resources for Education and Learning, *Policy Analysis of Hawai'i State Department of Education School Community-Based Management* (Honolulu, HI: Author, March 2004), p. 4.

With the implementation of the charter school movement in states such as Minnesota, California, Colorado, and Delaware, many Hawai'i educators, parents, and community members began to seek legislative authorization for charter schools in Hawai'i.

Some of the first schools to embrace SCBM (e.g., Waialae Elementary and Lanikai Elementary) were frustrated with the need to seek waivers from administrative and BOE policies, a task that consumed time and effort that many felt should be devoted to improvements at the school level. As a result of this frustration, these two schools were the first to become "student-centered" schools during the 1995-96 school year.<sup>4</sup> Subsequently, these two student-centered schools were designated as charter schools when Hawai'i's charter school law was enacted in 1999.<sup>5</sup>

## Existing Charter Schools in Hawai'i

There are currently 27 public charter schools in operation throughout the State. Each of these has been authorized by an agreement or "charter" with the State Board of Education (BOE). Section 302A-1182, *Hawaii Revised Statutes*, permits a total of up to 23 "new century" charter schools, and section 302A-1191, *Hawaii Revised Statutes*, provides for the creation of up to 25 "conversion" charter schools.<sup>6</sup> To date, only four public schools have "converted" to charter status, the original 2 student-centered schools (Waialae Elementary and Lanikai Elementary), followed by Waimea Middle School, and most recently, Kualapu'u on Moloka'i. The remaining 23 are new century charter schools. Under the cap established by section 302A-1182, *Hawaii Revised Statutes*, no more new century charter schools are allowed. There is room for 21 more existing schools to "convert" to charter status, but no recent applications have come before the BOE or DOE. Of the 27 charter schools in Hawai'i, 12 are on the island of Hawai'i, 10 are on O'ahu, 3 on Kaua'i, and 1 each on Maui and Moloka'i. Moreover, 13 of the charter schools are host culture charter schools and 14 are non-host culture charter schools. All of the conversion charter schools are in the non-host culture category. As stated previously, 12 of the 13 host culture charter schools are members of Na Lei Na'auao.

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<sup>4</sup> Act 272, Session Laws of Hawaii 1994, which set up "student centered schools," was codified as §§296-101 and 102, *Hawaii Rev. Stat.* These provisions were later repealed by Act 62, Session Laws of Hawaii 1999, which established new century charter schools.

<sup>5</sup> See Act 62, Session Laws of Hawaii 1999.

<sup>6</sup> Act 62, Session Laws of Hawaii 1999 (codified as Part IV, subpart D, of chapter 302A of the *Hawaii Rev. Stat.*), setup the framework for new century charter schools. This Act originally allowed 25 new century charter schools. In 2002, this number was reduced to 23 by Act 262, Session Laws of Hawaii 2002, while Act 2, Session Laws of Hawaii 2002, authorized the creation of up to 25 conversion charter schools.

## Host Culture Charter Schools

As the above figures suggest, charter schools have been particularly popular on the neighbor islands and within the host culture (i.e., Native Hawaiian) community. Researchers N.K. Buchanan and R.A. Fox provide an explanation of this phenomenon.

Legislation enabling twenty-five New Century Public Charter Schools including start-ups, school-within-school programs and whole school conversions was passed in April of 1999. By September of 1999, over thirty groups had submitted letters of intent to become charter schools. The new law clearly attracted two distinct populations whose needs were not met by the current system. The first group consisted of Native Hawaiian communities (50% of the letters of intent from throughout the state). The second overlapping group consisted of programs and groups from the neighbor islands (60%). In Hawai'i the central administration of the DOE and most other government agencies are located on the island of O'ahu, geographically small but with the largest population. The other inhabited islands are often referred to as the neighbor islands. The primary reasons for starting charter schools in Hawai'i appear to be autonomy from a distant center of control and the desire to serve a neglected special population of Native Hawaiian and part Hawaiian children.<sup>7</sup>

As stated earlier, 12 of the host culture charter schools in Hawai'i are members of the Native Hawaiian Charter School Association (NHCSA), also known as Na Lei Na'auao. In 2002, members of Na Lei Na'auao, along with other Hawaiian educators, developed the first definition of a Hawaiian or host culture charter school. According to this definition, a host culture charter school is a public charter school authorized under section 302A-1182 or section 302A-1191, *Hawaii Revised Statutes*, which meets the following criteria:

- is initiated by a Hawaiian community;
- is supported by the Hawaiian community in which the school is located;
- offers Hawaiian culture-based curriculum, instruction, and assessment;
- is committed to perpetuating Hawaiian culture, language, values, and tradition;
- supports charter school ideals, including education reform and culturally-compatible educational experiences serving Hawaiians;

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<sup>7</sup> N.K. Buchanan and R.A. Fox, *To Learn and to Belong: Case Studies of Emerging Ethnocentric Charter Schools in Hawai'i*. *Education Policy Analysis Archives*, 11(8). Retrieved on 15 October 2004 from: <http://epaa.asu.edu/epaa/v11n8/>.

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- is willing to share, actively participate, and collaborate with other Hawaiian-focused charter schools in an effort to initiate systemic educational reform for Hawai'i's indigenous student population.<sup>8</sup>

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<sup>8</sup> Email from Dr. Ku Kuhakalau, Director/Principal, Kanu o ka 'Aina New Century Public Charter School, 25 September 2004.

## Chapter 3

### FEDERAL AND STATE ROLES IN CHARTER SCHOOLS

#### The Role of the Federal Government in Relation to Charter Schools

The federal government has encouraged the charter school movement and has established an office within the U.S. Department of Education, called the Charter Schools Program, to advocate and support charter schools across the nation.

The Charter Schools Program (CSP) was authorized in October 1994, under Title X, Part C of the Elementary and Secondary Education Act of 1965 (ESEA), as amended, 20 U.S.C. 8061-8067. The program was amended in October 1998 by the Charter School Expansion Act of 1998 and in January 2001 by the No Child Left Behind Act of 2001. The program, which provides support for the planning, program design, and initial implementation of charter schools, is intended to enhance parent and student choices among public schools and give more students the opportunity to learn to challenging standards.<sup>1</sup>

The support and encouragement for charter schools provided by the CSP is well documented, and charter schools throughout the country have availed themselves of the services of the U.S. Department of Education.

The U.S. Department of Education (ED) establishes, administers, and coordinates federal assistance in education. The mission of ED ensures that all students have equal access to education and promotes excellence in the nation's schools. That said, it is important to remember that education in the United States remains the primary responsibility of state and local governments. For its part, the federal government fills gaps in state and local support for education when critical needs arise.

Charter schools are a prime example of the type of coordinated effort that is possible between the federal government and the states. Illustrative of this point, Minnesota passed the first charter school law in 1991 that allowed for the development and operation of publicly-funded charter schools. Three years later, the ED, through the Charter Schools Program (CSP), began a competitive grant program for alleviating the financial constraints in planning and starting a charter school. By helping charter school developers overcome start-up challenges, the federal government sought to increase the number of charter schools operating nationwide.

Since 1995, when CSP started administering start-up grants, the number of states that have passed charter laws has risen to 40, not including the District of

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<sup>1</sup> United States, Department of Education, *Non-Regulatory Guidance Title V, Part B Charter Schools Program* (Washington, D.C.: Author, July 2004). Retrieved on 8 October 2004 from: [www.uscharterschools.org/pdf/fr/cspguidance04.pdf](http://www.uscharterschools.org/pdf/fr/cspguidance04.pdf).

Columbia and Puerto Rico. Accordingly, federal policy makers have allocated more funds to the grant program. In fiscal year (FY) 1995, the CSP administered \$6 million in grants; in fiscal year (FY) 2002, the CSP administered \$200 million. This year also marked the start of the Credit Enhancement for Charter School Facilities Program, earmarked at \$25 million, to address the difficulties in acquiring facilities for new charter schools.<sup>2</sup>

## Legal Authority for Charter Schools in Hawai'i

As discussed previously, the origins of the charter school movement in Hawai'i can be traced to other educational reform initiatives of the 1990s that were designed to provide schools with increased autonomy and independence from bureaucratic constraints. These initiatives included school community-based management (SCBM) and student-centered schools authorized under Act 272, Session Laws of Hawaii 1994. Hawai'i's first comprehensive charter school statute was passed in 1999 as Act 62, Session Laws of Hawaii 1999. Since that time, the charter school law has been amended in almost every legislative session to refine and modify the charter school program in keeping with findings about the program's needs and effectiveness.

Section 302A-1182, *Hawai'i Revised Statutes*, authorizing the establishment of "New Century Charter Schools" provides in pertinent part:

**§302A-1182 New century charter schools; establishment.** (a) Up to a total of twenty-three schools may be established as new century charter schools. These new century charter schools may be established by:

- (1) The creation of a new school; or
- (2) The creation of a new school, comprising programs or sections of existing public school populations and using existing public school facilities, pursuant to subsection (b).

(b) Any community, group of teachers, group of teachers and administrators, entity recognized as a nonprofit organization under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or any program within an existing school may submit a letter of intent to the board to form a new century charter school, establish a local school board as its governing body, and develop a detailed implementation plan pursuant to subsection (c).

(c) The local school board, with the support and guidance of the executive director, shall formulate and develop a detailed implementation plan that meets the requirements of this subsection and section 302A-1184. . . .

...

Section 302A-1184, *Hawai'i Revised Statutes*, exempts new century charter schools from all applicable state laws, except those regarding:

- Collective bargaining under chapter 89;

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<sup>2</sup> Retrieved on 11 September 2004 from: [www.uscharterschools.org/pub/uscs\\_docs/fs/index.htm](http://www.uscharterschools.org/pub/uscs_docs/fs/index.htm).

- Discriminatory practices under section 378-2; and
- Health and safety requirements.<sup>3</sup>

Furthermore, legislation passed during the Regular Session of 2004 ensures the civil service status of employees with respect to conversion charter schools.<sup>4</sup>

The legal status of charter schools in Hawai'i was addressed in the previously cited 2002 LRB Report. Notwithstanding the differences between charter schools and regular public schools, the report indicates that charter schools are nevertheless public entities.

Legally, charter schools in Hawai'i are public entities that come into existence through a contract with the BOE. The state constitution requires the State to "provide for the establishment, support and control of a statewide system of public schools free from sectarian control ..." While it is debatable whether a charter school system contravenes the constitutional requirement of a single "system" under the constitution, charter schools may nevertheless be considered to be "public schools" that are funded and controlled by the State to provide education to Hawai'i's students.

Although they have a greater degree of autonomy than public schools in Hawaii, charter schools are created by state statute and are therefore public entities, are subject to state regulation (however minimal), receive state funding, and may be closed down by the State. Section 302A-101, *Hawaii Revised Statutes*, defines "new century charter schools" as "the implementation of alternative frameworks with regard to curriculum, facilities management, instructional approach, length of the school day, week, or year, and personnel management, formed under section 302A-1182 ...". Section 302A-1182 specifies the terms of the contract between the charter school and the BOE, while section 302A-1184 exempts charter schools from all applicable state laws except those regarding collective bargaining, discriminatory employment practices, and health and safety requirements.<sup>5</sup>

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<sup>3</sup> *Hawaii Rev. Stat.*, §302A-1184(1)-(3). Although section 302A-1184, *Hawaii Revised Statutes*, indicates that new century charter schools are subject to collective bargaining under chapter 89, the legislation also includes provisos that:

- The exclusive representatives defined in chapter 89 may enter into agreements that contain cost and noncost items to facilitate decentralized decision making;
- The exclusive representatives and the local school board of the new century charter school may enter into agreements that contain cost and noncost items;
- The agreements shall be funded from the current allocation or other sources of revenue received by the new century charter school;
- These agreements may differ from the master contracts. *Hawaii Rev. Stat.*, §302A-1184(1)(A)-(D).

<sup>4</sup> Act 63, Session Laws of Hawaii 2004.

<sup>5</sup> Hawai'i, Legislative Reference Bureau, *On the Level? Policy, Law and the Charter School Movement*, pp. 40, 41.



## **Charter School Administrative Office**

Section 302A-1187, *Hawai'i Revised Statutes*, establishes a Charter School Administrative Office (CSAO), attached to the DOE for administrative purposes, and the position of Executive Director of the CSAO.<sup>6</sup> The Executive Director is appointed by the BOE based upon the recommendation of "an organization of charter schools operating within the state or from a list of nominees submitted by the charter schools."<sup>7</sup>

Section 302A-1187(b), *Hawai'i Revised Statutes*, identifies 7 major duties for the Executive Director including:

- Preparation and execution of the budget for the charter schools, including submission of the budget request to the BOE and the governor;
- Allocation of annual appropriations to the charter schools and preparation of an annual financial audit of each charter school;
- Compliance with applicable state laws related to the administration of charter schools;
- Preparation and execution of contracts between the charter schools and the DOE for centralized services to be provided by DOE;
- Preparation and execution of contracts between the charter schools and other state agencies for financial or personnel services;
- Representation of charter schools in communications with the BOE, governor, and legislature; and
- Monitoring and supporting the development, growth, and progress of charter schools.

## **State Board of Education Policies**

The BOE has only one official policy regarding charter schools, and that policy relates to deficit spending. Policy No. 6102 requires new century charter schools to be "fiscally responsible" and the Department of Education to monitor schools to identify projected deficits. The policy also holds the local charter school board responsible for any over-expenditures. One critically important area that is not addressed by BOE

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<sup>6</sup> *Hawaii Rev. Stat.*, §302A-1187(a), as amended by Act 203, Session Laws of Hawaii 2003.

<sup>7</sup> *Id.*

policy relates to the independent evaluation requirements for charter schools specified in section 302A-1186(b), *Hawai'i Revised Statutes*. There is no evidence to substantiate that the BOE has conducted any independent evaluations for the charter schools to date. Only self-evaluations conducted annually by each charter school and submitted to the Charter School Administrative Office have been completed, as required by section 302A-1186(a), *Hawai'i Revised Statutes*.

## Chapter 4

### COMPARISON OF OTHER STATE LAWS

Act 134, Session Laws of Hawaii 2004, requests the LRB to examine the feasibility and implications of a major structural change to Hawai'i's charter schools—i.e., establishing the charter schools as an independent school district or LEA rather than as part of the existing statewide district or LEA. However, as will be discussed in Chapter 5, the proposed change does not necessarily imply modifications to other important provisions of the Hawai'i charter school law. For instance, Section 302A-1182(e)(1), *Hawaii Revised Statutes*, establishes the BOE as the sole chartering authority in Hawai'i. Creation of a charter school district or LEA could lead the State Legislature to reconsider this provision and establish the charter district's governing body as a second chartering authority. Yet, such an amendment is not a necessary or inevitable consequence of establishing a charter school district. Similarly, the mere creation of a charter school district or LEA would not necessarily imply changes in the way the charter schools' per pupil allocation is computed.

Put simply, the strengths and weaknesses of Hawai'i's existing charter schools law are likely to be inherited by a charter school district or LEA, unless the Legislature chooses to amend key provisions of those statutes. Accordingly, although this report is not an assessment of the status of Hawai'i's charter school movement, it is worthwhile to consider how Hawai'i's charter school law compares with that of other states.

One of the most prominent sources of comparative data on states' charter schools laws is the Center for Educational Reform (CER), based in Washington, D.C. CER publishes a ranking and scorecard for states with charter school laws, ranking the states according to the strength of their state laws and the quantity and viability of their charter schools. Hawai'i's charter school law is ranked 33rd among the 41 states and jurisdictions with charter school laws, achieving a grade of C minus (Appendix B).<sup>1</sup> According to the CER, the states or jurisdictions with the strongest charter school laws are, in rank order, Arizona, Minnesota, Washington, D. C., Delaware, Michigan, and Massachusetts.<sup>2</sup>

The CER indicates that the strength of Hawai'i's charter school law is in the areas of new starts allowed, automatic waiver from state and district laws, and eligible charter applicants. Weak areas in Hawai'i's law identified by the CER concern: the number of chartering authorities (only the BOE may issue charters), legal and operational autonomy of charter schools, guaranteed full per pupil funding, fiscal autonomy, and the

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<sup>1</sup> Center for Educational Reform, *Charter Schools Laws Across the States: Ranking and Scorecard*, 8<sup>th</sup> Edition (Washington, D.C.: Center for Educational Reform, February 2004). Retrieved on 15 October 2004 from: [http://www.edreform.com/\\_upload/charter\\_school\\_laws.pdf](http://www.edreform.com/_upload/charter_school_laws.pdf).

<sup>2</sup> *Id.*

fact that the schools are not exempt from collective bargaining and district work rules.<sup>3</sup> In a separate study of state charter school laws, the Education Commission of the States identifies areas of weakness in Hawai'i's charter school law as not providing facilities assistance or transportation to charter schools, and not requiring periodic reporting on the effectiveness of charter schools.<sup>4</sup>

## Areas of Weakness in Hawai'i's Charter Schools Law According to CER

**Lack of Multiple Chartering Authorities.** In Hawai'i, the Board of Education (BOE) is the only chartering authority for prospective charter schools. Section 302A-1182(d)(1-3), *Hawaii Revised Statutes*, provides for a charter review panel composed of four members of the BOE, two members of the charter school community approved by the chair of the BOE from a list submitted by existing new century charter schools, and the Executive Director of the Charter School Administrative Office (CSAO) or the director's designee. Pursuant to section 302A-1182(e)(1-2), *Hawaii Revised Statutes*, the review panel has 60 days to submit its recommendation to the BOE, and "[u]pon receipt of the panel's recommendation, the board shall issue a charter, and the implementation plan shall be converted to a written performance contract between the school and the board; ..."<sup>5</sup>

In other states, both the state school board and local school district boards may issue charters. In some states, post-secondary institutions, non-profit associations, and a charter school state board have the authority to issue charters.

Because Hawai'i has a single statewide education system without autonomous local school districts as on the U.S. mainland, it is not entirely surprising that the BOE is the only authorized entity to issue charters. However, if a separate district or LEA is formed for charter schools, it is reasonable to expect that the governing authority of that entity would be given the authority to issue charters in addition to or in place of the BOE.

**Legal and Operational Autonomy.** As stated in a previous LRB report, "charter schools in Hawai'i are public entities that come into existence through a contract with the BOE ... Although they have a greater degree of autonomy than public schools in Hawaii, charter schools are created by state statute and are therefore public entities, are subject to state regulation (however minimal), receive state funding, and may be

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<sup>3</sup> *Id.*

<sup>4</sup> Education Commission of the States, *Charter Schools Online Database* (Denver, Colorado: Education Commission of the States, n.d.). Retrieved on 15 October 2004 from: [www.ecs.org/ecsmain.asp?page=/html/ProjectbySubject.asp?issueID=191](http://www.ecs.org/ecsmain.asp?page=/html/ProjectbySubject.asp?issueID=191).

<sup>5</sup> *Hawaii Rev. Stat.*, §302A-1182e-1.

closed down by the State."<sup>6</sup> Other state charter school laws also create the broad framework within which the charter schools operate and most of these laws call for states or local districts to provide funding to the schools and close down schools that do not perform to standards established by the state or district.

Nevertheless, Hawai'i ranks very low (0.5 on a scale of 1 to 5) in legal and operational autonomy on the CER scorecard. This is because the CER defines legal and operational autonomy as "States that allow charter schools to be independent legal entities that can own property, sue and be sued, incur debt, control budget and personnel, and contract for services." In addition, legal autonomy refers to the ability of charter schools to control their own enrollment numbers.<sup>7</sup> All six of the states or jurisdictions with charter school laws that the CER ranks with a grade of "A" provide a high degree of legal autonomy to their charter schools and achieved a rating of 4 or 5 in this category.

One of these states is Arizona. Arizona's charter schools law indicates that a school's charter shall: ensure compliance with federal, state, and local rules, regulations, and statutes relating to health, safety, civil rights, and insurance; adopt a nonsectarian stance in its programs, admission policies, employment practices, and other operations; and provide a comprehensive program of instruction for any K-12 grade, with due allowance for a curriculum with an emphasis on a specific learning philosophy or style or certain subject areas, such as mathematics, science, fine arts, performance arts, or foreign language. Arizona's charter school law also states that a charter school is exempt from all statutes and rules relating to schools, governing boards, and school districts, and that charter schools may contract, sue and be sued.<sup>8</sup> It also states that the sponsoring entity of a charter school shall have oversight and administrative responsibility for the charter schools that it sponsors, and that charter schools may pledge, assign or encumber their assets to be used as collateral for loans or extensions of credit.<sup>9</sup>

Colorado's charter schools law also stresses autonomy, but leaves much of that up to the individual school district. As stated by the CER, "exemptions from district policies must be negotiated with sponsor district and specified in charter, and waivers from state statutes must be granted by state board of education; in practice, however,

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<sup>6</sup> Hawai'i, Legislative Reference Bureau. *On the Level? Policy, Law and the Charter School Movement*, pp. 40, 41.

<sup>7</sup> Center for Educational Reform, *Charter Schools Laws Across the States: Ranking and Scorecard*, p. viii.

<sup>8</sup> *Arizona Rev. Stat.*, §15-183.

<sup>9</sup> *Id.*

waivers from state statutes are invariably granted upon request, and many districts grant charter schools wholesale waivers from district policy as well."<sup>10</sup>

**Guaranteed Per Pupil Funding.** Section 302A-1185, *Hawaii Revised Statutes*, establishes a per pupil funding allocation formula for charter schools based upon a combination of: (1) the actual and projected enrollment figures in the current school year for each charter school; and (2) a per pupil amount for each regular education and special education student equivalent to the total per pupil cost based upon average enrollment in all cost categories, including comprehensive school support services but excluding special education services, and for all means of financing except federal funds, as reported in the most recently published department of education consolidated annual financial report.

Funding of charter schools through a guaranteed per pupil allocation formula is common among the states. Examples include:

*Arizona.* For charter schools authorized by local school boards, funding is calculated by the state through a per pupil formula. As part of the contract between a local school board and a charter school, a local school board may withhold a negotiated portion of the funding for oversight. For other charter schools, funding is determined by a similar per pupil formula.

*Connecticut.* For local charter schools, the per pupil allocation is specified in the charter. For state charter schools, the state pays \$7,360 per pupil to the charter school. However, funding for state charter schools is directly dependent on the state's annual appropriation.

*Delaware.* In Delaware, 100 percent of state funding is based on a state unit funding formula and 100 percent of local funding is based on the previous year's per pupil expenditure in a student's school district of residence.

*Indiana.* Charter schools receive 100 percent of the per pupil funding that traditional schools receive.

*Michigan.* In Michigan, 100 percent of state and school district operations funding follow a charter school student. The amount is based on the average school district per pupil revenue, not to exceed a certain amount that increases from year to year based on a state aid formula.

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<sup>10</sup> Center for Educational Reform, *State by State Charter Law Profiles* (Washington, D.C.: Center for Educational Reform, February 2004). Retrieved on 3 October 2004 from: <http://www.edreform.com/index.cfm?fuseAction=cLaw&stateID=34&altCol=2>.

*Minnesota.* The state portion of operations funding follows charter school students and is based on average state per pupil revenue. The school district portion of operations funding does not follow charter school students.

An overview of how states handle their funding of charter schools and students is provided in Appendix C.

Although Hawai'i is similar to many other states in funding charter schools through a per pupil allocation formula, funding is nevertheless one of the major concerns among charter school spokespersons, who claim that Hawai'i's formula does not provide them with a fair and equitable share of state education resources. Facilities expenses provide one example of how charter schools might consider themselves shortchanged by the current allocation formula. As was pointed out in an earlier LRB report, new century charter schools must often rent or build their school facilities. However, the cost of building public schools is usually undertaken through the issuance of general obligation bonds that are the responsibility of the State to repay—not the BOE, DOE, or individual schools "Since neither the BOE, the HIDOE, nor individual public schools are responsible for the payment of principal or interest on these general obligation bonds, they essentially operate 'rent free' and 'debt free' in their physical facilities."<sup>11</sup>

Recent initiatives during the 2004 Hawai'i Legislative Session may mitigate some of the concerns of charter schools about receiving a "fair and equitable allocation" of funds.<sup>12</sup> Two pieces of legislation are particularly relevant to this issue.

Act 51, Session Laws of Hawaii 2004, the Reinventing Education Act of 2004, is a multi-faceted piece of legislation that seeks to create "significant changes" in the Hawai'i public education system to "meet the evolving needs of today's communities."<sup>13</sup> Among other provisions, the Act creates a Committee on Weights within the DOE to develop a "weighted student formula." At the risk of oversimplifying a complex matter, a weighted student formula is one that identifies student characteristics that determine the relative costs of educating any student, assigns values (weights) to these characteristics, and permits the calculation of the cost of educating students with any combination of the weighted characteristics. Once the Committee on Weights has established the weighted student formula, it will provide its recommendation to the BOE, which will have the final responsibility for adopting or revising the formula. One of the major advantages of the weighted student formula is that it will allow funds to flow to schools based on the actual costs of educating its students rather than on enrollment or other arbitrary considerations.

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<sup>11</sup> Hawai'i, Legislative Reference Bureau. *On the Level? Policy, Law and the Charter School Movement*, p. 26.

<sup>12</sup> See Act 203, Session Laws of Hawaii 2003, and Acts 132 and 221, Session Laws of Hawaii 2004.

<sup>13</sup> Act 51, §1, Session Laws of Hawaii 2004.

Anticipating enactment of the Reinventing Education Act of 2004, Act 221, Session Laws of Hawaii 2004, amended section 4 of Act 51 (S.B. No. 3238, S.D. 2, H.D. 2, C.D. 1), which created the new statutory section on weighted student formula, to allow charter schools to receive their per pupil allocations using the weighted student formula beginning September 1, 2006. It would be premature to speculate on the possible impact of the weighted student formula on charter schools since the Committee on Weights, which first met in September 2004, has yet to recommend a formula to the BOE or identify the funds that should be allocated to schools through the formula. At a minimum, however, it would appear that the weighted formula will put charter schools on a more level playing field with other public schools since the weighted formula, unlike the charter schools' current per pupil allocations, will apply to all public schools in Hawai'i.

Another measure that may benefit charter schools is Act 132, Session Laws of Hawaii 2004. Act 132 amended section 302A-1185, *Hawaii Revised Statutes*, to enable the Legislature to make additional appropriations to charter schools, above and beyond the standard per pupil allocation, for fringe and other employee benefits and for facility costs. As in the case of Act 221, it would be premature to estimate the impact of this amendment on charter school finances until the Legislature has had an opportunity to receive and act on employee benefit and facility requests from the charter schools. However, it is important to note that charter school spokespersons and previously published reports both cite the fact that the guaranteed per pupil allocation formula for charter schools does not take account of charter school facility costs and calculates employee benefits in a manner that is disadvantageous to charter schools.<sup>14</sup> Act 132 may provide an effective means of dealing with these funding issues.

**Fiscal Autonomy.** Section 302A-1185, *Hawaii Revised Statutes*, as amended by Act 132, provides specific funding criteria for charter schools. While this is a great improvement over prior practices and guarantees a per pupil amount, it does not provide for fiscal autonomy for charter schools.

**§302A-1185 New century charter schools; funding.** (a) Beginning with the fiscal year 2004-2005 supplemental budget request, and each budget request thereafter, the charter school administrative office shall submit a request for general fund appropriations for each new century charter school based upon:

- (1) The actual and projected enrollment figures in the current school year for each charter school; and
- (2) A per pupil amount for each regular education and special education student, which shall be equivalent to the total per pupil cost based upon average enrollment in all cost categories, including comprehensive school support services but excluding special education services, and for all means of financing except federal funds, as reported in the most recently published department of education consolidated annual financial report, provided that the

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<sup>14</sup> See discussion regarding the cost of fringe benefits on p. 26.



## COMPARISON OF OTHER STATE LAWS

legislature may make an adjustment to the per pupil allocation for the purposes of this section.

The legislature shall make an appropriation based upon the budget request; provided that the legislature may make additional appropriations for collective bargaining increases for charter school employee members of collective bargaining units, fringe and other employee benefits, facility costs, and for other requested amounts. The governor, pursuant to chapter 37, may impose restrictions or reductions on charter school appropriations similar to those imposed on other public schools.

(b) All federal financial support for new century charter schools shall be no less than all other public schools; provided that if administrative services related to federal grants and subsidies are provided to the charter school by the department, the charter school shall reimburse the department for the actual costs of the administrative services in an amount that does not exceed six and one-half per cent of the charter school's federal grants and subsidies.

Any new century charter school shall be eligible to receive any supplementary financial grant or award for which any other public school may submit a proposal, or any supplemental federal grants limited to new century charter schools; provided that if department administrative services, including funds management, budgetary, fiscal accounting, or other related services, are provided with respect to these supplementary grants, the charter school shall reimburse the department for the actual costs of the administrative services in an amount that does not exceed six and one-half per cent of the supplementary grant for which the services are used.

All additional funds that are generated by the local school boards, not from a supplementary grant, shall be separate and apart from allotted funds and may be expended at the discretion of the local school boards.

(c) To enable new century charter schools to access state funding prior to the start of each school year, foster their fiscal planning, and enhance their accountability, the charter school administrative office shall:

- (1) Provide fifty per cent of a new century charter school's per pupil allocation based on the new century charter school's projected student enrollment no later than July 20 of each fiscal year; provided that the new century charter school shall submit to the charter school administrative office a projected student enrollment no later than May 15 of each year;
- (2) Provide an additional forty per cent of a new century charter school's per pupil allocation no later than November 15 of each year; provided that the new century charter school shall submit to the charter school administrative office:
  - (A) Student enrollment as verified on October 15 of each year, provided that the student enrollment shall be verified on the first day of business immediately prior to October 15 should that date fall on a weekend;
  - (B) An accounting of the percentage of student enrollment who transferred from public schools established and maintained by the department, provided that these accountings shall also be submitted by the charter school administrative office to the legislature no later than twenty days of each regular session; and

FEASIBILITY OF A NONCONTIGUOUS CHARTER SCHOOL DISTRICT

- (3) The remaining ten per cent per pupil allocation of a new century charter school no later than January 1 of each year as a contingency balance to ensure fiscal accountability.
- (d) The department shall provide appropriate transitional resources to a new century conversion charter school for its first year of operation as a charter school based upon the department's allocation to the school for the year prior to the charter school's conversion.
- (e) No new century charter school or new century conversion charter school may assess tuition.
- (f) The department shall transfer additional funds from EDN 100 to EDN 600 for new century charter schools whose student enrollment, verified on or immediately prior to October 15 as provided for by subsection (c), exceeds the new century charter schools' projected student enrollment, in an amount corresponding to the number of additional students and the per pupil allocation. The charter school administrative office shall transfer from EDN 600 to EDN 100 any excess per pupil allocations for new century charter schools whose verified student enrollment is lower than their projected student enrollment in an amount corresponding to the lower number of students and the per pupil allocation.

In determining what makes a strong charter school law, the CER asserts that "States that give charter schools full control over their own budgets, without the district holding the funds, encourage more activity than states that do not."<sup>15</sup> Examples of states that the CER ranks high in this category include:

*Arizona.* For charter schools authorized by local school boards, funding may be negotiated and is specified in the charter. For other charter schools, funding is determined by the same base support level formula used for all district schools. The estimated amount is approximately \$4,600.

*Delaware.* In Delaware, 100 percent of computed state funding based on a state unit funding formula and 100 percent of local funding based on previous year per pupil expenditures (in students' district of residence) follow students to their charter schools. The estimated amount is approximately \$7,400.

*Minnesota.* The state portion of operations funding follows students, based on average state per pupil revenue (the district portion is lost). The estimated amount is approximately \$6,300.

Complicating the issue of charter school funding in Hawai'i is the deduction of the cost of fringe benefits for staff from each charter school's allocation. As indicated in a recent paper by the Hawai'i's Educational Policy Center, the cost of fringe benefits for DOE employees is not expended by the DOE itself, but is transferred out of the DOE's budget and "reimbursed" to the State Department of Budget and Finance (B&F), which does the actual spending for fringe benefits. Consistent with this practice, B&F and the CSAO recommended that the per pupil allocation to charter schools be reduced by

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<sup>15</sup> Center for Education Reform, *Charter Schools Laws Across the States: Ranking and Scorecard*, p. viii.

\$1,110 to pay for the cost of fringe benefits for charter school staff. The amount is calculated by applying an average DOE fringe benefit percentage to the charter schools. However, examination of that amount indicates that the cost of fringe benefits for charter school staff was not based on their payrolls, but on their total operating budgets. Although personnel costs are a large part of the charter schools' budgets, they are not the only cost item. Hence, application of the DOE fringe benefits percentage to the schools' total operating budgets would strongly suggest that they are having too much deducted from their per pupil allocations. This problem is compounded by the fact that some charter school staff are not DOE employees at all and should not be factored into the per pupil deduction since the cost of their fringe benefits is already covered by, for instance, the University of Hawai'i or the Research Corporation of the University of Hawai'i.<sup>16</sup>

It should be noted that Act 132, Session Laws of Hawaii 2004, which amended section 302A-1185, *Hawaii Revised Statutes*, enables the Legislature to make additional appropriations to charter schools, above and beyond the standard per pupil allocation, for fringe and other employee benefits and facility costs, and authorizes an additional \$2,472,714 to the charter schools for these and other purposes.<sup>17</sup> Depending on how much of this additional money goes towards paying for fringe benefits, it would partially, but not completely, offset the deduction for fringe benefits itemized in the Supplemental Appropriations Act of 2004.

**Collective Bargaining.** As noted earlier, section 302A-1184, *Hawaii Revised Statutes*, exempts charter schools from all applicable state laws except those regarding collective bargaining, discrimination, and health and safety requirements. However, section 302A-1184(1), *Hawaii Revised Statutes*, specifically provides for charter schools to enter into agreements with the unions representing public employees.<sup>18</sup>

In the opinion of CER, collective bargaining is the weakest area in Hawai'i's charter school law, scoring "0" on CER's 1-5 scale. Other states provide a much higher degree of autonomy to their charter schools in hiring staff. Examples of this are:

*Arizona.* Teachers may remain covered by the district bargaining agreement, negotiate as a separate unit with the charter school governing body, or work independently.

*California.* Teachers may remain covered by the district bargaining agreement, negotiate as a separate unit with the charter school governing body, or work independently.

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<sup>16</sup> Hawai'i Educational Policy Center, *Charter Challenges: Policy Issues Facing Charter Schools in Hawai'i, Charter School Policy Issue No. 1, Funding Charter Schools* (Honolulu, HI: Author, August 2004), pp. 5-6.

<sup>17</sup> Act 132, Session Laws of Hawaii 2004, §§1 and 2.

<sup>18</sup> Note provisos under §302A-1184(1)(A)-(D), *Hawaii Rev. Stat.*

*Colorado.* Teachers may remain covered by the district bargaining agreement, negotiate as a separate unit with the charter school governing body, or work independently.

*Delaware.* Teachers may remain covered by the district bargaining agreement, negotiate as a separate unit with the charter school governing body, or work independently.

*Minnesota.* Teachers may remain covered by the district collective bargaining agreement if all parties agree. Teachers may also negotiate as a separate unit with the governing body or work independently.

**Start-Up Money.** Act 203, section 3, Session Laws of Hawaii 2003, amended section 302A-1185, *Hawaii Revised Statutes*, to eliminate a provision of the Hawai'i charter school law that allowed the DOE to "provide a limited start-up and planning grant formulated by the auditor to a charter school upon the issuance of its charter." This is consistent with the fact that the limit of 23 new century charter schools has been met already. However, because there is room for 21 more conversion charter schools under existing law, section 302A-1185(d), *Hawaii Revised Statutes*, directs the DOE to provide "appropriate transitional resources to a new century conversion charter school for its first year of operation as a charter school based upon the department's allocation to the school for the year prior to the charter school's conversion."

States with more rapidly expanding charter school programs often maintain special funds to enable these schools to get started. Examples of these are:

*California.* The state's charter schools revolving loan fund allows charter schools to receive loans for as much as \$250,000, allowing up to five years for repayment.

*Florida.* As part of a conversion charter school pilot program, the state provides each local school board in which there is a school selected to participate in the pilot program with a \$100,000 planning and development grant for each conversion charter school selected.

*Illinois.* From a separate appropriation, the state board of education makes grants to charter schools to pay their start-up costs of acquiring educational materials and supplies, textbooks, furniture, and other equipment needed during their initial term. The state board of education annually establishes the time and manner of application for these grants, which are not to exceed \$250 per student enrolled in the charter school.

*Ohio.* The state legislature appropriates start-up funds, amounting to as much as \$50,000 for a single charter school, for schools that do not receive grants from the federal government's Public Charter Schools Fund.

## COMPARISON OF OTHER STATE LAWS

*New Mexico.* The legislature appropriates money to a charter school "stimulus fund" every year to assist conversion and start-up charter schools.

*Rhode Island.* If federal funds are unavailable, the state allows for the establishment of a system of interest-free loans provided from state funds, not to exceed \$150,000 to a single charter school.

Although Hawai'i does not provide planning or start-up grants to new century charter schools, there is nothing in the Hawai'i charter school law that would prevent a charter school from applying for federal charter school support or seeking other funds for planning or start-up purposes. Section 302A-1185(b), *Hawaii Revised Statutes*, states in pertinent part that:

Any new century charter school shall be eligible to receive any supplementary financial grant or award for which any other public school may submit a proposal, or any supplemental federal grants limited to new century charter schools; provided that if department administrative services, including funds management, budgetary, fiscal accounting, or other related services, are provided with respect to these supplementary grants, the charter school shall reimburse the department for the actual costs of the administrative services in an amount that does not exceed six and one-half per cent of the supplementary grant for which the services are used.

**Facilities Assistance.** Section 302A-1182(c)(6)(A), *Hawaii Revised Statutes*, indicates that as part of a charter school's detailed implementation plan, its facilities management plan may include the use of any existing school facilities available to the charter school. If the facilities management plan does include the use of existing school facilities, the charter school must receive authorization from the administrator responsible for the facilities. An example of the use of existing school facilities by a charter school is at Keaukaha School, where the school's Hawaiian Language Immersion Program was part of the whole school, converted to charter status, and continues to use the existing facility under an agreement with the school administration. This arrangement makes sense because of the availability of facilities and the close working relationship that existed previously between the charter school and the regular school.

The major weakness of the Hawai'i law in terms of facilities is that it does not include a provision for facilities funds for charter schools that do not have access to an existing facility.

Examples of state laws that do provide for facilities assistance include:

*Arizona.* Non-profit charter schools may apply for bond financing from industrial development authorities. Also, the state department of education must annually publish

a list of vacant and unused portions of buildings that are owned by the state or by school districts and that may be suitable for the operation of a charter school.

*California.* The charter schools revolving loan fund allows charter schools to receive loans for as much as \$250,000, allowing up to five years for repayment. A school district is generally required to provide facilities "rent free" to charter schools for students who reside in the district. A lease aid funding program for charter schools in low-income areas provides up to \$750 per student.

*Colorado.* Capital construction funds have been appropriated and are provided to qualified charter schools in the amount of \$332.40 per pupil to assist with capital construction needs. The Educational and Cultural Facility Authority (ECFA) may issue bonds on behalf of charter schools. The charter school debt reserve fund enhances charter schools' ability to borrow funds from ECFA and to obtain more favorable rates. If space is available in a school district facility, a charter school may not be charged for that space, although other costs for facility operations and maintenance must be negotiated. School districts are required to invite charter schools to discuss their capital construction needs prior to submitting a request to the voters or floating a bond for facilities funding, although the school district is not required to include the charter schools as part of their requests or bonds.

*Delaware.* School districts must make unused buildings or space in buildings available for charter schools and must bargain in good faith over the cost of rent, services, and maintenance related to such space. In addition, the state department of education and state department of administrative services must publish a list of all vacant and unused buildings and portions of buildings owned by the state or school districts that may be suitable for charter schools.

*Minnesota.* State grants are available for facility improvement. The state provides lease aid to charter schools in the amount of 90 percent of lease costs or \$1,500 per pupil. With approval of the state department of education, charter schools may lease space from public or private nonprofit, nonsectarian organizations and from sectarian organizations.

An overview of how states handle their facilities assistance to charter schools is provided in Appendix D.

**Effectiveness Reporting.** Although section 302A-1186(b), *Hawaii Revised Statutes*, calls for the BOE to initiate "an annual independent evaluation of each new century charter school for the first two years after its establishment and every four years thereafter", there is no established BOE policy regarding this independent evaluation requirement nor any evidence that independent evaluations of the charter schools have been conducted to date.

## COMPARISON OF OTHER STATE LAWS

Most other states' and jurisdictions' laws provide for annual reports to various government bodies and to the public on the status of charter schools. Examples of these include:

*Arizona.* The state board for charter schools must annually report to the legislature for funding for its operation. This report includes reporting on agency goals, the number of new charter schools, and the accountability systems for charter schools.

*California.* The legislative analyst is required to contract for a neutral evaluator to conduct an evaluation of charter schools and report to the governor and the legislature on or before July 1 of each year.

*Colorado.* Beginning in the 2004-05 budget year, and at least every three years thereafter, the state department of education must prepare a report and evaluation for the governor and the house and senate committees on education on the success or failure of charter schools, their relationship to other school reform efforts, and suggested changes in state law necessary to strengthen or change the charter school program.

*Delaware.* The state department of education must prepare an annual report for the governor and the legislature.

*Washington, D.C.* Each eligible chartering authority that issues a charter must submit an annual report to the mayor, the District of Columbia Council, the Board of Education, the U.S. Secretary of Education, the appropriate congressional committees, and the Census Commission.

*Michigan.* The state board of education must prepare an annual report for the legislature that includes, among other items, aggregate test scores of charter school students.

*Missouri.* The state department of elementary and secondary education is required to commission a study of the performance of charter students every two years, with results disseminated to the public, charter governing boards, charter sponsors, and the school boards and superintendents of the Kansas City and St. Louis school districts.

An overview of states' reporting and evaluation requirements is provided in Appendix E.

### **Summary**

The notion of a charter school district or LEA carries with it the implication of greater independence and self-reliance than that of an individual charter school existing as part of a "parent" school district or LEA. To a certain degree, this implication is warranted. For instance, as will be discussed later in this report, a charter school LEA has more direct access to federal grant funds than do charter schools that are not their

own LEAs. Moreover, it assumes a much higher degree of responsibility in planning for, implementing, monitoring, evaluating, and reporting on the grant funds that it receives as an independent LEA.

Nevertheless, all local school districts and LEAs operate within the context of a state educational framework of laws, policies, and regulations that can either support or hamper the district and LEA in the success of its enterprise. Many of the states that have established their charter schools as LEAs and are now pursuing the creation of charter school districts have done so on the foundation of a strong charter school law designed to stimulate educational innovation and address unmet needs in the traditional public school system. Even if establishing a Hawai'i charter school district or LEA is feasible, attention to the legal and regulatory context in which the district will be operating is a consideration for the future.



## Chapter 5

### CREATION OF A HAWAII CHARTER SCHOOL DISTRICT

As stated previously, Act 134, Session Laws of Hawaii 2004, requests the LRB to examine the feasibility and implications of establishing a noncontiguous charter school district, including a district with LEA status, for host culture and non-host culture charter schools. The next five chapters of this report consider these important questions. In particular, this chapter discusses the overall feasibility of the concept of a noncontiguous Hawaii charter district. Is this an idea that makes sense within the Hawaii public education governance structure or is it flawed in some important respect? Following consideration of the overall feasibility of the concept, Chapter 6 examines some of the governance implications of the proposed district or LEA with special reference to its relations with the Department of Education (DOE) and Board of Education (BOE). Chapter 7 examines the administrative implications of the district or LEA in relation to other state departments that play a role in the management and operation of charter schools, and Chapter 8 examines the financial implications of the proposed new district or LEA. Finally, Chapter 9 discusses the issue of a host culture charter school district and considers whether such a district would violate the 14th amendment to the U.S. Constitution or the equal protection provision of the Hawaii State Constitution (Article I, Section V).

#### Overview

In considering the feasibility of establishing a host culture or non-host culture charter school district in Hawai'i, it should first be noted that there is nothing particularly novel or unprecedented about the concept of a charter school district per se, and that there are already such districts in many states including Arizona, California, Florida, Georgia, New Mexico, Oregon, and Texas.<sup>1</sup> In Florida, for instance, school districts may enter into contracts with the State Board of Education to establish performance-based charter school districts. If a district's schools meet specified performance criteria and a majority of the district school board wishes to pursue charter status, the State Board of Education may charter it as an academic performance-based charter school district and the district school board may then convert each of its public schools to a charter school.<sup>2</sup> In fact, even without explicit state authority to establish a charter district, a school district could convert all its schools to charter status and thereby create an all-charter district.

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<sup>1</sup> New Democrats Online, *Charter Districts*, May 2, 2004. Retrieved on 19 October 2004 from: [www.ndol.org/ndol\\_ci.cfm?kaid=139&subid=273&contentid=3579](http://www.ndol.org/ndol_ci.cfm?kaid=139&subid=273&contentid=3579).

<sup>2</sup> *Florida Stat.*, Title XLVIII, §1003.62.

Indeed, with the spread of individual charter schools throughout the country, creation of charter districts is often viewed by charter school proponents as a logical "next step" for the charter school movement as a whole. Accordingly, there is a small but growing body of literature that provides examples of such districts, examines their pros and cons, and identifies key considerations for state and local policy leaders in considering whether to establish charter districts.<sup>3</sup> Some of the advantages that have been cited for all-charter districts include:

- enhanced ability of district parents to choose a school whose educational philosophy and method of instruction works best for their children;
- enhanced opportunities for district teachers and administrators to work in a school with like-minded staff and supported by parents who have chosen the school because of its educational mission and methods;
- increased leverage of district boards to hold schools accountable for student performance by canceling charters and issuing new ones.
- increased ability to create lean and efficient central district office operations by forcing the central office to compete for services needed by the charter schools; and
- improved ability to attract philanthropic and private investment on the part of foundations and entrepreneurs who want to devote their resources to supporting institutions with innovative methods and practices.<sup>4</sup>

Although the concept of charter school districts is not new, its application in the Hawai'i context is somewhat problematic because of the structure of the public education system in Hawai'i. Creation of charter school districts on the U.S. mainland occurs within a public education governance structure in which local school districts already exist. Charter school districts are typically existing school districts that have chosen to convert to charter district status and been authorized by the appropriate state chartering authority to do so. Because Hawai'i does not have local school districts, creation of a charter school district cannot simply mean the conversion of an existing district to charter status, but must also entail the creation of a second school district within the existing single, statewide district governed by the BOE. Accordingly, one important question to be addressed in this chapter is whether the creation of a second school district of any type whatsoever is legally feasible in Hawai'i.

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<sup>3</sup> There are many excellent resources available for state and local policymakers interested in investigating charter school districts. See, for instance, the four-part Education Commission for the States series titled *The Nuts and Bolts of Charter Districts*. Retrieved on 9 November 2004 from: [www.ecs.org/clearinghouse/44/95/4495.htm](http://www.ecs.org/clearinghouse/44/95/4495.htm).

<sup>4</sup> Paul T. Hill, *Charter School Districts*, May 16, 2001. Retrieved on 19 November 2004 from: [www.ppionline.org/ndol/print.cfm?contentid=3365](http://www.ppionline.org/ndol/print.cfm?contentid=3365).

If the concept of a second school district for charter schools is feasible in Hawai'i, another question that must be addressed concerns the district's status as an LEA. As noted previously, designation as an LEA is important because it provides the holder of the designation with eligibility for and direct access to federal education grant funds that it would otherwise have to seek through the mediation of its parent LEA. Thus, the second question that this chapter will address is whether and how a Hawai'i charter school district would qualify for LEA status.

Finally, this chapter will consider the feasibility of establishing a charter district that is noncontiguous. Traditional school districts on the U.S. mainland administer and operate schools within a defined geographical area. A Hawai'i charter school district would, in contrast, include schools that are geographically dispersed on the islands of Hawai'i, O'ahu, Kaua'i, Maui, and Moloka'i.<sup>5</sup> The discussion in this chapter will consider whether the noncontiguity of these charter schools negatively impacts on the feasibility of establishing a charter school district or charter school LEA.

## **Hawai'i's Statewide System**

It is common for reports on Hawai'i's public education system to point out that Hawai'i's system differs from all other states in establishing the statewide educational agency (i.e., the BOE and DOE) as the state's single school district and LEA. In considering the feasibility of establishing a Hawai'i charter school district, an important consideration is the legal authority for this governance structure. If, for example, the basis for a single statewide school district and LEA derives from the Hawai'i *State Constitution*, establishing a charter school district would require voter approval of a constitutional amendment permitting the creation of a second district. If, on the other hand, the basis for a single statewide school district derives from BOE policies or state statute, it would be within the purview of the BOE or Legislature to approve creation of a second school district. While the need for a constitutional amendment would certainly not be fatal to the concept of a Hawai'i charter school district, it would introduce an element of uncertainty to the enterprise until the amendment had actually been approved by voters.

Article X of the *Hawai'i State Constitution* declares that "the State shall provide for the establishment, support and control of a statewide system of public schools"<sup>6</sup> and goes on to create a board of education with the power "to formulate statewide educational policy and appoint the superintendent of education as the chief executive

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<sup>5</sup> The issue of noncontiguity would be of lesser importance for a host culture charter school district because most host culture charter schools are currently located on the island of Hawai'i. Even in the case of a host culture district, however, new host culture conversion charter schools could be established O'ahu, Kaua'i, Maui, and Moloka'i leading to as much noncontiguity as in the case of the other charter schools.

<sup>6</sup> Hawai'i State Constitution, Article X, §1.

officer of the public school system."<sup>7</sup> The most conservative interpretation of these provisions is that, in declaring that *the State* shall control a statewide system of public schools, the *Hawai'i State Constitution* is specifically prohibiting any political entities *other* than the State from controlling public schools.<sup>8</sup> In effect, this interpretation would make it unconstitutional to establish another LEA in Hawai'i since, as noted in Chapter 1, a key aspect of the definition of LEA is its control of a public elementary or secondary school in a state. A more liberal interpretation of these provisions is that the *Hawai'i State Constitution* is not prohibiting local entities from controlling one or more public schools, but indicating that local control would need to be carried out within a system, or framework, of State laws, policies, and regulations.

In researching the intent of Article X of the *Hawai'i State Constitution*, including the proceedings of the 1978 Constitutional Convention, the authors of this report could find no clear and unequivocal indication of which of these two interpretations was intended. An Attorney General's opinion on the constitutionality of establishing an LEA in Hawai'i should be sought.

## Charter School LEA

The second issue to be considered in this chapter is the relationship between a duly authorized Hawai'i charter school district and a charter school LEA. Through what means could a Hawai'i charter school district become a charter school LEA? Is it possible that a Hawai'i charter school district could fail to qualify for LEA status? As noted earlier, these questions are important because LEA status has a decisive influence on how federal education grants can be sought.

As noted in Chapter 1, the U.S. Code defines LEA as follows:

(A) In general:

The term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

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<sup>7</sup> Hawai'i State Constitution, Article X, §3.

<sup>8</sup> Alternative interpretations of the term "statewide system of public schools" are possible, in part, because the requirement that the State have a "statewide system of public schools" may not necessarily mean that Hawai'i must have a "single statewide school district."

(B) Administrative Control and Direction

The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

Two features of this definition are worth noting. First, although this report has emphasized the near interchangeability of the terms school district and LEA, the federal definition of LEA permits a wide range of public authorities to qualify as LEAs. These other public authorities include SEAs, educational service agencies, consortia of educational service agencies, and even individual schools. Second, the federal government generally defers to the states to identify the LEAs within any given state. The designated "public authority" must, of course, meet requirements other than just state recognition as an LEA. In other words, the public authority must have been constituted to carry out the functions specified in the federal definition of LEA. However, the federal government does not further operationalize the definition of LEA to specify, for instance, the extent of administrative control and direction or the amount of services that the public authority must exercise to qualify as an LEA.

As noted in a recent memorandum from the education law firm Brustein & Manasevit on the subject of LEA eligibility, the general principle pursued by the federal government has been to promulgate a very broad definition of LEA that permits many different kinds of public authorities to qualify, and then let the states "narrow their interpretation of the broad definition in order to best administer their federal education dollars."<sup>9</sup> For instance, although the federal definition of LEA opens the door for educational service agencies to qualify as LEAs, Brustein & Manasevit point out that an ESA's eligibility for LEA status ultimately depends on the roles and responsibilities assigned to it by the state in which it operates.

...an ESA will be eligible to participate in federal education programs covered by this definition [of LEA] to the same extent that LEAs would do so, only if the state recognizes that the ESA is the administrative agency responsible for a) direction or control of a school district, b) performance of a service function for a school district or c) fulfills both functions. Conversely, if state law limits the ESA so that it cannot function as an LEA, that ESA would not meet the federal general definition of LEA, would not be eligible for general grant funding as an LEA, but will have a more limited role...<sup>10</sup>

In considering a proposed Hawai'i charter school district's standing as an LEA, it is also important to note that many jurisdictions (e.g., Arizona, California, Connecticut, Delaware, Indiana, Massachusetts, Michigan, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, and Utah, and Washington, D.C) extend LEA eligibility to

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<sup>9</sup> Memorandum from Brustein & Manasevit Attorneys at Law, Washington, D.C., to Brian Talbot and Kari Arfstrom, Association of Educational Service Agencies, 9 April 2002, p. 3.

<sup>10</sup> *Id.*, pp. 2-3.

individual charter schools.<sup>11</sup> In Washington, D.C., for instance, a charter school applicant must indicate whether it wishes the school to be treated as an independent LEA or affiliate with the Washington, D.C. Public Schools (DCPS).<sup>12</sup> Similarly, in California, the *Education Code* permits individual charter schools to serve as their own LEAs for purposes of participating in a special education local plan area and receiving federal and state special education funds through the allocation plan adopted by the local plan area.<sup>13</sup> These examples indicate the latitude given to states in determining LEAs within their respective jurisdictions.

Indeed, there are educators who think that the federal definition of LEA makes LEAs out of all charter schools, whether or not state laws authorize them as such. For instance, Jay P. Heubert, Assistant Professor at the Harvard Graduate School of Education, asserts that the federal definition of LEA applies to every charter school.

Every board that runs a charter school meets this definition. It explicitly applies to any "public board of education" that operates a charter school. Significantly, however, the independent charter school boards that some state charter laws authorize also meet this definition, since they are "public institution[s] or agenc[ies]" that have "administrative control and direction of a public elementary or secondary school." The only board that would not be covered is one that *lacked* "administrative control and direction of a public elementary or secondary school."<sup>14</sup>

Reverting to the questions posed at the beginning of this section, a Hawai'i charter school district will be eligible for LEA status if the state recognizes that the governing authority of the district provides administrative direction or control for the district. Although, as stated earlier, the federal government does not define administrative direction or control, the "minimum requirements" for a Hawaii charter school LEA would appear to be:

- Establishment or designation of a public authority, in the form of an elected or appointed board of director or board of trustees, to govern the Hawai'i charter school district;
- State recognition that this legally constituted board is responsible for the administrative direction or control of the district and will serve as its own LEA;

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<sup>11</sup> Email from Dean Kern, Director, Charter Schools Program, U.S. Department of Education, 12 November 2004.

<sup>12</sup> A copy of the Washington, D.C. charter school application is available from: [www.dcpubliсharter.com/forschool/applicationinfo/04guideline.htm](http://www.dcpubliсharter.com/forschool/applicationinfo/04guideline.htm). Retrieved on 28 November 2004.

<sup>13</sup> California, Education Code, §47640.

<sup>14</sup> Jay P. Heubert, Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation. Retrieved on 7 November 2004 from: [www.cast.org/ncac/SchoolswithoutRules2850.cfm#section2](http://www.cast.org/ncac/SchoolswithoutRules2850.cfm#section2).

- Ability of the board to hire a chief educational officer (e.g., superintendent of education or executive director) and other needed staff to implement its broad policy mandates and administer the day-to-day operations of the district; and
- Ability of the board to establish the district's educational mission and student learning goals within the parameters of statewide standards and expectations for student learning outcomes.

Put simply, the steps needed to establish a Hawai'i charter school district as an LEA are not substantially different from the steps needed to establish the district itself except for explicit state recognition that the district will serve as its own LEA.

### **Considerations for Noncontiguous Districts**

The third issue to be considered in this chapter is how the noncontiguous nature of a Hawai'i charter school district might impact the district's feasibility. At the outset of the discussion, it should be noted that noncontiguity would apparently have no impact on the proposed district's eligibility to qualify as an LEA. The federal definition of LEA already allows public authorities serving noncontiguous schools (e.g., consortia of ESAs) to qualify as LEAs, and there is nothing in the definition to suggest that a school district serving as an LEA needs to be geographically defined in the way that traditional school districts are.

Examples of noncontiguous school districts are difficult to find, of course, because of the purpose that such districts have traditionally served. The contiguous nature of school districts derives from the fact that one of their roles is to provide a full range of educational opportunities (e.g., elementary, middle, and high schools) to students within a defined geographical area, so that children living in the district can attend schools reasonably close to their places of residence. With this purpose in mind, it would not make much sense for a traditional school district to seek to incorporate noncontiguous schools, and the state's district boundary authorities would likely reject the idea as self-contradictory. However, with the exception of conversion charter schools, Hawai'i's charter schools do not serve students in or from a defined geographical area. By law (section 302A-1182(c)(2), *Hawaii Revised Statutes*), they must admit any student for whom space is available wherever he or she may reside. Accordingly, the concept of a noncontiguous Hawai'i charter school district is not incongruous in the manner that a noncontiguous traditional school district is.

If its noncontiguity does not undermine the feasibility of a Hawaii charter school LEA and is not an inherently self-contradictory concept, the remaining question is whether the dispersal of the charter district's schools over a disconnected geographical area would make the administration of such a district so unwieldy that the basic practicality of the concept is put in question. The authors of this report note that, although there are some obvious advantages in administering schools that are all within

close proximity of each other and the administering authority, these are largely matters of convenience rather than necessity in an age of high speed communication.

Far from undermining the charter school district concept, some educators contend that a noncontiguous charter school district is something that states should actively promote. For instance, Ron Wolk, former Vice President of Brown University and founder of the newspaper *Education Week*, states that:

On the premise that it is easier to make significant change by starting something new than by trying to reform something old, I would argue that each state should charter a nongeographic district that could include institutions located anywhere in the state. The charter district would be led by a superintendent with a relatively small administrative staff. The superintendent would be appointed by, and accountable to, a board, whose members would in turn be elected by the individual schools in the charter district....

The role of the district would be largely to coordinate and support innovation and experimentation in education and youth development. It would offer educational alternatives to the conventional schools.<sup>15</sup>

Perhaps the most prominent example of the noncontiguous administration of schools is the Department of Defense Education Activity (DoDEA), which operates 222 public schools in 13 countries for the children of service men and women. DoDEA's schools are divided into 15 districts, each headed by a superintendent. The superintendent of the Japan District administers a district consisting of 20 elementary, middle, and high schools located throughout the country. The superintendent of the Heidelberg District administers 25 schools in various areas of Germany.<sup>16</sup> Closer to home, the authors note that during the regular session of 2004, the Hawaii Legislature authorized the DOE to establish a Hawaiian language medium state education agency, which encompasses the entire State, to administer schools consisting of *geographically noncontiguous* classes, boarding schools, charter schools, and cyber schools.<sup>17</sup> Accordingly, although there may have been insufficient time for the DOE to act upon this new authority, it would seem at least to provide some precedent for the idea of geographically noncontiguous administration of schools.

## Summary

In conclusion, the authors of this report believe that the concept of a geographically noncontiguous Hawaii charter school district is feasible, constitutional issues aside. Charter school districts themselves, while not yet common, are being

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<sup>15</sup> Ron Wolk, "Think the Unthinkable," *Educational Horizons* (Summer 2004), pp. 274-5.

<sup>16</sup> Information on the organization of DoDEA is available from: [www.dodea.edu](http://www.dodea.edu). Retrieved on 23 November, 2004.

<sup>17</sup> See Act 133, Session Laws of Hawaii 2004 (quoted language is codified as HRS §302H-6).



established in numerous states and are often viewed by charter school proponents as a logical "next step" for the movement as a whole. Similarly, the concept of a charter school district that serves as an LEA is consistent with the federal definition of LEA and simply requires state recognition that the district authority directs the district's schools and serves as its own LEA. Finally, a noncontiguous charter school district is an idea that has been advocated by some educators as a powerful educational reform initiative and, at worst, entails administrative inconveniences.

## Chapter 6

### GOVERNANCE

As stated previously, Act 134, Session Laws of Hawaii 2004, requests the LRB to examine the administrative and financial implications of establishing a new district or LEA for host culture or non-host culture charter schools. The next three chapters of this report consider these important questions. In particular, this chapter discusses some of the administrative or governance implications of the proposed district or LEA with special reference to its relations with the Department of Education (DOE) and Board of Education (BOE). Chapter 7 examines the administrative implications of the district or LEA in relation to other state departments that play a critical role in the management and operation of charter schools. Finally, Chapter 8 examines the financial implications of the proposed new district or LEA.

#### **Current Status**

Section 302A-1187, *Hawaii Revised Statutes*, establishes a Charter School Administrative Office (CSAO), attached to the DOE for administrative purposes, and the position of Executive Director of the CSAO.<sup>1</sup> The Executive Director is appointed by the BOE based upon the recommendation of "an organization of charter schools operating within the state or from a list of nominees submitted by the charter schools."<sup>2</sup>

Section 302A-1187(b), *Hawaii Revised Statutes*, identifies 7 major duties for the Executive Director including:

Preparation and execution of the budget for the charter schools, including submission of the budget request to the BOE and the governor;

Allocation of annual appropriations to the charter schools and preparation of an annual financial audit of each charter school;

Compliance with applicable state laws related to the administration of charter schools;

Preparation and execution of contracts between the charter schools and the DOE for centralized services to be provided by the DOE;

Preparation and execution of contracts between the charter schools and other state agencies for financial or personnel services;

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<sup>1</sup> *Hawaii Rev. Stat.*, §302A-1187(a), as amended by Act 203, Session Laws of Hawaii 2003.

<sup>2</sup> *Id.*

Representation of charter schools in communications with the BOE, governor, and legislature; and

Monitoring and supporting the development, growth, and progress of charter schools.

### **Internal Governance Issues and Implications of Creating a Charter School District or LEA**

If Hawai'i were to establish a separate charter school district or LEA, many internal and administrative issues relating to governance would arise concerning the new entity. Four of the most important of these issues are discussed below.

**Governing Authority.** The current CSAO is responsible directly to the BOE and the charter schools themselves. If a separate charter school district patterned on U.S. mainland school districts were established in Hawai'i, it would be necessary to create a separate board of directors or board of trustees for the district to ensure that its governing authority is autonomous and meets the federal definition of an LEA as a legally constituted public authority to administer and direct the charter schools. Yet, there are important questions about exactly how such a charter school governing authority would be constituted.

As noted earlier, school district boards on the U.S. mainland are typically composed of elected residents of the geographic area that the district serves. However, with the exception of "conversion" schools, charter schools in Hawai'i do not serve defined geographical areas, leading to issues about who would be qualified to stand for election to the district board and who would be eligible to vote for candidates. Under these circumstances, an appointed rather than elected board would be the more feasible option. Currently, each charter school, whether new or conversion, has its own local school board, as specified in section 302A-1182(b) and section 302A-1191(b), *Hawaii Revised Statutes*. Representation on the local school board of conversion schools is specified by law and consists of either: (1) the board of directors of a nonprofit organization seeking to convert an existing public school to a charter school;<sup>3</sup> or (2) at least one member from six role groups—principals, instructional staff, support staff, parents, students, and the community at-large.<sup>4</sup> Composition of the local school board of new charter schools is not specified in the law by role group,<sup>5</sup> although most, if not all, such charter school boards are composed of the same role groups as the boards of conversion schools. It would seem to be most practical for the board of directors of a

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<sup>3</sup> *Hawaii Rev. Stat.*, §302A-1191(b)(1).

<sup>4</sup> *Hawaii Rev. Stat.*, §302A-1191(d)(1).

<sup>5</sup> *Hawaii Rev. Stat.*, §302A-1182.

new charter school district to be appointed from among the existing members of the charter schools' boards. But even an appointed board would require further consideration of the role groups to be represented on the board, the exact mechanisms for enabling schools to nominate candidates, and the criteria for selection of board members. Once elected or appointed, the district board would then be empowered to select the chief executive officer or superintendent of the district, who would operate within the parameters of the Hawai'i charter school statute.

**Administrative and Program Staff.** Even with a legally constituted board, if the proposed charter school district or LEA were expected to assume greater responsibility for the administration and direction of the charter schools, additional staffing would need to be provided. Within the existing CSAO, there are only two positions—the Executive Director and a business manager. Among other positions in a separate charter school district office, it would be desirable to add curriculum and instruction experts, assessment specialists, evaluation specialists, a development officer to track and respond to grant opportunities, and clerical staff. Support services can be contracted to private providers or to the DOE, as the CSAO currently does. However, to the extent that the new charter school district depends on external agencies to provide services that are integral to the educational enterprise, its autonomy and independence is compromised. Special education services would pose a major problem and will be discussed below.

**Membership.** One of the most challenging problems that would face a new charter school district or LEA is the matter of membership. Would membership in the district be mandatory or voluntary? Would all charter schools be included in a single district or LEA or would there be multiple districts for charter schools with different philosophies and instructional emphases? Who would speak on behalf of an individual charter school?

Perhaps the most obvious membership issue concerns the potentially differing interests of host culture and non-host culture charter schools. The majority of host culture charter schools are working together under the auspices of Na Lei Na'auao (Native Hawaiian Charter School Alliance) and actively cooperating in the areas of curriculum development and cultural relevance. The Kamehameha Schools assists this organization with additional resources and funding through its Ho'okako'o Program.<sup>6</sup> However, non-host culture charter schools can and do have very different educational emphases that could lead to conflicts if the only factor uniting the schools in a separate charter school district is the fact that they are charter schools.

Further complicating the concept of an LEA for all charter schools is the fact that some of the schools have, over time, developed unique relationships with traditional

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<sup>6</sup> Interview with Dr. Ku Kuhakalau, Principal/Director and Ms. Taffi Wise, Business Manager, Kanu o ka 'Aina New Century Public Charter School, 22 September 2004; email from Ms. Sharlene Chun-Lum, Program Director, Ho'okako'o Like Program, The Kamehameha Schools.

## GOVERNANCE

schools in the Hawai'i public education system. Two examples of these relationships are provided below.

- The Ke Kula 'o Nawahiokalani'opu'u Iki Laboratory public charter school in Kea'au on the Big Island is a K-6 elementary school with approximately 68 students. It is not a member of Na Lei Na'auao, although it focuses primarily on Hawaiian Language Immersion. The Ke Kula 'o Nawahiokalani'opu'u Iki Laboratory was one of the original Hawaiian language immersion schools and comes under the direction of University of Hawai'i-Hilo Hawaiian Language Professor Kauanoe Kamana.

The Ke Kula 'o Nawahiokalani'opu'u Iki Laboratory shares campus facilities, including library, gymnasium, and playing field, as well as many instructional materials, with the grade 7-12 Hawaiian Language Immersion secondary program which has 72 students. The secondary program is under the administrative direction of Hilo High School and has a Vice Principal assigned to oversee the campus. There needs to be a maximum amount of flexibility for these two distinct programs to maintain their strong program and curriculum articulation. Establishing a new charter school LEA and separating these two strongly articulated programs into different administrative entities could undermine their historically productive relationship.

- Another unique arrangement is with the Hawaiian Language Immersion charter school that shares the Keaukaha public school campus. Custodial and cafeteria services are provided to both the charter school and the regular school students, with their respective funding formulas counting both school populations.

In citing these examples, the major point is that many charter schools in Hawai'i have already developed relationships with institutions and agencies, including the DOE, that they may not wish to see submerged in a strong and autonomous charter schools LEA. Instead, they may desire maximum flexibility in working out their own organizational relationships and may find that that interest is best served by the existing governance arrangements.

Finally, a separate charter school LEA would seem to require a clear distinction between new and conversion charter schools as far as their inclusion in the LEA is concerned. Specifically, it may be difficult to place conversion charter schools in a separate LEA because, unlike new schools, conversion charter schools serve a dual role. On the one hand, a conversion school serves as the home school for all students within the geographic area it serves, just like any other public school. As stated in a previous LRB report, "[u]nless a student is granted a geographic exception to attend a public school outside a conversion school's geographic attendance area, the student

must attend the conversion school."<sup>7</sup> On the other hand, a conversion school also serves as a school of choice for students from outside the geographic attendance area who decide to enroll there. It is entirely conceivable that students (and their parents) for whom conversion schools serve as a traditional home school would object to their school being moved out of the existing governance structure of the Hawai'i public education system and into a new charter school district or LEA. These students are not necessarily attending the conversion school because of any unique charter school characteristics that it possesses, but simply because it is the public school in their neighborhoods.

**Special Education.** A major concern for a charter school LEA would be in the area of special education. At the present time, all special education students receive services from their respective complex area teams. Unless specifically stated by law, a charter school district would lose those services and have to contract for them with a private provider or the DOE. Special education services, particularly for the "high needs" population, can be very expensive, and a charter school LEA may not have the funds to provide the necessary services for such students. "High needs" students may include autistic, seriously emotionally handicapped, and medically fragile children, or other children with conditions that merit a high level of instructional modification or care. At the present time, the charter schools are well-equipped (with consultation from the complex area staffs) to handle the mild to moderately handicapped student, and they receive services as appropriate for all special education students according to the student's Individualized Educational Program (IEP). As stated earlier, Act 221, Session Laws of Hawai'i 2004, may assist charter schools in meeting the needs of special education students and other students who are relatively more expensive to educate, by allowing charter schools to receive their per pupil allocations using a weighted student formula beginning September 1, 2006.

### **External Governance Issues: Relationships Between Charter School District, BOE, and DOE**

**Board of Education.** Notwithstanding the possible creation of a new board of directors to govern an autonomous charter school district, the State BOE is ultimately responsible for public education in Hawai'i in accordance with Article X of the State Constitution. With the creation of an autonomous charter school district, the Board of Education's role would be to hold the district accountable for meeting student performance standards and carrying out other state educational policies just as it holds the DOE responsible for executing its policies in the current governance structure. Providing that assessment, monitoring, and reporting procedures are in place within the charter school district, this would ensure both the autonomy and accountability of the charter schools. In addition to a self-evaluation, an independent evaluation must be

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<sup>7</sup> Hawai'i, Legislative Reference Bureau, *On the Level? Policy, Law and the Charter School Movement*, p. 13-14.

conducted to comply with both the requirements of the existing charter school law and ensure accountability to the BOE.

**Department of Education.** A comprehensive description of how a charter school will provide for services to students is required in each charter school's Detailed Implementation Plan (DIP). To assist charter schools in making provisions for the wide variety of support services it needs, the DOE has prepared an extensive guidance document that categorizes these services by type and, in some instances, provides the per pupil cost of purchasing the service from the DOE.

Service Menu A identifies and itemizes essential and required support services that are provided to any public school in Hawai'i, including charter schools, by the Board of Education, the Superintendent's Office, the Information Resource Management Branch, the Communications Branch, and the Civil Rights Compliance Office. Examples of these are the maintenance of student information systems, internal and external communications from the Superintendent's Office, civil rights regulatory consultations, and the oversight activities of the BOE. These services are provided by the DOE at a cost of \$25.99 per pupil.<sup>8</sup>

Service Menu B includes basic support services such as business services (payroll processing, vouchering, Financial Management Systems reporting, and courier services), human resources (certificated and classified personnel management services and employee benefits), information technology services, and curriculum, instruction and student support services. The cost for Menu B services is \$103.90 per pupil.<sup>9</sup> For convenience, it is the current practice among most of the charter schools to contract for the services itemized in Menu B from the DOE.<sup>10</sup>

Service Menu C and Menu D apply only to conversion charter schools. Service Menu C simply states that the DOE will provide all services to conversion schools in their first year of transition to charter school status.<sup>11</sup> Service Menu D includes custodial, auxiliary services (moving of furniture and heavy equipment, custodial training and support, and vector control), electricity, and school safety attendants where applicable. The cost of these services is \$12.89 per pupil.<sup>12</sup>

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<sup>8</sup> Hawai'i, Department of Education, Memorandum of Agreement for Goods and Services, Menu A, pp. 7-11. Document obtained from Mr. Chuck Higgins, Charter School Specialist, DOE, via email on 15 October 2004).

<sup>9</sup> *Id.*, Menu B, pp. 7-9.

<sup>10</sup> Interviews with Hawaii Charter School Administrators.

<sup>11</sup> Hawai'i, Department of Education, Memorandum of Agreement for Goods and Services, Menu C, p. 7.

<sup>12</sup> *Id.*, Menu D, p. 8.

Service Menu E deals with special education services and delineates the roles of the charter schools and the DOE in the provision of such services. Public charter schools may choose to leave their federal Individuals with Disabilities Education Act (IDEA) and Section 504, Rehabilitation Act of 1973 funds with the DOE and receive services from their respective DOE district offices or complexes. They may also elect to take their respective IDEA moneys and provide the special education services themselves. If they take their share of the moneys, "they will be solely responsible for the provision of supplementary aids and services to their students with disabilities and any supplementary training or professional development related to the delivery of FAPE" (Free and Appropriate Public Education).<sup>13</sup> All but three of the charter schools have chosen to leave their moneys with the DOE and receive special education services from the district offices. The implication for an autonomous charter school district is that it would be responsible for all of the IDEA services, which may be excessive when dealing with "high needs" children.

Finally, Service Menu F covers school food services and is a voluntary agreement between the charter school and the DOE. Eighteen charter schools contract with the DOE for food services, while others arrange for their meals with another vendor, depending on their particular school's location and available suppliers. The provisions of the contract call for a charge of \$3.00 for an adult or student lunch and \$1.25 for a breakfast, regardless of whether the vendor is the DOE or another agency.<sup>14</sup>

One of the major issues to be addressed by an autonomous charter school district would be to determine how to provide the support services that are available to charter schools now through the DOE's various Service Menus. Theoretically, the major advantage to charter schools under the current system is that the cost of support services obtained through the DOE benefit from economies of scale, since the DOE hires support personnel to serve the needs of all public schools. If a separate charter school district were obliged to provide such services for itself, either by hiring new staff or contracting for their provision, the costs could be higher.

However, further analysis is needed into the degree and quality of the support services provided by the DOE once those mandated under the existing charter school law are taken into consideration. As stated earlier, in the current DOE organizational structure, the former seven district offices have been converted to 14 complex areas, each headed by a Complex Area Superintendent (CAS). Within each complex are several support staff, including educational specialists and resource teachers. Each complex is composed of several high schools and their elementary and intermediate feeder schools.

In a January 2003 report prepared by the Hawai'i Educational Policy Center on the creation of autonomous LEAs in Hawai'i, some of the deficiencies in the provision of

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<sup>13</sup> *Id.*, Menu E, p. 5.

<sup>14</sup> *Id.*, Menu F, p. 9.



support services under the current system were discussed. The report cites the following three weaknesses:

- Crippled support units. The cutbacks in staff at the central and district offices have minimized the benefits of economies of scale and coordination. The district offices are overburdened and increasingly occupied with creation of forms and documents rather than delivery of services to the schools. There is a persistent criticism that Hawai'i's system has a "bloated" bureaucracy, although recent reports place the out-of-school administration at only 2.2% of the system, less than the national average of 3.9%. At the Honolulu District offices, six complexes are "coordinated" or "supported" with a total staff of approximately 110, including clerical and special education personnel. This averages out to a little over 2 support staff for each of the 54 public schools in the Honolulu district.
- Dilution of qualifications. District and Complex level support personnel are caught between the need to attend to compliance issues and the need to provide expert support. This may result in the dilution of qualifications for either role.
- Compliance vs. innovation. Because compliance-related work is time consuming, district or complex level time and resources are not as available for new reform initiatives, such as dividing larger schools into smaller administrative and learning units.<sup>15</sup>

With proper staffing, it is conceivable that the complex areas could function as a more viable support team for the regular public schools in the complex. However, interviews conducted for this study indicate that charter schools face even more obstacles than regular schools in receiving support services from the complexes in which they are located. Because the charter schools, which report directly to the BOE and CSAO, function more independently of the complex system than regular schools, charter school spokespersons report that they are often not aware of services or assistance available from the complex staff. It is not uncommon for personal relationships and lines of communication between an individual charter school director or principal and the complex staff to be a major determinant of the amount and quality of services that the school receives from the complex.

## Summary

The authors of this report believe that the internal governance issues that would face a Hawai'i charter school district or LEA are not particularly problematic. Further consideration would need to be given to the means of constituting the district's

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<sup>15</sup> Hawai'i Educational Policy Center, *Should Hawai'i Create Autonomous Local Education Agencies?*, (Honolulu, Hawai'i: Author, January 2003), p. 10.

governing board, and the district's "central office" would need to have more staff than the CSAO currently does to do a credible job of administering the new entity. However, these are reasonably routine matters that are capable of being resolved once the task is at hand. Of more concern is the district membership issue discussed earlier. It was not evident to the study team that all charter school spokespersons were in favor of the creation of a charter district or LEA. If a charter school is against the idea, who will decide whether it is in or out of the district and will that decision be in the best long-term interests of the charter school movement in Hawai'i?

However, it is external governance issues and, in particular, the charter district's relationship with the DOE that present the thorniest problems. As schools within the existing statewide LEA, charter schools are able, or even entitled, to receive a variety of services and assistance from the DOE. In some cases, the charter schools have elected not to purchase services available from the DOE. For instance, nine charter schools have apparently found food services options preferable to those offered by the DOE. Yet, other DOE services are more complex and less easily procured from another vendor. Special education services are one of the most important examples of these.

Under IDEA, although states are ultimately responsible for ensuring that the provisions of IDEA are met, much of the heavy lifting is done by LEAs. Among other responsibilities, the LEA must: conduct evaluations to determine the disability status of its children; develop, review, and revise an individualized education program (IEP) for each child with a disability; provide a free appropriate public education (FAPE) in conformity with the IEP; and provide developmental, corrective, and support services that may be required to assist a disabled child to benefit from special education.<sup>16</sup> Clearly, the cost of providing such services can become high, and potentially ruinous, to a charter school that serves as its own LEA or to a small charter district. As one special education expert has stated:

The essential cost factor that is influenced by LEA status is the charter school's responsibility for programs and services for students with disabilities prescribed on their IEPs. An LEA must bear the cost for any student whose IEP requires placement in a day or residential placement...[T]his obligation can be borne more easily by most traditional school districts than by an individual charter school that constitutes an independent district. Most traditional districts are larger than a single autonomous charter school and have other resources to access, such as larger budgets that can be revised to pay for costly placements, or the raising of additional tax revenue. Similar to the few small, one-school type of districts, charter schools that are independent LEAs have very limited capacity to absorb unanticipated expenses and can go out of business as a result of funding problems.<sup>17</sup>

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<sup>16</sup> IDEA, Part B, §614.

<sup>17</sup> Eileen M. Ahearn, *Charter Schools and Special Education: A Report on State Policies* (Alexandria, Virginia: National Association of State Directors of Special Education, March 1999), pp. 11-12.

A Hawai'i charter school district with 27 schools may be large enough to withstand such financial demands and vicissitudes. Nevertheless, charter schools that are their own LEAs have found it sufficiently difficult to meet the requirements and obligations of IDEA that states have acted to counteract the burden. In Minnesota, for instance, where charter schools are independent LEAs, they still bill the student's district of residence for all special education costs in excess of the revenues received for the student. In Hawai'i, similar measures to defray the costs of special education for charter schools could be enacted.<sup>18</sup> Alternately, the new charter school LEA could be autonomous in all respects, but could establish joint eligibility for IDEA funds if permitted to do so under the state's charter school law.<sup>19</sup>

These examples from special education highlight the fact that the relationship between a Hawai'i charter school LEA and the DOE may vary considerably according to the issues involved. Creation of a charter school LEA does not imply that the district must always go it alone. In some instances, it may legitimately seek services and assistance from the DOE in the latter's capacity as the SEA, while in other instances it may legitimately affiliate with the DOE in the latter's capacity as the other Hawai'i LEA.

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<sup>18</sup> *Id.*, p. 12.

<sup>19</sup> IDEA, Part B, §613(e)(1)(A) states that "a State educational agency may require a local educational agency to establish its eligibility jointly with another local educational agency if the State educational agency determines that the local educational agency would be ineligible under this section because the local educational agency would not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities." However, IDEA, Part B, §613(e)(1)(B) goes on to say that "a State educational agency may not require a charter school that is a local educational agency to jointly establish its eligibility under subparagraph (A) unless it is explicitly permitted to do so under the State's charter school statute."

## Chapter 7

### RELATIONSHIP WITH OTHER STATE AGENCIES

Act 203, Session Laws of Hawaii 2003, amended section 302A-1187, *Hawaii Revised Statutes* to establish a Charter School Administrative Office attached to the Department of Education for administrative purposes only. Act 203 also established the position of CSAO Executive Director appointed by the Board of Education upon the recommendation of an organization of charter schools operating in Hawai'i or from a list of nominees submitted by the charter schools. Among the duties of the Executive Director is to establish contracts with state agencies for services to be rendered to the charter schools.

Section 302A-1187(b) provides in pertinent part:

(b) The executive director, under the direction of the board of education and charter schools, shall be responsible for the internal organization, operation, and management of the charter schools, including:

...

(5) Preparation and execution of contracts between the charter schools and other state agencies for financial or personnel services to be provided by such agencies to the charter schools;

...

The charter schools have the option to contract with state agencies or seek outside vendors for such services, but require internal procedures that are consistent with the goals of public accountability and public procurement practices.

New century charter schools shall be exempt from the state procurement code, chapter 103D, but shall develop internal policies and procedures for the procurement of goods, services, and construction, consistent with the goals of public accountability and public procurement practices. However, where possible, the new century charter school is encouraged to use the provisions of chapter 103D; provided that the use of one or more provisions of chapter 103D shall not constitute a waiver of the exemption of chapter 103D and shall not subject the new century charter school to any other provision of chapter 103D....<sup>1</sup>

As discussed in the preceding section, charter schools can and do avail themselves of DOE financial, personnel, and other services that are itemized and costed in a series of service menus published by the DOE. Not surprisingly, the charter schools' relationship with the DOE is by far the most complex of its relationship with state agencies. However, charter schools sometimes receive services from other state agencies, and this study includes a consideration of how the relationship between these

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<sup>1</sup> *Hawaii Rev. Stat.*, §302A-1184.

agencies and the charter schools might change with the creation of a charter school district or LEA.

On the basis of two test agencies (i.e., the Office of the Attorney General and the Department of Health) examined by researchers, it was concluded that the charter schools' relationship with state agencies would not change simply because they were restructured as a charter school district or LEA. In the case of these two agencies, services are provided to schools because they are public schools and the agencies are, or should be, oblivious to the internal structure of the SEA. Since the charter schools within an independent district or LEA would continue to be public schools, no changes in their relationship with state agencies would be anticipated unless such changes were explicitly authorized under state statutes.

Findings regarding the Office of the Attorney General and the Department of Health are summarized below.

### **State Agencies' Responsibilities to Charter Schools**

**Attorney General.** A letter from the State Attorney General's Office indicates that, as public schools, charter schools may obtain legal services from that Office:

[T]he Attorney General is responsible for providing legal services and representation for all state agencies and officials. Because new century charter schools are public schools and, as such, agencies of the State, the Attorney General ... must provide legal services to new century charter schools, including representation in the state and federal courts, if a charter school asks the Attorney General to provide those legal services.<sup>2</sup>

In the same letter, the Attorney General also states that "the new century charter schools are not required to obtain their legal services from the Attorney General" and "are free to contract for legal services from private attorneys without the Attorney General's or Governor's approval or participation."<sup>3</sup>

**Department of Health.** The State Department of Health (DOH) is responsible for providing health and related services to public schools through the comprehensive school health services program.<sup>4</sup> The current status is that every regular public school (except for two new schools) has a health aide provided by the Department of Health.

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<sup>2</sup> Hawai'i, Legislative Reference Bureau. *On the Level? Policy, Law and the Charter School Movement*, Appendix D, p. 72.

<sup>3</sup> Hawai'i, Legislative Reference Bureau, *On the Level? Policy, Law and the Charter School Movement*, Appendix D, pp. 72, 73.

<sup>4</sup> *Hawaii Rev. Stat.*, §321-241, 242.

The DOH is requesting two additional health aides in its budget to accommodate the new schools.

In 2003, the DOH requested an opinion from the Attorney General's Office regarding its obligation to charter schools and related issues. In its response to the inquiry, a brief answer to the issue of health aides was that "HRS 321-242 requires the DOH to provide school health aides to service new century charter schools." The letter also states that "the DOH has the authority to determine the number of health aides necessary to service each public school, including new century charter schools."<sup>5</sup> The letter also states that "the requirements of the school health services program, including the provision for school health aides, apply to new century charter schools."

However, it further states that "no statute or rule sets forth the number of health aides that the DOE [sic] must provide to each public school under the school health program, nor does any law establish a minimum requirement of one health aide per school. Instead, legislative history indicates that the DOH has the authority to determine how best to provide the services under this program."<sup>6</sup>

This letter opinion from the Attorney General clarifies that the DOH is required to provide comprehensive school health services, but does not require a health aide at each public school. While the DOH is requesting two additional health aide positions for new public schools, its request does not include the 23 new century charter schools. The first two conversion charter schools have existing health aide positions based on their prior status within the DOE, and the two most recent conversion schools are expecting to get their health aides from DOH in the near future. On the basis of the Attorney General's letter opinion, the conclusion to be drawn is that the difference between conversion and non-conversion charter schools vis-à-vis health aide positions is not due to the inconsistent application of the law, but because the DOH has determined that placement of health aide positions at the conversion schools is "how to provide the best services" under the comprehensive school health services program.

## Summary

Creation of an autonomous charter school district or LEA would not significantly alter the existing relationship between the charter schools and state agencies. Even if charter schools were to be established as a separate district, they would still be public schools, funded by public funds, and would continue to have the same, or much the same, relationship with state agencies in so far as those agencies' mandates require them to provide services to all public schools.

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<sup>5</sup> Letter from Ms. Bridget Palmer Holtaus, Deputy Attorney General, Office of the Attorney General to Chiyome Fukino, M.D., Director, State Department of Health, October 8, 2003.

<sup>6</sup> *Id.*

## Chapter 8

### FINANCIAL IMPLICATIONS

Act 134, Session Laws of Hawaii 2004, requested LRB to examine the financial implications of creating a Hawai'i charter school district and the impact of such a district on "obtaining additional federal funding."<sup>1</sup> This chapter considers these two important issues.

#### What the Law Says

Section 302A-1185(a), *Hawaii Revised Statutes*, establishes the funding parameters for charter schools. Subsection (a) provides in pertinent part:

(a) Beginning with the fiscal year 2004-2005 supplemental budget request, and each budget request thereafter, the charter school administrative office shall submit a request for general fund appropriations for each new century charter school based upon:

- (1) The actual and projected enrollment figures in the current school year for each charter school; and
- (2) A per pupil amount for each regular education and special education student, which shall be equivalent to the total per pupil cost based upon average enrollment in all cost categories, including comprehensive school support services but excluding special education services, and for all means of financing except federal funds, as reported in the most recently published department of education consolidated annual financial report. ...

....

Section 302A-1185(b), *Hawaii Revised Statutes*, specifies that all federal funding shall be no less than that provided to all other public schools. Subsection (b) provides in pertinent part:

(b) All federal financial support for new century charter schools shall be no less than all other public schools; provided that if administrative services related to federal grants and subsidies are provided to the charter school by the department, the charter school shall reimburse the department for the actual costs of the administrative services in an amount that does not exceed six and one-half per cent of the charter school's federal grants and subsidies.

Any new century charter school shall be eligible to receive any supplementary financial grant or award for which any other public school may submit a proposal, or any supplemental federal grants limited to new century

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<sup>1</sup> Act 134, Session Laws of Hawaii 2004, §2.

charter schools; provided that if department administrative services, including funds management, budgetary, fiscal accounting, or other related services, are provided with respect to these supplementary grants, the charter school shall reimburse the department for the actual costs of the administrative services in an amount that does not exceed six and one-half per cent of the supplementary grant for which the services are used.

....

In addition, section 302A-1185(b), *Hawaii Revised Statutes*, indicates that charter schools are free to seek out other funding sources without jeopardizing their per pupil allocations from the State of Hawai'i:

All additional funds that are generated by the local school boards, not from a supplementary grant, shall be separate and apart from allotted funds and may be expended at the discretion of the local school boards.

### **Cost Perspectives on a Hawai'i Charter School District**

Notwithstanding the seeming clarity of *Hawaii Revised Statutes* on the subject of charter school funding, there are serious differences of opinion between charter school administrators and the state about how the per pupil amount referred to in section 302A-1185(a)(2), *Hawaii Revised Statutes*, should be calculated and what it should include. It is not mere happenstance that the Hawai'i Educational Policy Center's first policy paper on issues facing charter schools focuses on funding.<sup>2</sup>

Currently, the allocation is based upon a calculated average of per pupil costs for all students in the DOE, which is \$5,355 for FY 2004 (2004-2005 school year) and \$5,482 for FY 2005 (2005-2006 school year). These figures are arrived at by dividing the DOE's total costs for the most recent fiscal year for which a consolidated financial report is available by the total number of students enrolled in the public schools. As permitted under section 302A-1185(a)(2), *Hawaii Revised Statutes*, the DOE subtracts federal funds and special education funds from its total costs before calculating this per pupil allocation.

However, many charter school administrators believe that the current method of calculating the per pupil allotment for charter schools is unfair and severely underestimates the expense of educating a student. For instance, as was discussed in Chapter 4, traditional schools operate essentially rent free or debt free in their facilities, whereas charter schools must either lease or build their facilities. Yet, the current method of calculating the per pupil allotment to charter schools does not take this difference into account by providing the schools with a special facilities assistance add-on. Similarly, as was also discussed in Chapter 4, there is a fundamental disagreement

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<sup>2</sup> Hawai'i Educational Policy Center, *Charter Challenges: Policy Issues Facing Charter Schools in Hawai'i, Charter School Policy Issue No. 1, Funding Charter Schools* (Honolulu, HI: Author, August 2004).



between charter school administrators and the state about how much should be deducted from the schools' per pupil allocations to pay for staff fringe benefits. Indeed, the Hawai'i Educational Policy Center notes that section 302A-1185(a)(2), *Hawaii Revised Statutes*, does not authorize a fringe benefit deduction at all.<sup>3</sup>

As discussed earlier, amendments to the Hawai'i charter school law during the 2004 legislative session may ameliorate some of the funding-related concerns voiced by charter school representatives. Specifically, Act 221, Session Laws of Hawaii 2004, amended section 4 of Act 51, Session Laws of Hawaii 2004 (S.B. No. 3238, S.D. 2, H.D. 2, C.D. 1), which created the new statutory section on weighted student formula, to allow charter schools to receive their per pupil allocations using the weighted student formula developed by the Committee on Weights and approved by the BOE beginning September 1, 2006. If there is a discrepancy between the charter schools' current per pupil allocations and their actual costs in educating students, it is hoped that the weighted student formula will close some of this gap. Similarly, Act 132, Session Laws of Hawaii 2004, which amended section 302A-1185, *Hawaii Revised Statutes*, enables the Legislature to make additional appropriations to charter schools, above and beyond the standard per pupil allocation, for fringe and other employee benefits and for facility costs.

Yet, in considering the financial implications of creating a charter school district, there are two essential points to bear in mind.

First, as was discussed in Chapter 4, creation of a charter school district is essentially a structural modification and does not, in and of itself, imply modifications to provisions of the Hawai'i charter school law that do not directly relate to this structural change. For instance, creation of a charter school district would necessarily imply an amendment to the Hawai'i charter school law to create a district governing authority. However, creation of such a district does not necessarily imply changes to the method of calculating the charter schools' per pupil allocation. There is nothing inherently self-contradictory about a Hawai'i charter school district based on the same per pupil funding formula now in use. Put differently, creation of a charter school district does not mean that any of the contentious issues surrounding the charter schools' per pupil allocation will have been settled.

Second, if a charter school district were created, it is possible that additional funds would be needed to provide the district with effective governance and administration. With the creation of a charter school district, the existing CSAO (or its successor) should function as the nucleus of a central district office on the structural model of traditional school districts. However, as briefly discussed in Chapter 6, the CSAO staff currently consist of only two positions—the Executive Director and a business manager. Creation of a Hawai'i charter school district that serves as its own LEA does not necessarily mean that new positions would need to be created in the charter district central office. Yet, if the central office's capabilities were to exceed those

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<sup>3</sup> *Id.*, p. 6.

of the CSAO, staff augmentation would obviously be desirable. For instance, a development specialist with responsibilities for identifying, applying for, and securing federal and private grant funds would be helpful in building a meaningful revenue stream for the schools. Similarly, funds should be provided for the charter school district board to cover board travel and expenses and staff time to prepare agendas, keep minutes of meetings, and handle other routine administrative functions.

## Federal Education Grants

As stated above, Act 134 directs LRB to examine the impact of a charter school district on the schools' ability to obtain federal funds. Federal education grants consist of two basic types—formula and discretionary. Formula grants, sometimes called state-administered grants, are noncompetitive awards based on a predetermined formula that relates to the overall purposes of the program. For instance, Title I of the *No Child Left Behind Act* (NCLB) of 2001, which is intended to improve the academic achievement of disadvantaged children, bases its allocation to SEAs and LEAs on the number of children aged 5 to 17 from families residing in the jurisdiction that are below the poverty level. The federal government's two largest educational grant programs, NCLB and the *Individuals with Disabilities Education Act* (IDEA), are both formula-driven.

Discretionary grants, on the other hand, are awarded on the basis of a competitive process. The U.S. Department of Education reviews applications, often using a panel of peer experts to read and rank the proposals, in light of the legislative and regulatory requirements of the program and published selection criteria. The review process gives the Department discretion to determine which applications best address the program requirements and are most worthy of receiving funds. With discretionary grants, there is no assurance that a given SEA or LEA will receive any of the funds available.

In its publication *A Guidebook for Charter School Operators and Developers*, the U.S. Department of Education indicates that charter schools have a high degree of latitude in pursuing federal funding opportunities. The *Guidebook* says that:

One factor that determines the degree to which charter schools may access federal funds is the nature of the state rules governing charter schools. State laws and regulations that establish charter schools vary widely among states. Of particular importance in applying for federal funding is the exact legal status of a charter school as defined by the state's authorizing legislation.<sup>4</sup>

The *Guidebook* further states:

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<sup>4</sup> United States, Department of Education, Office of Elementary and Secondary Education, *A Guidebook for Charter School Operators and Developers* (Washington, D.C.: Author, June 2000), p.7.

## FINANCIAL IMPLICATIONS

In some states, charter schools are established as highly independent legal entities with a legal status separate from that of the agency that grants the charter. In such cases, when receiving state funding or federal dollars, charter schools are treated as independent LEAs or school districts and receive funding directly through the appropriate SEA. In other states, charter schools are constituted as a legal branch of a local or "parent" school district, and thus are considered dependent schools and may only receive funding through the parent school district.

The variation in the legal status of a charter school affects the process by which a given charter school either applies [for] or receives a discretionary grant, or participates in a formula grant program. For example, if a charter school is considered an independent LEA by state law, the school can apply directly to their SEA for many of the formula-driven grant programs. If a school is not considered an independent LEA, the school will most likely participate in the program through its parent district. Given these complexities, the particular route federal funding takes before reaching an individual school differs from state to state, and from school to school.<sup>5</sup>

The U.S. Charter Schools website provides an inventory of federal grant programs for which charter schools are eligible. Many of these are available specifically to charter schools, while others are available to both charter and traditional schools.

As publicly funded schools, charter schools are eligible to apply for federal formula grants as well as discretionary grants administered by various Program Offices of the U. S. Department of Education (ED). In fact, these represent a large and important source of federal support for charter schools.<sup>6</sup>

### Financial Implications of LEA Status for Charter Schools

One major purpose of Act 134, Session Laws of Hawaii 2004, was to determine if a charter school district would assist in making additional federal funds available to charter schools. At the risk of sounding equivocal, the answer in the case of formula grants is that it depends on what is meant by "available." As public schools that are members of the single statewide LEA, Hawai'i charter schools can and do receive a share of federal formula funds for which they are eligible, although the means of distributing them may vary from one program to another. For instance, in the case of Title I funds, charter schools in Hawai'i that are eligible for these funds under the provisions of NCLB receive the same per pupil allocation as other public schools in the counties in which they are located. In FY 2003-04, the amount ranged from a low of \$361 per eligible pupil on Maui to a high of \$468 per eligible pupil on O'ahu. In the case of IDEA funds, the DOE offers each charter school the choice of either taking its IDEA

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<sup>5</sup> *Id.*, p.8.

<sup>6</sup> Retrieved on 22 November 2004 from: [www.uscharterschools.org/cs/fs/query/q/1853?x-r=runnew](http://www.uscharterschools.org/cs/fs/query/q/1853?x-r=runnew).

allocation and providing special education aids and services for itself or leaving its IDEA funds with the designated complex area to manage.<sup>7</sup>

If a charter school district serving as its own LEA were created, these school-by-school arrangements would cease. Under IDEA, for instance, the charter school LEA would apply directly to the SEA for IDEA Part B funds for all schools within the district. Only in exceptional circumstances (e.g., if the SEA determined that the LEA were not in compliance with state policies and procedures) could the SEA withhold grant funds from the LEA. Thus, although federal funds would now be directly available to the charter school district that the SEA currently has the option of retaining at the complex level, they would not be new funds for the individual schools who already receive an IDEA allocation or services from the complex area. Essentially the same logic applies to other federal formula grants such as Title I.

In the case of federal discretionary grants, there are many instances in which the eligible applicant is an LEA rather than an individual school or group of schools. Since Hawai'i charter schools are not an LEA, this means they must work with and through the parent LEA to submit a proposal for discretionary funding. This can be a challenging proposition in Hawai'i where the only LEA is the state educational agency and state-level educational officials have duties and responsibilities that are often more pressing than preparing discretionary grant applications.

Although a charter school LEA would be eligible to apply for federal discretionary grants independently of the DOE, it is virtually impossible to estimate how this would impact on the actual availability of funds. Successfully competing for federal discretionary grants is a time-intensive proposition that often requires experts in a range of specialties to prepare an application worthy of federal support. For instance, in the interests of accountability, many federal discretionary grant competitions rate the strength of applications' formative and summative evaluation plans. The purpose of these plans is to assist in determining whether a funded project is doing what it said it would do and ascertain its impact on the target group. However, evaluation expertise is not usually available in individual schools or even school complexes, and the DOE itself often contracts with private vendors to develop evaluation designs for major grant competitions. Similarly, many grant competitions focus on a relatively narrow federal priority (e.g., improving teaching methods for at-risk students or other special sub-populations, demonstrating innovative uses of technology in the classroom, or implementing new approaches to teacher training) that require the involvement of subject matter experts to prepare competitive applications. In short, even with its enhanced eligibility for federal discretionary grants, it is not certain that a charter school LEA would have the time or expertise to compete for many discretionary grants without significantly increased staffing in the form of a grants writer and a variety of content specialists who could design innovative and effective educational initiatives.

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<sup>7</sup> Hawai'i, Department of Education, *Guidelines for Charter Schools, Internal Management and Operational Guidelines for SV 03-04, Implementation of IDEA and Section 504 in New Century Public Charter Schools*, 9 September 2003, p.4.

## Summary

The major conclusions of this analysis of the financial implications of creating a Hawai'i charter school LEA are:

- (1) Creation of a charter school LEA will not, in and of itself, affect the state's current method of calculating the per pupil allotment to charter schools or resolve any of the disputes that currently exist about the fairness of that method. A charter school LEA is simply an alternative organizational structure and does not necessarily imply changes to the charter school law other than those needed to authorize the new structure.
- (2) Creation of a charter school LEA will facilitate direct access to federal formula grant funds for the charter schools as a group. However, it will not generate new formula funds or increase the total amount that the state receives.
- (3) Creation of a charter school LEA will enhance the schools' eligibility for discretionary federal grant funds, but does not guarantee the increased availability of such funds.
- (4) Realistically, additional staff will need to be provided to a charter district central office to significantly increase its opportunities to secure more federal discretionary grant funds.

## Chapter 9

### LEGAL ANALYSIS

This chapter provides an analysis of the noncontiguous host culture charter school district and noncontiguous charter school district (collectively referred to as "Charter Schools") proposed by Act 134, Session Laws of Hawaii 2004, in furtherance of Pacific Resources for Education and Learning's ("PREL") study commissioned by the State of Hawaii ("State") Legislative Reference Bureau ("LRB"), and offers a preliminary response to the specific inquiry of whether establishment of the Charter Schools violates the equal protection guarantee of the Fourteenth Amendment of the United States Constitution ("Fourteenth Amendment") or Article I, Section V of the Hawaii State Constitution ("Hawaii Constitution").<sup>1</sup>

In short, since determinations under the Fourteenth Amendment and the Hawaii Constitution are extremely fact dependent and the specific characteristics of the Charter Schools, including the Charter School legislation itself, remain undetermined, this chapter reaches only the following general conclusions. If the Charter School legislation (or admissions policy) does not facially discriminate based upon a protected class of persons nor does the establishment or administration of the Charter Schools further discriminatory motives, a court may uphold the Charter Schools as constitutional under the Fourteenth Amendment and the Hawaii Constitution. If, however, there exists any racial motive with respect to the Charter Schools, the State has a colorable argument as to the validity of the schools when the motives concern Native Hawaiians. On the other hand, since precedent with respect to disparate treatment of Native Hawaiians remains unsettled and courts closely scrutinize racial discrimination based upon most other racial groups, a court may still deem the Charter Schools unconstitutional under the equal protection guarantees of the Fourteenth Amendment or the Hawaii Constitution.

Part I of this chapter discusses Act 134; Part II evaluates the constitutionality of the proposed "host culture" charter school district under the Fourteenth Amendment; Part III discusses other potential challenges to the Charter Schools under the Fourteenth Amendment; Part IV discusses the constitutionality of the Charter Schools under the Hawaii Constitution; and Part V concludes.

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<sup>1</sup> This chapter discusses only the legality of the Charter Schools under the Fourteenth Amendment and the Hawaii Constitution. There may exist additional applicable laws, including but without limitation, the Hawaii State Constitution: Article I, Section V, and, Article X, Section I. Further, if the Charter Schools receive Federal funding, they will clearly within the purview of Title VI (if not already through State participation).

## I. Act 134, Session Laws of Hawaii 2004

Through Act 134, Session Laws of Hawaii 2004, the State Legislature directed the LRB to conduct a study on the feasibility of establishing a Charter Schools district. Act 134 stated in pertinent part:

The legislature finds that the charter school movement has gained momentum nationwide as a way to encourage innovation and excellence in public education. Accountable directly to the students, parents, and communities they serve, charter schools are constantly developing novel ways to improve student achievement while providing an educational atmosphere that cannot be duplicated in traditional schools.

The legislature finds that the State needs to allow charter schools the freedom to develop fully. In some states, each individual charter school is a local educational authority. In other states, there are varying ways for charters to be formed and governed. This Act seeks to address some of the questions that have arisen relating to the governance, administration, accountability, and growth of the charter school movement in Hawaii.<sup>2</sup>

Act 134 requested a number of specific analyses, one of which is: "An analysis of whether the districts would violate the fourteenth amendment to the United States Constitution."<sup>3</sup> The LRB commissioned PREL to conduct the actual study.

## II. Noncontiguous Host Culture Charter School District

The Fourteenth Amendment protects a broad spectrum of rights, giving rise to a host of theories pursuant to which plaintiffs might challenge the Charter Schools.<sup>4</sup> Since the specific characteristics of the Charter Schools are not yet known, this chapter cannot offer an exhaustive discussion of these potential challenges. The specific proposal of a noncontiguous host culture charter school district,<sup>5</sup> however, hints suspiciously at a racial preference. Therefore, an equal protection claim under the Fourteenth Amendment merits further discussion.

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<sup>2</sup> Act 134, Session Laws of Hawaii 2004.

<sup>3</sup> *Id.*

<sup>4</sup> See generally, Robert J. Martin, Charting the Court Challenges to Charter Schools, 109 Penn St. L. Rev. 43 (2004) for a survey of previously litigated challenges to charter schools.

<sup>5</sup> While Parts II and III of this chapter discuss the establishment and administration of host culture charter schools as opposed to the establishment of a host culture charter school "district", for purposes of a racial discrimination analysis, this distinction proves insignificant. As such, while Parts II and III of this chapter discuss the establishment and administration of host culture charter "schools", rather than that of a host culture charter school "district", the analysis with respect to each is one in the same.

As an initial matter, it is important to note that this chapter assumes the host culture charter school district proposed by Act 134 will focus primarily upon Native Hawaiian culture,<sup>6</sup> thus potentially impacting the Native Hawaiian community differently than other ethnic communities within the State. As such, this chapter focuses primarily upon a racial discrimination challenge to the Charter Schools as the most viable.

### A. Equal Protection and the Fourteenth Amendment

The Fourteenth Amendment prohibits States from denying "any person within its jurisdiction the equal protection of the laws."<sup>7</sup> The United States Supreme Court ("US Supreme Court") consistently interprets this to impose strict limits upon racial classifications by states<sup>8</sup> and views racial classifications as "presumptively invalid"<sup>9</sup> States may "treat people differently because of their race only for the most compelling reasons".<sup>10</sup> Courts examine racial classifications, including benign classifications – *i.e.* those benefiting certain racial groups – through application of a strict scrutiny analysis, and only hold racial distinctions constitutional when narrowly tailored to further a compelling government interest.<sup>11</sup>

The equal protection guarantee of the Fourteenth Amendment does not deprive states of all power to act based upon race.<sup>12</sup> In fact, most laws affect racial groups

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<sup>6</sup> See Act 134, Session Laws of Hawaii 2004.

<sup>7</sup> Courts hold the Federal government to the same standard under the Fifth Amendment of the United States Constitution. *Adarand v. Peña*, 515 U.S. 200, 235-36 (1995).

<sup>8</sup> The Fourteenth Amendment applies only to "state action". While the degree of entanglement between charter schools and states varies, as a general rule, charter schools are sufficiently "controlled" by states to constitute state action for purposes of the Fourteenth Amendment. See, e.g., *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996). For further discussion, See Justin M. Goldstein, Exploring "Unchartered" Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution, 7 S. Cal. Interdisc. L.J. 133 (1998); Kevin S. Huffman, Charter Schools, Equal Protection Litigation, and the New School Reform Movement, 73 N.Y.U. L. Rev. 1290, 1398 (1998). Charter schools are typically "funded by public money, created and defined by state legislation, and fulfill state functions." Wendy Parker, The Color of Choice: Race and Charter Schools, 75 Tul. L. Rev. 563, 604 (2001) (citing Martha Minow, Reforming School Reform, 68 Fordham L. Rev. 257 (1999); See also Huffman, 73 N.Y.U. L. Rev. at 1398. Further, "the entities overseeing the charter school process are overwhelmingly state actors. School districts and state boards of education exercise a great deal of control over charter schools". *Id.* In fact, we could not discover any case in which a charter school did not satisfy the "state action" inquiry. Accordingly, the Charter Schools likely constitute state action. Thus, this chapter discusses the issue no further.

<sup>9</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>10</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>11</sup> See *id.*; *Grutter v. Bollinger*, 539 U.S. 1, 14 (2003) (examining University of Michigan Law School's admissions policy); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (examining University of Michigan's undergraduate admissions policy).

<sup>12</sup> *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).



differently,<sup>13</sup> and the settled rule recognizes "that the Fourteenth Amendment guarantees equal laws, not equal results."<sup>14</sup> Rather, the Fourteenth Amendment aims to invalidate laws originating in discriminatory motives. In accomplishing this object, the US Supreme Court employs a "twofold inquiry."<sup>15</sup> First, the court determines whether a statute is neutral in the sense that it is not expressly based upon racial classifications – *i.e.* facially discriminatory. If a statute itself is not race-based, the Court will then evaluate whether an unequal racial result reflects invidious race-based discrimination.<sup>16</sup> For example, a state might violate the Fourteenth Amendment by enacting a law or sponsoring a program expressly premised upon racial distinctions,<sup>17</sup> employing "a classification that is ostensibly neutral," but applied unequally on a racial basis,<sup>18</sup> or enacting "a neutral law[, which] has a disproportionately adverse effect upon a racial minority . . . if that impact can be traced to a discriminatory purpose."<sup>19</sup>

In the present case, the host culture charter schools likely do not facially violate the Fourteenth Amendment since they are not based upon express racial classifications, but are rather culturally focused. Further, we understand that the host culture charter schools will not employ a race-based admissions policies. Nonetheless, courts might still discover a violation of the Fourteenth Amendment through the establishment of "host culture" charter schools if the charter schools are unequally established or administered, or result in a disparate racial impact, pursuant to a discriminatory motive.

## **B. Disparate Impact**

A facially neutral law may violate the Fourteenth Amendment if it results in a racially disparate impact and is motivated by racial considerations<sup>20</sup> – *i.e.* invidious discrimination. As a general rule, a "law, neutral on its face and serving ends otherwise

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<sup>13</sup> *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

<sup>14</sup> *Id.* at 273.

<sup>15</sup> *Id.* at 274.

<sup>16</sup> *Id.*

<sup>17</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>18</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>19</sup> *Feeney*, 442 U.S. at 256. See *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

<sup>20</sup> "The discriminatory purpose need not be the only purpose, but it must be 'a motivating factor in the decision.'" *Villanueva v. Carere*, 85 F.3d 482, 484 (10th Cir. 1996) (citing *Arlington Heights*, 429 at 265-66).

within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."<sup>21</sup> Rather, "a neutral law [with] a disproportionately adverse effect upon a racial minority, [] is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."<sup>22</sup> "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. To establish intentional discrimination, a plaintiff must show that the 'decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of not merely in spite of its [disproportionate] effects upon an identifiable group."<sup>23</sup> "In determining whether invidious discrimination was a motivating factor requires the Court to make a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."<sup>24</sup> "[A]n invidious discriminatory purpose may be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."<sup>25</sup>

Numerous aspects of public educational programs affect the racial composition of a student body. As one commentator notes in the context of charter schools, "[a] school's site, curriculum, instruction, staff, faculty, board members, and transportation will all affect the racial composition of the school."<sup>26</sup> "In many respects, a charter school can intentionally create segregated schooling, even with a race-neutral admissions policy. A charter school's design, over which both the requesting and authorizing agency have a great deal of control, impacts dramatically student enrollment."<sup>27</sup> For example:

A school started by a group of whites, placed in a white neighborhood with no transportation, with an all-white faculty, staff, and board to oversee Gaelic and Irish curriculum can be expected to enroll an overwhelming number of white students. On the other hand, a school sited in an African American neighborhood, providing no transportation, started by a group of African Americans, staffed by African Americans, guided by an African American board, and structured around an Afrocentric curriculum will overwhelmingly attract African American students. Educators fully realize that their decisions on how to

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<sup>21</sup> Adarand, 426 U.S. at 242.

<sup>22</sup> Feeney, 442 U.S. at 272; See Washington, 426 U.S. at 229; Arlington Heights, 429 U.S. at 252.

<sup>23</sup> *Grimes v. Cavazos*, 786 F. Supp. 1184, 1192 (S.D. N.Y. 1992) (citing Feeney, 442 U.S. at 279).

<sup>24</sup> *Knight v. State of Alabama*, 900 F. Supp. 272, 343 (N.D. Ala. 1995) (citing Arlington Heights, 429 U.S. at 266) (finding no evidence that the absence of a black studies department resulted from intentional discrimination) (internal quotations omitted).

<sup>25</sup> Washington, 426 U.S. at 242.

<sup>26</sup> Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 Tul. L. Rev. 563, 604 (2001).

<sup>27</sup> *Id.*

operate a charter school will impact student enrollment patterns, and centric charter schools in some instances appear to be designed by definition to be segregated, publicly funded education.<sup>28</sup>

Courts agree, recognizing that "culture" "might in some circumstances be used as a proxy for ethnicity, race, national origin or some other suspect classification."<sup>29</sup>

To date, courts have not yet directly addressed the constitutionality of culturally-focused charter schools ("centric charter schools"). Courts do, however, generally deem programs focusing upon certain ethnic groups ("centric programs") constitutional under the Fourteenth Amendment, so long as the programs do not further racially discriminatory motives.<sup>30</sup> On the other hand, courts also consistently recognize that plaintiffs challenging centric programs could prevail if they prove racial motivations.<sup>31</sup>

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<sup>28</sup> Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 *Tul. L. Rev.* 563, 607 (2001). There exist a number of charter schools demonstrating these effects. For example, in 2001:

[I]n Lansing, Michigan, where African Americans make up thirty-three percent of the school district, the El-Hajj Malik El-Shabazz Academy, with its Afrocentric curriculum, is almost completely African American. Likewise, enrollment at the A.G.B.U. Alex & Marie Manogian School in Southfield, Michigan, a charter school with a focus on Armenian language and culture, is almost 100% Armenian. The same is true for Benito Juarez Academy, an overwhelmingly Hispanic charter school in Saginaw, Michigan (where only thirteen percent of the children in the school district are Hispanic), and Eci Nompá Woonspe' Charter School in Morton, Minnesota, with its ninety-five percent American Indian student population, as compared to eleven percent in the surrounding school district. *Id.* at 602 (citing *Ctr. For Educ. Reform, National Charter Schools Directory 2000* (Angela H. Dale, 6th ed. 2000)).

<sup>29</sup> *Villanueva v. Carere*, 85 F.3d 482, 488 (10th Cir. 1996).

<sup>30</sup> "Studying matters related to a particular ethnic group, race, or sex can be an educational experience of all groups. French people, either individually or as a group, are not "preferred" when the French language or French literature or French history is taught." Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 *UCLA L. Rev.* 1335, 1349 (1997). To date, "no court has suggested that these [centric] programs would have to face [strict] scrutiny, precisely because they are not discriminatory: So long as they're open to all, they discriminate against none." *Id.* at 1349.

On the other hand, at least one commentator disagrees, stating that "centric charter schools, to the extent they do not match their surrounding school district, would be deemed unconstitutional. They are designed to educate one racial group and therefore treat students differently because of their race." Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 *Tul. L. Rev.* 563, 604 (2001). See *Villanueva*, 85 F.3d at 481 (rejecting an argument that "cultural" is a "code-word" for "ethnic minority").

<sup>31</sup> See *Grimes v. Cavazos*, 786 F. Supp. 1184 (S.D. N.Y. 1992) (finding no evidence of intentional discrimination and upholding "curriculum of New York City schools favoring European culture"); *Grimes v. Sobol*, 832 F. Supp. 704 (S.D. N.Y. 1993) (concluding that implementation of "a Holocaust Curriculum and an Italian Heritage Curriculum", but no "special curriculum to focus on issues of particular importance to African Americans" did not constitute discrimination against African Americans); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2nd Cir. 1983) (holding that the Secretary's failure to provide forms and services in Spanish "does not constitute discrimination against Hispanics since "[l]anguage, by itself, does not identify members of a suspect class"; and recognizing that an equal protection claim "requires that a plaintiff show an intent to discriminate"); *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002) (recognizing that

For example, with respect to site locations of public schools, courts generally take the position that "a school board has no constitutional duty to select school sites or make other educational decisions for the purpose of relieving a racial imbalance which it did not cause."<sup>32</sup> A school board may not, however, "deliberately select sites to achieve racial segregation",<sup>33</sup> since such is clearly unconstitutional under *Brown v. Board of Education*.<sup>34</sup>

If a plaintiff challenges any racial disparate impact resulting from the "host culture" charter schools (and/or its programs) under the Fourteenth Amendment and establishes racial motives, a court will likely examine the school (and/or its programs) through a strict scrutiny analysis. Under strict scrutiny, as discussed in Part II(A) above, a State must demonstrate that its racially motivated action serves a compelling governmental interest, and is narrowly tailored to further that interest. This "standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification." There is only one "strict scrutiny" level of review.<sup>35</sup>

In previous decisions, the US Supreme Court deemed remedying past discrimination<sup>36</sup> and a pursuit of diversity<sup>37</sup> compelling government interests in the context of public education. In the present case, however, there is likely little evidence of past discrimination against Native Hawaiians in Hawaii's charter schools,<sup>38</sup> especially

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"[w]hile bilingual education has obvious racial implications," but upholding such programs not motivated by racial discrimination or racial animus). The initial three of the foregoing cases discuss racial discrimination primarily in the context of Title VI, however, the applicable standards are identical to those of the Fourteenth Amendment, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978).

<sup>32</sup> 16B McQuillin *The Law of Municipal Corporations* §46.20.10 (3rd ed. 2004) (citing *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996)). *But c.f. In Re Grant of Charter School Application of Englewood On Palisades Charter School*, 727 A.2d 15 (1999), *aff'd*, 753 A.3d 687, 694-95 (2000) (requiring Commissioner to "assess the racial impact that a charter school applicant will have on the district of residence in which the charter school will operate" and to "prevent segregation in the public schools . . . us[ing] the full panoply of his powers to avoid that result" pursuant to the New Jersey Constitution's prohibition of segregation in public schools).

<sup>33</sup> *Id.* (citing *Villanueva*, 85 F.3d at 481; *Banks v. Muncie Community Schools*, 433 F.2d 292 (7th Cir. 1970); *United States School Dist. 151 of Cook County, Ill.*, 404 F.2d 1125 (7th Cir. 1968); *Berry v. School Dist. Of Benton Harbor*, 442 F. Supp. 1280 (W.D. Mich. 1977)). *See also Bell v. Board of Education, Akron Public Schools*, 491 F. Supp. 916 (N.D. Ohio 1980), *aff'd*, 683 F.2d 963 (6th Cir. 1982); *Reed v. Rhodes*, 455 F. Supp. 546 (N.D. Ohio 1978) (school officials are required to use reasonable prudence to avoid predictably segregative decisions).

<sup>34</sup> 347 U.S. 483 (1954).

<sup>35</sup> *Adarand*, 515 U.S. at 222 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

<sup>36</sup> *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989).

<sup>37</sup> *Gutter*, 539 U.S. at 14; *Gratz*, 539 U.S. at 244.

<sup>38</sup> *See Wendy Parker, The Color of Choice: Race and Charter Schools*, 75 Tul. L. Rev. 563, 615 (2001).

since charter schools are relatively new institutions. Further, the State of Hawaii likely cannot show a pursuit of diversity through the design of "host culture" charter schools since centric charter schools, by definition, do not pursue the goal of diversity.<sup>39</sup> The State may be able to argue that it designed the "host culture" charter schools to address past discrimination in Hawaii's public school system as a whole, however, since there exists no prior decisions discussing this issue, the breadth to which a court would extend its analysis of prior discrimination remains uncertain – *i.e.* whether a court will examine only charter schools or the State's public school system as a whole.<sup>40</sup> On the other hand, if the State cannot establish a history of discrimination, courts consistently find "no legal basis, in the absence of demonstrable harm from prior race discrimination, to impose remedies solely addressing inequities of educational opportunity."<sup>41</sup>

Therefore, under current jurisprudence addressing racially discriminatory educational programs, if a plaintiff establishes a discriminatory motive on behalf of the State in legislating for, establishing and/or administering "host culture" charter schools, the State may be able to argue that the schools address prior discrimination against Native Hawaiians in our State's public school system as a whole. If such argument fails, however, the State may be unable to validate the schools on any other grounds under the "strict scrutiny" standard of the Fourteenth Amendment. If, however, no discriminatory motives exist (or can be shown), a court might hold the schools valid under the Fourteenth Amendment despite a disparate impact.

### **C. Special Treatment of Native Hawaiians**

While the above discussion relies upon current equal protection jurisprudence under the Fourteenth Amendment, since this chapter assumes that the "host culture" charter schools involve issues pertaining to Native Hawaiians, a discussion of the present legal climate with respect to Native Hawaiians is necessary.

Presently, there exists much controversy as to whether Federal and State governments should be afforded greater discretion in their differential treatment of Native Hawaiians, as is permitted with respect to Native Americans. Courts long recognized a "special relationship" between the United States and Native Americans

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<sup>39</sup> *Id.*

<sup>40</sup> The State must possess actual evidence of past discrimination prior to establishment of the "host culture" charter schools. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) ("While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.")

<sup>41</sup> See *generally*, Martha Minow, *Reforming School Reform*, 68 *Fordham L. Rev.* 257, 265 (1999).

rooted in the Indian Commerce Clause.<sup>42</sup> Courts hold that the Indian Commerce Clause allows Congress a special power to regulate with respect to Native American tribes, granting Native Americans a "unique legal status."<sup>43</sup> The U.S. Supreme Court in *Morton v. Mancari*<sup>44</sup> explains that Native Americans are not a "discrete racial group, but, rather . . . members of quasi-sovereign tribal entities."<sup>45</sup> Accordingly, the strict scrutiny analysis of the Fourteenth Amendment does not apply to differential treatment of Native Americans. Rather, "[a]s long as the . . . treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians [– i.e. the rational basis test], such legislative judgments will not be disturbed."<sup>46</sup>

It currently remains unsettled whether disparate treatment of Native Hawaiians should be reviewed under the same rational basis level of scrutiny. While courts and commentators commonly cite parallels between the histories of, and our nation's relationships with, Native Americans and Native Hawaiians,<sup>47</sup> there unfortunately exists little judicial guidance as to the applicable standard of review. In *Nalielua v. State of Hawaii*,<sup>48</sup> the United States District Court examined the constitutionality of the Hawaiian Homes Commission Act of 1920. The Court reasoned that "Native Hawaiians are people indigenous to the State of Hawaii, just as the American Indians are indigenous to the mainland United States."<sup>49</sup> In reliance upon *Mancari*, the *Nalielua* court looked to "the clear body of law surrounding preferences given to American Indians"<sup>50</sup> and applied the rational basis test to conclude that "the Hawaiian Homes Commission Act, 1920, does not create a suspect classification which offends the constitution."<sup>51</sup> Thereafter, the same court in the 1996 *Rice v. Cayetano*<sup>52</sup> case examined the exclusion of non-

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<sup>42</sup> See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n. 7 (1973); *United States v. Antelope*, 430 U.S. 641, 645 & n.6 (1977); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537, 560-62 (1996).

<sup>43</sup> *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).

<sup>44</sup> 417 U.S. 535 (1974).

<sup>45</sup> *Morton*, 417 U.S. at 554 (1974).

<sup>46</sup> *Id.* at 555.

<sup>47</sup> See, e.g. *Rice v. Cayetano*, 941 F. Supp. 1529 (1996); Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996).

<sup>48</sup> 795 F. Supp. 1009 (D.Haw. 1990), aff'd, 940 F.2d 1535 (9th Cir. 1991).

<sup>49</sup> *Id.* at 1013. See also *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339 (1982).

<sup>50</sup> *Id.* at 1013 and n. 4 ("[A]lthough the state does not have the same unique relationship with native Hawaiians that the United States enjoys, the state may exercise jurisdiction over them in response to an explicit federal measure designed to confer such responsibility.")

<sup>51</sup> *Id.*

<sup>52</sup> 941 F. Supp. 1529 (D.Haw. 1996).

Native Hawaiians from a vote regarding Native Hawaiian self-governance under the Fourteenth Amendment, stating "[t]his court's decision in *Nalielua* is authority for the proposition that special legislation for Native Hawaiians, like that for Native Americans, does not require strict scrutiny analysis." The Court noted that "Congress has clearly indicated that the Native Hawaiians have a special relationship with the United States government that closely parallels that of the American Indians"<sup>53</sup> and then relied upon the rational basis test in its review to hold the vote restrictions valid under the Fourteenth Amendment.<sup>54</sup> These rulings suggest that differential treatment of Native Hawaiians will be evaluated under the less rigorous rational basis standard in certain circumstances. In the 2000 *Rice v. Cayetano*<sup>55</sup> case, however, the U.S. Supreme Court inferred that this still remains an unsettled area of law and refrained from issuing clear precedent on the issue. In that case, plaintiffs again challenged the vote limitations discussed in the earlier *Rice* case bringing suit under the Fifteenth Amendment of the United States Constitution. The U.S. Supreme Court explained:

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises *not yet established in our case law*. Among other postulates, it would be necessary to conclude that Congress . . . has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. . . . *We can stay far off that difficult terrain, however.*<sup>56</sup>

Therefore, the question of which standard applies to special treatment of Native Hawaiians remains uncertain. There exists a host of federal and state programs singling out Native Hawaiians; however, existence does not necessarily indicate constitutionality.<sup>57</sup> Congress is currently discussing, but has not yet passed,<sup>58</sup> the

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<sup>53</sup> *Id.* at 1542.

<sup>54</sup> *Id.* at 1543.

<sup>55</sup> 528 U.S. 495 (2000).

<sup>56</sup> *Rice v. Cayetano*, 528 U.S. 495, 518-19 (2000) (invalidating the vote limitation as a violation of the one person, one vote rule under the Fifteenth Amendment) (emphasis added).

<sup>57</sup> Compare Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996), with Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998).

<sup>58</sup> See S. Rep. No. 108-85 (2003) ("Although Congress has consistently recognized Native Hawaiians as among the Native people of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause, it has not as yet acted to provide a process for the reorganization of a Native Hawaiian sovereign governing entity. S. 344 provides authority for that process."); Frank Oliveri & Vicki Viotti, Vote on Akaka Bill Expected Next Year, Honolulu Advertiser, Tuesday, October 12, 2004 (online version).

Native Hawaiian Recognition Act<sup>59</sup> (commonly referred to as "The Akaka Bill"), which provides Native Hawaiians with increased autonomy through self-governance. If passed, the Akaka Bill would likely enable courts to view Native Hawaiians as a political group rather than a race for purposes of the Fourteenth Amendment, thus making the rational basis test applicable in reviewing government programs singling out Native Hawaiians.

At this point, however, while the State may have a strong argument for the validity of "host culture" charter schools (if challengers succeed in establishing discriminatory motives) under *Naliielua* and the 1996 *Rice* case, the State cannot be sure a court will adopt the reasoning of those cases rather than apply a strict scrutiny standard, under which the schools will likely be deemed unconstitutional. Therefore, in the absence of clear U.S. Supreme Court precedent or Congressional enactment of The Akaka Bill, the State cannot proceed with its "host culture" charter schools without assuming risk.

If the State Legislature decides to establish the Charter Schools, the Legislature could strengthen its position (should a challenge surface) by including clear language in the establishing legislation to dispel suspicions of racial discrimination. To this end, the Legislature might identify the specific interests to be addressed through implementation of the Charter Schools, such as observance of our Hawaii Constitution's mandate that the State "provide for a Hawaiian education program consisting of language, culture and history in the public schools,"<sup>60</sup> or as Act 134 states, "encourage[ing] innovation and excellence in public education", creating direct accountability to students, parents and communities, and "developing novel ways to improve student achievement while providing an educational atmosphere that cannot be duplicated in traditional schools."<sup>61</sup> The Legislature may further emphasize its intent to provide these benefits for both Native Hawaiian and Non-Native Hawaiian students alike. While it is possible a court will deem such language pretext, such language can only help the State in the event the Charter Schools are challenged.

### III. Other Challenges to Charter Schools

Notwithstanding the foregoing discussion, as a general rule, courts allow states deference in establishing public school systems since "[t]he very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them.'"<sup>62</sup>

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<sup>59</sup> See Native Hawaiian Recognition Act of 2003, S. 344, 108th Congress (2003).

<sup>60</sup> Haw. Const., art. X, § 4 (1978).

<sup>61</sup> Act 134, Session Laws of Hawaii 2004.

<sup>62</sup> *Villanueva v. Carere*, 85 F.3d 481, 487 (1996).



"Such deference is abandoned, though, when a legislative act either disadvantages a 'suspect class' or impinges upon the exercise of a 'fundamental right.'"<sup>63</sup>

Courts have long held that education is not a "fundamental right" in the context of the Fourteenth Amendment,<sup>64</sup> thus a challenge to the Charter Schools will not *per se* invoke a heightened level of scrutiny.<sup>65</sup> Accordingly, so long as a state's actions do not facially discriminate or create a disparity based upon a protected class of persons (*e.g.*, race, gender) pursuant to discriminatory motives, a court will likely uphold the actions under the Fourteenth Amendment if they "rationally further a legitimate state purpose."<sup>66</sup> For example, in *Villanueva v. Carere*, the Tenth Circuit found the closing of public schools and opening of charter schools rationally related to the state's legitimate purpose of "creat[ing] new, innovative, and more flexible ways of educating all children within the public school system."<sup>67</sup> Similarly, in the present case, the State can argue that establishment of Charter Schools furthers the legitimate purposes of furthering the Hawaii Constitution's mandate that the State "provide for a Hawaiian education program consisting of language, culture and history in the public schools,"<sup>68</sup> or accomplishes the State Legislature's goals of "encourage[ing] innovation and excellence in public education", creating direct accountability to students, parents and communities, and "developing novel ways to improve student achievement while providing an educational atmosphere that cannot be duplicated in traditional schools"<sup>69</sup> in satisfaction of the rational basis standard.

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<sup>63</sup> *Id.* (citing *Pylar v. Doe*, 457 U.S. 202, 216-17 (1982)). Examples of fundamental rights include privacy, marriage, voting, travel, and freedom of association. *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

<sup>64</sup> *Id.* at 489.

<sup>65</sup> *See id.* (finding no suspect classification of students and applying a rational basis test).

<sup>66</sup> *Id.* at 488 (citing *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)) ("Because the Act creates no suspect classification, and because no fundamental right is alleged to be affected, the correct standard is whether the challenged state action rationally furthers a legitimate state purpose.").

<sup>67</sup> *Id.*

<sup>68</sup> Haw. Const., art. X, § 4 (1978).

<sup>69</sup> Act 134, Session Laws of Hawaii 2004.

#### IV. Equal Protection and the Hawaii State Constitution, Article I, Section V

The equal protection guarantee of the Hawaii State Constitution parallels the Fourteenth Amendment of the United States Constitution.<sup>70</sup> The Hawaii State Constitution, Article I, Section V mandates: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."<sup>71</sup> With a few exceptions (none applicable in the present case), courts generally rely upon settled interpretations of the Fourteenth Amendment (and often the Fifteenth Amendment, which applies the equal protection standards of the Fourteenth Amendment to the federal government)<sup>72</sup> in analyzing claims under the equal protection provision of the Hawaii State Constitution, Article I, Section V ("Hawaii Constitution").

##### A. Race-Based Discrimination

Due to the similarities between the Fourteenth Amendment and the Hawaii Constitution, when courts examine equal protection claims with respect to most types of discrimination<sup>73</sup> pursuant to both the Fourteenth Amendment and the Hawaii Constitution, courts rarely make distinctions between the two constitutional authorities. Rather, courts discuss both constitutional protections as if identical.<sup>74</sup> For example, in *Honolulu Weekly v. Harris*,<sup>75</sup> the Ninth Circuit recognized that "[e]qual protection is analyzed similarly under the United States and Hawaii Constitution,<sup>76</sup> and thus chose to address claims under the Fourteenth Amendment and the Hawaii Constitution

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<sup>70</sup> See *Rice v. Cayetano*, 941 F. Supp. 1529, 1538 n.8 (1996) ("Article I §5 . . . of the Hawaii State Constitution parallel[s] the Fourteenth . . . Amendment of the United States").

<sup>71</sup> Haw. Const. art. I, §4 (1978) formerly art. I, §4).

<sup>72</sup> *Rice*, 941 F. Supp at 1538 n.8.

<sup>73</sup> See e.g. *Baehr v. Lewin*, 74 Haw. 530, 580-82 (1993) (departing from federal constitutional precedent and holding "sex" a "suspect category" subject to strict scrutiny analysis under the Hawaii State Constitution, article I, section 5); *Richardson v. City and County of Honolulu*, 802 F. Supp. 326 (D.Haw. 1992) ("While the Hawaii State Constitution is generally modeled after the United States Constitution, the scope of its protections are not necessarily the same.") (citing *Hawaii Housing Authority v. Lyman*, 68 Haw. 55 (1985)). The limited areas in which the Hawaii Supreme Court departs from federal precedent bear little relevance to the discussion in this chapter, and thus merit no further discussion in this chapter.

<sup>74</sup> See *State v. Tookes*, 67 Haw. 608 (1985) (addressing both "the guarantees of equal protection of the laws provided by the federal and State constitutions" in one general discussion).

<sup>75</sup> 298 F.3d 1037 (9th Cir. 2002).

<sup>76</sup> *Id.* at 1947 n.10.

"simultaneously."<sup>77</sup> Similarly, the Hawaii Supreme Court in *State v. Miller*<sup>78</sup> began its equal protection discussion by stating "[t]he guarantee of equal protection of the laws under Hawai'i and United States Constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment," and continued its analysis without any further distinction between the United States Constitution and the Hawaii Constitution.<sup>79</sup>

The cases in which Hawaii state courts discuss equal protection claims with respect to only the Hawaii Constitution further demonstrate the conformance of Hawaii Constitutional authority to federal constitutional precedents. True, Hawaii state courts preserve the right to depart from federal precedent when interpreting the Hawaii Constitution;<sup>80</sup> however, as in the cases discussed above, Hawaii state courts generally rely upon Fourteenth Amendment authority and rationale when analyzing equal protection claims under the Hawaii Constitution. For example, in *Nagle v. Board of Education*,<sup>81</sup> the Hawaii Supreme Court addressed an age discrimination claim brought pursuant to the Hawaii Constitution, but cited and discussed a number of federal equal protection cases as precedent. In fact, the Hawaii Supreme Court specifically stated, "[i]n light of these recent Supreme Court cases, this court must now decide as a matter of Hawaii's constitutional law whether to follow these decisions in adopting a standard of review," and concluded that "[b]ecause [it was] persuaded by the [United States] Supreme Court's reasoning . . . the principles of law enunciated in those cases are controlling in this jurisdiction."<sup>82</sup>

In the few cases specifically discussing racial discrimination, courts reached identical conclusions under both the Fourteenth Amendment and the Hawaii Constitution. For example, in *Richardson v. City and County of Honolulu*,<sup>83</sup> the United States District Court discussed a racial discrimination claim under the United States Constitution finding no violation. Thereafter, the court addressed the same racial discrimination claim under the Hawaii Constitution. The court noted that "[w]hile the Hawaii State Constitution is generally modeled after the United States Constitution, the

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<sup>77</sup> *Id.*

<sup>78</sup> 84 Hawai'i 269 (1997).

<sup>79</sup> *Id.* at 276.

<sup>80</sup> See *Hawaii Housing Authority v. Lyman*, 68 Haw. 55, 69 (1985) ("However, we are not precluded from interpreting our state constitution to afford greater protection than that required by federal constitutional interpretations and have not hesitated to do so where warranted by logic and due regard for the purposes of those protections.") (citing *State v. Kaluna*, 55 Haw. 361, 369 (1974); *State v. Teixeira*, 50 Haw. 138, 142 n.2 (1967)).

<sup>81</sup> 63 Haw. 389 (1981).

<sup>82</sup> *Id.* at 391-94.

<sup>83</sup> 802 F. Supp. 326 (D.Haw. 1992).

scope of its protections are not necessarily the same." However, the court then concluded that "legal analysis" of racial discrimination claims under the Hawaii Constitution are "essentially the same as the inquiry under the corresponding sections of the United States Constitution," and thus "for the same reasons this court rejected [plaintiff's] federal constitutional claims . . . the court similarly finds its state constitutional arguments unpersuasive."<sup>84</sup>

As such, although not extensive, existing precedent with respect to equal protection, and specifically racial discrimination, under the Hawaii Constitution suggests that an inquiry into the issues presented in this chapter under the Hawaii Constitution would be similar, if not identical, to the Fourteenth Amendment discussion above. Accordingly, this chapter refrains from a thorough equal protection analysis pursuant to the Hawaii Constitution since such would merely track Parts II and III of this chapter.

## **B. Other Challenges**

In concert with the discussion above, courts also adopt the Fourteenth Amendment principle that "[a]s a standard for judicial review, the strict scrutiny test is applicable where equal protection challenges involve a 'suspect' classification or fundamental rights" in interpreting the Hawaii Constitution.<sup>85</sup>

As discussed in Part III above, federal courts hold that education is not a "fundamental right" in the context of the Fourteenth Amendment.<sup>86</sup> Thus, a challenge to the Charter Schools will not *per se* invoke a heightened level of scrutiny.<sup>87</sup> With respect to the Hawaii Constitution, however, there exists no authority on point indicating whether Hawaii state courts adopt or depart from this Fourteenth Amendment rule. As such, a determination as to how a court will analyze the different educational experiences resulting from establishment of the Charter Schools under the Hawaii Constitution proves difficult. On the other hand, the trend of conformance to federal authority as to most other aspects of the Hawaii Constitution strongly suggests that a court would adopt the well-settled federal rule that education is not a "fundamental right," and thus apply an analysis resembling Part III above.

## **C. Discrimination Based Upon "Ancestry"**

As a final matter, this chapter notes one potentially pertinent, yet unresolved issue, with respect to the Hawaii Constitution. In addition to designating "race" as a

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<sup>84</sup> *Id.* at 333-34.

<sup>85</sup> Nagle, 63 Haw. at 392 (examining an age discrimination claim under the Hawaii State Constitution).

<sup>86</sup> *Id.* at 489.

<sup>87</sup> See *id.* (finding no suspect classification of students and applying a rational basis test).

protected class of persons, the Hawaii Constitution also specifies "ancestry" as a suspect classification. Based upon the cardinal rule of statutory construction that "courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute,"<sup>88</sup> a presumption must be made that "race" and "ancestry" are substantively distinct. Unfortunately, there exists no prior judicial discussion explaining how "race" differs from "ancestry." Further, this chapter cannot look to federal precedent for instruction since the Fourteenth Amendment does not contain identical language. Therefore, the resolution of this question will likely depend upon future legislative or judicial determinations.

## **V. Conclusion**

In conclusion, while this chapter could not offer an exhaustive discussion of potential challenges to the Charter Schools due to the limited information presently available, it is clear that if the State decides to pursue establishment of the Charter Schools, any racially discriminatory motive will jeopardize the validity of the Charter Schools under current Fourteenth Amendment and Hawaii Constitution jurisprudence. If, however, the Charter School legislation (or admissions policy) does not facially discriminate based upon a protected class of persons nor does the establishment or administration of the Charter Schools further discriminatory motives, a court will likely uphold the Charter Schools as constitutional under the Fourteenth Amendment and the Hawaii Constitution.

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<sup>88</sup> *Richardson v. City and County of Honolulu*, 76 Hawai'i 46, 71 (1995) (citation omitted).

## Chapter 10

### FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

Act 134, Session Laws of Hawaii 2004, directs LRB to examine the feasibility and implications of establishing a noncontiguous charter school district, including a district with local educational agency (LEA) status. In addition, the Act requested LRB to investigate the constitutional equal protection implications of establishing a charter school district specifically for host culture charter schools. This chapter of the report summarizes the findings and conclusions of LRB's analysis and ends with recommendations.

#### Findings

The major findings of the LRB report are listed below.

##### Overall Feasibility

- Charter school districts are becoming increasingly common on the U.S. mainland and many states have authorized their establishment. Indeed, many charter school proponents view charter school districts as the logical “next step” in the evolution of the charter school movement.
- The federal definition of LEA is sufficiently broad that there would be few obstacles in establishing a Hawai'i charter school district as its own LEA. The major requirement would be the creation of a district governing authority, in the form of an elected or appointed board, to administer district operations. Many states and jurisdictions establish individual charter schools as their own LEAs or offer them the option of becoming their own LEAs.
- The concept of establishing a noncontiguous charter school LEA, in and of itself, is not particularly problematic. There are few instances of noncontiguous LEAs on the U.S. mainland, but that is only because a fundamental purpose of traditional school districts, which represent the vast majority of LEAs, is to serve students within a defined geographical area. There is nothing in the federal definition of LEA to prohibit the establishment of a noncontiguous LEA and some educators believe that a noncontiguous charter school district or LEA is a powerful educational reform concept.

##### Internal Governance

- The governance structure of a charter school LEA consisting of all Hawai'i's charter schools is no more complex than the governance structure for an

individual charter school. A charter school LEA would only require the creation of an elected or appointed LEA governing authority to administer the new entity.

- The existing Charter School Administrative Office could be converted to serve as the nucleus of a charter school LEA “central office” on the model of traditional school districts on the U.S. mainland. Any increase in the number of CSAO staff would reflect the charter school LEA board’s determination of how many and what kind of services it wishes the CSAO to perform and is able to pay for from state, federal, or private funding sources. One of the advantages of charter school districts that is often cited by proponents is that they allow the schools to control the size of the central office, since the schools themselves determine the services for which they will contract.
- A problem may arise in determining membership in a charter school district or LEA. It was not evident to researchers that all charter schools would want to be part of a new charter school LEA if one were created. Therefore, a decision would need to be made about whether membership in the new LEA is mandatory or voluntary. There is more consensus among host culture charter schools about joining a new charter school LEA for host culture schools only. However, the concept of a host culture school district raises constitutional issues.

### **Relationship with the DOE and Other State Agencies**

- The U.S. Code defines a statewide educational agency (SEA) as the “State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools” (20 U.S.C. 1401[28]). In Hawai‘i the SEA is the Board of Education, while the DOE is the agency established to administer programs of education and public instruction throughout the State under the policy direction of the BOE.
- Even with the creation of a charter school LEA, the BOE will retain its role as the SEA and bear the ultimate responsibility for important educational objectives, such as the provision of a free appropriate public education for children with disabilities. Thus, creation of a charter school LEA will not require complete autonomy for the charter schools.
- Charter schools currently have the option of receiving a wide variety of services from the DOE, from food services to special education services. Creation of a new charter school LEA would not necessarily imply the cessation of such services. SEAs and charter school LEAs have developed many different kinds of arrangements in other states to permit the charter LEAs to meet the educational needs of their students and comply with the requirements of federal and state law.

- Other state agencies that provide services to schools, such as the Department of Health, would be largely unaffected by the creation of a charter school LEA. These agencies are usually mandated to provide services to schools because they are public instrumentalities and would continue to do so regardless of how the public education system is organized.

### **Financial Implications**

- Creation of a charter school LEA would not, in and of itself, resolve any of the current questions and debates (e.g., deduction of fringe benefits) about the method for determining dollar allocations to charter schools. Creation of a charter school LEA only implies changes to the Hawai'i charter school law that are needed to authorize this new structure, such as explicit acknowledgment that the district is its own LEA and establishment of an LEA governing authority.
- A charter school LEA would be able to apply directly to the SEA, on behalf of its entire membership, for its allocation of federal formula grant funds under major programs such as Title I of the No Child Left Behind Act of 2001. This would provide more flexibility to the schools in planning for the use of such funds, but would not generate additional federal education funds for the state or the schools. As indicated by the federal definition of SEA and Article X of the Hawai'i State Constitution, the SEA would continue to be the BOE, with the DOE acting as its administrative agency for purposes of receiving and allocating federal formula grant funds.
- Designation of the charter schools as their own LEA means that they will assume entirely new duties and responsibilities under federal formula grants such as NCLB and IDEA. For instance, under IDEA, Part B, the charter LEA would be responsible for providing all assistance and services dictated by the IEPs of children with disabilities. In the event of expensive services that were unanticipated and not budgeted for, such as residential placement, the charter LEA could be forced to cut back on other cost items to find the money.
- A charter school LEA would be eligible to apply for a large number of federal discretionary grants that it must now seek through the mediation of the DOE as the "parent" LEA. These discretionary grants are, by definition, competitive, and they have become even more competitive under the Bush administration, which has extended eligibility for many grants to new kinds of applicants such as for-profit corporations. Thus, the amount of additional federal money that would be generated through discretionary grants is uncertain. Thus:



## FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

- (1) Simply changing the present structural arrangement by creating a separate charter school LEA will not itself generate larger amounts of federal funding; and
  - (2) The amount of additional federal money, if any, that could be generated through discretionary grants is uncertain.
- A charter school LEA would benefit from a full-time development officer, grant writer or equivalent position if it were expected to implement an effective revenue generating initiative.

### Conclusions

On the basis of these findings, the authors conclude that:

- Constitutional issues aside, creation of a noncontiguous charter school district, including a district with LEA status, is theoretically feasible.
- Creation of a noncontiguous charter LEA will not necessarily impact on any other provisions of the Hawai'i charter school law or assist in resolving outstanding issues such as the per pupil allocation.
- A charter school LEA would achieve more autonomy, particularly in establishing eligibility for and administering federal education grants and sub-grants, but could still remain tied to the DOE (with the concurrence of both the LEA and the SEA) for the provision of selected services.
- A charter school LEA will not necessarily mean that additional federal funds are made available to the schools unless an effective development program is put in place.

### Recommendations

Creation of a charter school LEA is not a panacea for the charter schools, but is a potentially meaningful educational reform strategy that should not be dismissed out of hand. Yet, there are too many issues that need to be resolved for the authors to confidently recommend the creation of a charter school district or LEA at this time. Accordingly, the authors recommend that the Hawai'i State Legislature take no additional steps at this time towards creating a charter school LEA until the following two issues are analyzed and reported on by the charter schools with the assistance of the CSAO.

- **Membership.** As discussed in Chapter 6 of this report, membership in the proposed charter school LEA poses difficult questions. How many schools

would elect to be part of the new LEA? Who would make this decision on the part of an individual school? Could schools opt out of the LEA after a “trial” period? Or would membership be mandatory? What would happen to the four conversion charter schools that currently serve defined DOE geographical attendance areas? In the opinion of the authors, membership issues constitute the major governance-related stumbling block to a charter school LEA. Further analysis and a summary report on these matters is needed.

- **Charter School Capability.** LEA status for the charter schools entails both opportunities and responsibilities, and one of the prime examples of the latter is the responsibilities of LEAs under IDEA, Part B, section 614. In giving further consideration to a charter district LEA, it is important to know how close or far the charter schools are to being able to fulfill the responsibilities of an LEA in relation to IDEA mandates. The issue of IDEA responsibilities stands out because the vast majority of charter schools currently leave their IDEA funds to the management of their respective complex areas. An analysis and summary report of the charter schools’ capability of carrying out these responsibilities is also needed.

If further consideration of these two issues indicates that they do not represent insuperable obstacles to the creation of a charter school LEA and the Legislature wishes to pursue the concept further, the authors recommend that the Legislature:

- Request the Attorney General’s Office to prepare a definitive legal opinion on whether establishing a second local educational agency in Hawai’i violates the requirement of Article X of the Hawai’i State Constitution that the State provide for the establishment, support and control of a “statewide system of public schools.”

Separate from the issue of creating an additional local education agency, if the Legislature wishes to take steps to assist the charter schools in obtaining additional funding, the authors recommend that the Legislature:

- Consider providing funds for the CSAO to hire a development officer to identify and pursue federal and private funding opportunities for the charter schools.

**Note:** It was observed at the outset of this report (p. 2) that one of the attractions of creating a Hawai’i charter school LEA is the hope that such an entity would increase the schools’ access to federal funds. Although the conclusion of the report is that a Hawai’i charter school LEA would not *necessarily* increase the flow of federal funds to charter schools, it is also true that there are external funding *opportunities* for charter schools that should be identified and competed for in a purposeful and systematic fashion. Even if the Legislature does not pursue creation of a Hawai’i charter school LEA, the

*FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS*

overall objective of developing a strong external funding program for the charter schools should not be dismissed. Specifically, creation of a development officer position within the CSAO may enable the charter schools to tap into more external funding sources, while avoiding many of the legal and organizational issues to which a separate charter school LEA would give rise. It should be noted that even without independent LEA status, the charter schools can apply for federal discretionary grants, as well as foundation and corporate support, under the umbrella of the DOE. LEAs often submit grant applications on behalf of a subset of schools within their jurisdictions that have banded together to design a new program for which they are seeking support. A development officer within the CSAO could play a decisive role in enabling the charter schools to develop a more productive and collaborative grants-seeking relationship with its parent LEA.

- Direct the BOE to conduct independent evaluations of the charter schools, as required by section 302A-1186(b), *Hawaii Revised Statutes*.

**Note:** Section 302A-1186(b), *Hawaii Revised Statutes*, indicates that independent evaluation should be initiated by the BOE for each charter school "for the first two years after its establishment and every four years thereafter". No such evaluations have yet been conducted. The evaluations would provide important insights into the capabilities of the charter schools to act as their own LEA should the Legislature decide to pursue this structural option.

## Appendix A

### ACT 134

S.B. NO. 3148

A Bill for an Act Relating to Education.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The legislature finds that the charter school movement has gained momentum nationwide as a way to encourage innovation and excellence in public education. Accountable directly to the students, parents, and communities they serve, charter schools are constantly developing novel ways to improve student achievement while providing an educational atmosphere that cannot be duplicated in traditional schools.

The legislature finds that the State needs to allow charter schools the freedom to develop fully. In some states, each individual charter school is a local educational authority. In other states, there are varying ways for charters to be formed and governed. This Act seeks to address some of the questions that have arisen relating to the governance, administration, accountability, and growth of the charter school movement in Hawaii.

The legislature further finds that article X, section 4, of the Hawaii state constitution requires the State to promote the study of Hawaiian culture, history, and language and provide for a Hawaiian education program consisting of language, culture, and history in public schools. The constitution further states that the use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program. In Hawaii, many charter schools help to fulfill this mandate by engaging their students in Hawaiian history, culture, and language.

The purpose of this Act is to:

- (1) Explore the opportunities as well as the challenges regarding creating multiple local educational authorities, adding school districts, creating non-contiguous charter school districts, changing the relationships among and between groups of charter schools, associations between some or all of the charter schools, associations between charter schools and other schools, and the evolving relationships of these entities with existing parts of our public school structure. The dynamics that may emerge from the changed charter school relationships with the federal government, State of Hawaii, office of Hawaiian affairs, board of education, department of education, and charter school administrative office need to be clarified; and
- (2) Study the feasibility of establishing a noncontiguous host culture charter school district and a noncontiguous charter school district in order to solidify existing host culture focused charter schools, increase charter school autonomy, and provide opportunities for additional federal funding.

SECTION 2. The legislative reference bureau shall conduct a feasibility study regarding the establishment of a noncontiguous host culture charter school district and a noncontiguous charter school district in the State in order to solidify existing host culture focused charter schools, increase charter school autonomy, and provide opportunities for additional federal funding. The study shall include an analysis of pertinent issues including but not necessarily limited to:

- (1) The financial and administrative implications of creating these additional school districts and of establishing local educational agency (LEA) status for the purpose of obtaining additional federal funding;
- (2) An analysis of how the new districts would interact administratively with the board of education and the existing charter school administrative structure in the department of education; and
- (3) An analysis of whether the districts would violate the fourteenth amendment to the United States Constitution.

In conducting the study, the legislative reference bureau shall review and consider, but not be limited to, the proposals set forth in Senate Bill 3148, S.D. 2 and Senate Bill 3148, S.D. 2, H.D. 3 considered by the Twenty-Second Legislature of the State of Hawaii, Regular Session of 2004. If the legislative reference bureau is unable to conduct the study by itself out of available resources, it may secure resources from external sources and work with independent consultants and other entities as the legislative reference bureau deems appropriate. The legislative reference bureau shall be exempt from chapter 103D, Hawaii Revised Statutes, for the purposes of this Act.

SECTION 3. The legislative reference bureau shall submit its feasibility study, including findings, recommendations, and any proposed legislation, to the legislature no later than twenty days prior to the convening of the regular session of 2005.

SECTION 4. This Act shall take effect upon its approval.

(Approved June 18, 2004.)

Strong	Weak	NA
A=40-50; B=30-39	C=20-29; D=10-19	F=0-9

## Appendix B

### CER Ranking of State Charter School Laws

CRITERIA	STRONG																		
	****A****						****B****												
State	AZ	MN	DC	DE	MI	MA	IN	FL	CO	NY	OH	NC	PA	MO	CA	OR	NJ	WI	TX
Year Law Passed	'94	'91	'96	'95	'93	'93	'01	'96	'93	'98	'97	'96	'97	'98	'92	'99	'96	'93	'95
Number of schools allowed	4.5	5	4.5	5	4.5	3.3	4	4	4.5	2.3	3	3	5	2	5	5	5	5	3
Multiple chartering authorities	4	4.5	4	4	4.5	3.5	4.5	1.75	3	4	4.5	3	1.75	3.5	4	1.5	3	3.5	3.25
Eligible charter applicants	5	5	5	5	5	4.3	4	5	5	4	5	5	5	4	5	5	4	5	4.25
New starts allowed	4.75	4.75	4.75	4.5	4.75	4.5	4.75	4.5	4.5	4.5	4.5	4.75	4.5	3	4.75	3.5	4.5	4.75	4.75
School may be started without evidence of local support	5	3.5	3	3.5	5	4	3	3	3	4	5	3	3.5	4	3	5	3	2.5	3.5
Automatic waiver from state and district laws	4.5	5	5	3.5	2.7	3	5	3	3.25	5	3	4	3	4	2	2.5	1	2.5	0
Legal/operational autonomy	5	4.5	4.5	4	5	4.7	3	3.5	2.75	5	3	3	3	3.5	2	3	2	2.5	2
Guaranteed full per-pupil funding	3.5	3.5	4.5	5	5	5	3	5	4	2.5	3.5	4.5	3	4	3	2.5	2	2	3
Fiscal Autonomy	5	5	4.5	5	5	5	5	5	4.5	4	3	4	3.5	4	3	2.5	5	1.8	3
Exempt from collective bargaining agreement/district work rules	4.75	4.5	5	5	3	3	3	4.5	4.5	3	3	3	4.5	4	4	4.25	3	2.5	4
Total	46	45.25	44.75	44.5	44.45	40.3	39.25	39.25	39	38.3	37.5	37.25	36.75	36	35.75	34.75	32.5	32.05	30.75
RANK 2004	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
Rank 2003	1	2	3	4	5	7	6	8	9	10	11	12	13	14	15	16	17	18	19
Number of Charters Winter 2004	491	95	43	13	210	50	17	258	93	51	142	94	103	27	500	43	52	147	241

Note: The scores on this table are based on the current status of each law (through December 2003). Amendments to the original law, state board regulations, legal rulings, department of education interpretation and actual implementation have all been factored into the ranking. Each state is ranked for each criterion on a scale of 0 to 5, based on how the state's provisions under that criterion support or restrict the development of a significant number of autonomous charter schools. States are listed from left to right from the strongest to the weakest. This chart is part of the book entitled *Charter School Laws Across the States: Ranking Scorecards and Profiles*, which includes detailed profiles of each state's law. Also available at [www.edreform.com](http://www.edreform.com)

Each law was scored by a panel of charter school experts over time. States with the scores were ranked according to secondary factors influencing the effectiveness of their law. Produced and published by The Center for Education Reform February 2004. (202) 822-9000 or [www.edreform.com](http://www.edreform.com)

Ranking Scorecard

Strong	Weak	NA
A=40-50; B=30-39	C=20-29; D=10-19	F=0-9

CRITERIA	WEAK																****D****				****F****		
	*B*	***C***															AK	AR	RI	MD	VA	KS	IA
State	NM	OK	SC	NH	IL	LA	GA	ID	UT	CT	NV	WY	TN	HI	AK	AR	RI	MD	VA	KS	IA	MS	
Year Law Passed	'93	'99	'96	'95	'96	'95	'93	'98	'98	'96	'97	'95	'02	'94	'95	'95	'95	'03	'98	'94	'02	'97	
Number of schools allowed	3.5	2	5	5	1.75	2	5	2.6	1.5	1.5	2	5	2	2	2.3	2	1	1	1.6	1	1	0	
Multiple chartering authorities	1.75	1	1.75	4	1.75	1.75	1.5	1.3	3	2.5	1	1.75	1.75	1	1	2.5	1	1.5	1	1	1	1	
Eligible charter applicants	5	4	4	3	4	3.5	5	5	4	1.5	2	5	4	3	5	2	2.5	4	2	4.5	0	0	
New starts allowed	4.5	4.5	4.5	2	4.5	4.5	4.5	4.5	4.5	4.5	4.5	4.5	4	4.5	5	4.5	4.5	4	4.5	4.5	0	0	
School may be started without evidence of local support	3	5	2	3	1	2	2.5	1	2.5	1	5	2.5	2	2	1	2.5	0	1	2.5	1	1.5	0	
Automatic waiver from state and district laws	2	2.5	2.5	4	3	2.5	0	4.3	0.6	2.5	2.5	0.5	0	4.5	0	0	0.5	0	0.5	0.5	3	1.3	
Legal/operational autonomy	2.75	1	2	2	2	1	1	0	1.6	0.5	1.5	0	0	0.5	0	2	0.5	0	0.5	0	0	0	
Guaranteed full per-pupil funding	3	2	2	0	3	3	2	3	0.3	3.5	3.5	1.5	3	1.5	3.5	1.5	3.5	2	0.5	0.5	0	0	
Fiscal Autonomy	2	3	2	0	3.5	4.5	2	1	1	3	1	1	1	1	1	0	1.5	1	0	0	0	0	
Exempt from collective bargaining agreement/district work rules	2.5	4	3	5	2.5	1.5	1.5	1	4	2.5	0	0	3	0	0	0	0	0	0	0	0	0	
Total	30	29	28.75	28	27	26.25	25	23.7	23	23	23	21.75	20.75	20	18.8	17	15	14.5	13.1	13	6.5	2.3	
RANK 2004	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	
Rank 2003	20	22	23	31	21	24	25	27	26	28	29	30	32	33	34	35	36	N/A	37	38	39	40	
Number of charters Winter 2004	37	12	19	0	30	16	36	16	19	16	14	1	4	26	20	11	8	0	9	31	0	1	

## Appendix C

### Comparison of State Policies for Charter Schools

<b>How is the funding for a charter school determined?</b>	
Alaska : Charter Schools	A charter school shall receive an amount generated by students enrolled in the charter school minus a portion for administrative costs, which are determined by applying an indirect cost rate approved by the state department of education. The amount generated by students enrolled in the charter school is determined in the same manner as it is for a student enrolled in another public school in that school district.
Arizona : Charter Schools	For charter schools authorized by local school boards, funding is calculated by the state through a per-pupil formula. As part of the contract between a local school board and a charter school, a local school board may withhold a negotiated portion of the funding for oversight. For other charter schools, funding is determined by a similar per-pupil formula.
Arkansas : Charter Schools	A conversion charter school receives funds equal to the amount apportioned by the school district from state and local revenue per average daily membership. An open enrollment charter school receives funds equal to the minimum state and local revenue per average daily membership.
California : Charter Schools	Funding for most state general-purpose and categorical programs follows students, based on average school district per-pupil revenue. Charter schools do not receive transportation, desegregation and other specified funds. Special education funding is negotiated locally through regional consortia.
Colorado : Charter Schools	For charter schools authorized by local school boards, 100% of the per-pupil revenue flows to charter schools, less an amount for specified administrative costs based on actual district spending as reported to the state. The administrative amount is limited to 5%, except in districts with 500 or fewer students, where it is limited to 15%. For charter schools authorized by the state charter institute, 100% the per-pupil revenue flows to charter schools, less up to 5% for the state charter school institute's administrative costs and up to 2% for the state department of education's administrative costs.
Connecticut : Charter Schools	For local charter schools, specified in the charter. For state charter schools, the state pays \$7,360 per-pupil to the charter school. However, funding for state charter schools is directly dependent on state's annual appropriation.
Delaware : Charter Schools	100% of state funding based on state unit funding formula and 100% of local funding based on previous year per-pupil expenditure in a student's school district of residence follows students.



District of Columbia : Charter Schools	100% of operations funding follows students, based on District of Columbia per-pupil formula.
Florida : Charter Schools	Students enrolled in a charter school shall be funded as if they are in a basic program or a special program, the same as students enrolled in other public schools in the school district.
Georgia : Charter Schools	A specific funding formula dictates the minimum amount of funding a charter school must receive, with funding beyond the minimum negotiated with sponsor school district and specified in the charter. A state chartered special school may not receive local tax dollars that a charter school approved by a local school board receives.
Hawaii : Charter Schools	As determined annually, a per pupil amount for each regular education and special education student, which shall be equivalent to the total per pupil cost based upon average enrollment in all cost categories, including comprehensive school support services but excluding special education services, for all means of financing except federal funds, as reported in the most recently published department of education consolidated annual financial report.
Idaho : Charter Schools	Within the state's educational support program, the state calculates the support units for each charter school as outlined in state law.
Illinois : Charter Schools	Negotiated with sponsor school district and specified in charter, but not less than 75% or more than 125% of per-capita student tuition multiplied by the number of students residing in the district who are enrolled in the charter school.
Indiana : Charter Schools	Charter schools receive 100% of the per-pupil funding that traditional schools receive.
Iowa : Charter Schools	A charter school is considered a part of the school district in which it is located for purposes of state school foundation aid.
Kansas : Charter Schools	Discretion of school district.
Louisiana : Charter Schools	For locally-approved charter schools, 100% of state and school district operation funding follows students, based on average school district per-pupil revenue. For state-approved charter schools, 100% of funding, in the amount of the average per-pupil revenue of their resident school district. State-approved charters receive no school district funds.
Maryland : Charter Schools	A county school board disburses to a charter school an amount of county, state and federal money that is commensurate with the amount disbursed to other public schools in the local jurisdiction.
Massachusetts : Charter Schools	If a student attending a commonwealth charter school resides in a district with a "positive foundation gap," as defined in state law, the state shall pay a tuition amount to the charter school equal to the average

Massachusetts Cont'd	cost per student in said district. If the student resides in a district that does not have a "positive foundation gap," the state shall pay a tuition amount to the charter school equal to the lesser of (1) the average cost per student in said district and (2) the average cost per student in the district in which the charter school is located.
Michigan : Charter Schools	100% of state and school district operations funding follows students, based on average school district per-pupil revenue, not to exceed a certain amount that rises from year to year based on state aid formula.
Minnesota : Charter Schools	State portion of operations funding follows students, based on average state per-pupil revenue. School district portion of operations funding does not follow students.
Mississippi : Charter Schools	100% of per-pupil funding.
Missouri : Charter Schools	100% of state foundation formula entitlement per-pupil for the school district less the school district's per-pupil amount for revenue bond indebtedness. Additional funding may be available for specific student populations.
Nevada : Charter Schools	100% of per-pupil funding.
New Hampshire : Charter Schools	For charter schools approved by a local school board and the state board of education, a minimum of 80% of the per-pupil expenditure in the school district follows a student to school. For charter schools approved by the state board of education, the state's contribution to public education follows a student to school.
New Jersey : Charter Schools	90% of state-mandated minimum per-pupil spending.
New Mexico : Charter Schools	The amount of funding allocated to a charter school shall be not less than 98% of the school-generated program cost.
New York : Charter Schools	School districts are required to provide 100% of a state-specified per-pupil funding calculation, although this amount may be reduced pursuant to an agreement between the school and the charter authorizer set forth in the charter.
North Carolina : Charter Schools	The state board of education shall allocate to each charter school: an amount equal to the average per pupil allocation for average daily membership from the school district allotments in which the charter school is located for each child attending the charter school except for the allocation for children with special needs and for the allocation for children with limited English proficiency; an addition amount for each child attending the charter school who is a child with special needs; and an additional amount for children with limited English proficiency attending the charter school, based on a formula adopted by the state board of education. If a student attends a charter school, the school

North Carolina Cont'd	district in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the school district for the fiscal year.
Ohio : Charter Schools	A statewide base cost formula with adjustments, which includes a county-level cost of doing business factor.
Oklahoma : Charter Schools	At least 95% of average daily expenditure.
Oregon : Charter Schools	For locally approved charter schools, at least 80% of the amount of the school district's general purpose grant per weighted average daily membership for K-8 and at least 95% of the amount of the school district's general purpose grant per weighted average daily membership for 9-12. For state approved charter schools, at least 90% of the amount of the school district's general purpose grant per weighted average daily membership for K-8 and at least 95% for 9-12 of the amount of the school district's general purpose grant per weighted average daily membership.
Pennsylvania : Charter Schools	Relevant funding follows students, based on average school district per-pupil budgeted expenditure of the previous year. For regional charter schools and nonresident students, funds come from the school district of a student's residence. Charter schools receive additional funding for special needs students, or may request the intermediate unit to assist in providing special-needs services at the same cost as provided to a school district's schools.
Puerto Rico : Charter Schools	Secretary of education determines the per-pupil funding level for charter schools.
Rhode Island : Charter Schools	The funding for each charter school consists of state revenue and municipal or district revenue in the same proportions that funding is provided to other schools within the school district in which the charter school is located. The state deducts and gives 5% of the state revenue to the school district for indirect cost support. A charter school may negotiate with a school district to determine the cost of services that the charter school wants the school district to provide.
South Carolina : Charter Schools	A school district distributes state, county and school district funds to a charter school as determined by a formula outlined in state law.
Tennessee : Charter Schools	A local school board allocates 100% of the state and local education funds to a charter school based on the per-pupil expenditures of the school district, which are based on the prior year's average daily membership for the school district.

Texas : Charter Schools	For district-approved charters, funding is negotiated with sponsor school district and specified in charter. For open-enrollment charters, state operations and maintenance funding follows students.
Utah : Charter Schools	A conversion charter school sponsored by a local school board receives its funding on the same basis as it did prior to its conversion. A charter school sponsored by a local school board and located in a school district facility receives its funding on the same basis as other public schools in the school district. Any other charter schools sponsored by a local school board and charter schools sponsored by the state charter school board receive their funds on the same basis as a school district receives funds.
Virginia : Charter Schools	100% of per-pupil funding, with fees negotiated.
Wisconsin : Charter Schools	The funding for a charter school authorized by a city, university or technical college is determined by state law. According to state law, such a charter school receives an amount equal to the sum of the amount paid per pupil in the previous school year and the amount of revenue increase per pupil allowed in the current school year, multiplied by the number of pupils attending the charter school. The funding for a charter school authorized by a local school board is determined through negotiations between the charter school and the local school board.
Wyoming : Charter Schools	Guaranteed 95% of funding generated by the charter school's average daily membership, minus certain adjustments. 100% of major maintenance payments. Any other funding is negotiated with the school district.

## Appendix D

### Comparison of State Policies for Charter Schools

<b>Does the state provide facilities funds or other facilities assistance to charter schools?</b>	
Alaska : Charter Schools	Yes. Charter schools may operate in a vacant school district facility or any other facility if the local superintendent determines that it meets health and safety requirements.
Arizona : Charter Schools	Yes. Non-profit charter schools may apply for bond financing from Industrial Development Authorities. The state department of education must annually publish a list of vacant and unused portions of buildings that are owned by the state or by school districts and that may be suitable for the operation of a charter school. Although authorizing legislation for a charter school stimulus fund remains in place, it is currently not funded.
Arkansas : Charter Schools	No.
California : Charter Schools	Yes. The charter schools revolving loan fund allows charter schools to receive loans for as much as \$250,000, allowing up to five years for repayment. A school district is generally required to provide facilities "rent free" to charter schools for students who reside in the district. A lease aid funding program for charter schools in low-income areas provides up to \$750 per student.
Colorado : Charter Schools	Yes. Capital construction funds have been appropriated and are provided to qualified charter schools in the amount of \$332.40 per pupil to assist with capital construction needs. The Educational and Cultural Facility Authority (ECFA) may issue bonds on behalf of charter schools. The charter school debt reserve fund enhances charter schools' ability to borrow funds from ECFA and to obtain more favorable rates. If space is available in a school district facility, a charter school may not be charged for that space, although other costs for facilities operations and maintenance must be negotiated. School districts are required to invite charter schools to discuss their capital construction needs prior to submitting a request to the voters or floating a bond for facilities funding, although the district is not required to include the charter schools as part of their requests or bonds.
Connecticut : Charter Schools	Yes. A state charter school that is renewed is eligible for a one-time grant of \$500,000 to assist it in financing school building projects, general improvements in school buildings and repayment of debt incurred for prior school building projects. Also, charter schools may apply for low-interest loans from the Connecticut Health and Educational Facilities Authority.
Delaware : Charter Schools	Yes. School districts must make unused buildings or space in buildings available for charter schools and must bargain in good faith over the cost of rent, services and maintenance related to such space. In addition, the state department of education and state department of administrative services must publish a list of all vacant and unused buildings and

Delaware Cont'd	portions of buildings owned by the state or school districts that may be suitable for charter schools.
District of Columbia : Charter Schools	Yes. The amount is based on a five year moving average of capital funds available to the school system. The mayor and the District of Columbia government must give preference to charter schools with respect to the purchase, lease or contract for the use of certain public facilities or properties.
Florida : Charter Schools	Yes. The state provides a per-pupil payment on an annual basis to charter schools for their facilities costs in the amount of \$835, \$957.40 and \$1,266.93 for elementary, middle and high schools. The state also provides an exemption from ad valorem taxes for facilities used to house charter schools. If a school district surplus facility or property is available, it must be provided for a charter school's use on the same basis as it is made available to other public schools in the school district. For an existing public school converting to charter status, no rental or leasing fee for the existing facility or for the property normally inventoried to the conversion school may be charged by the district school board to the parents and teachers organizing the charter school.
Georgia : Charter Schools	The state board of education may require a local referendum of the qualified voters in a local school system in which a state chartered special school will be located. Such referendum is held for the purpose of deciding whether the local school board must provide funds from school tax levies to support the state chartered special school or incur bonded indebtedness or both.
Hawaii : Charter Schools	No.
Idaho : Charter Schools	Yes. The state's charter school law authorizes a charter school's board of directors to borrow money as a nonprofit corporation to finance the purchase of school building facilities. Subject to the terms of such a contractual agreement, the board may use the facility as collateral for the loan.
Illinois : Charter Schools	Yes. A charter school may negotiate and contract with a school district, the governing body of a state college or university or public community college or any other public or for-profit or nonprofit private entity for the use of a school building.
Indiana : Charter Schools	Yes. Charter schools that are sponsored by the mayor of Indianapolis may obtain facilities financing from the local public improvement bond bank.
Iowa : Charter Schools	No.
Kansas : Charter Schools	No.

Louisiana : Charter Schools	Yes. Depending upon legislative appropriations, each start-up charter school shall receive for each student based on average daily membership in the charter school for the first five years of its existence an amount equaling the average per student budgeted amount for each of those five years by the district in which the charter school is located for facility acquisition and construction services. Local school boards must make available to chartering groups any vacant school facilities or any facility slated to be vacant for lease or purchase at fair market value.
Maryland : Charter Schools	No.
Massachusetts : Charter Schools	No.
Michigan : Charter Schools	No.
Minnesota : Charter Schools	Yes. State grants are available for facility improvement. The state provides lease aid to charter schools in the amount of 90% of lease costs or \$1,500 per-pupil. With approval of the state department of education, charter schools may lease space from public or private nonprofit, nonsectarian organizations and from sectarian organizations.
Mississippi : Charter Schools	No.
Missouri : Charter Schools	Yes. A school district may incur bonded indebtedness or take other measures to provide for physical facilities for charter schools that it sponsors or with which it contracts.
Nevada : Charter Schools	No. However, a charter school may contract with the local school board of the school district in which the charter school is located or the University and Community College System of Nevada for the provision of facilities to operate the charter school.
New Hampshire : Charter Schools	Yes. Charter schools may lease, through the school district, buildings that receive state school building aid.
New Jersey : Charter Schools	No. However, the state allows charter schools to use federal funds for facility construction.
New Mexico : Charter Schools	No. However, in no event shall a charter school be required to pay rent for space that is deemed available, as negotiated by contract, in school district facilities, provided that the facilities can be made available at no cost to the district. All costs for the operation and maintenance of the facilities used by the charter school shall be subject to negotiation between the charter school and the district.

New York : Charter Schools	Yes. The state must annually publish a list of vacant and unused buildings and vacant and unused portions of buildings that are owned by the state and that may be suitable for the operation of a charter school. At the request of a charter school or a prospective applicant, a school district shall make available a list of vacant and unused school buildings and vacant and unused portions of school buildings, including private school buildings, within the school district that may be suitable for the operation of a charter school. The state defines charter schools as public agents that are eligible to obtain tax-exempt financing on their own. Although authorizing legislation for a charter school stimulus fund has been enacted, the state has not provided monies to the fund.
North Carolina : Charter Schools	Yes. At the request of a charter school, the local school board of the school district in which the charter school is located shall lease any available building or land to the charter school unless the board demonstrates that the lease is not economically or practically feasible or that the local board does not have adequate classroom space to meet its enrollment needs. Also, a local school board may provide a school facility to a charter school free of charge, but the charter school is responsible for the maintenance of and insurance for the school facility. Charter schools may lease space from sectarian organizations so long as sectarian symbols are removed. The North Carolina Educational Facilities Finance Authority may issue bonds on behalf of charter schools.
Ohio : Charter Schools	Yes. Charter schools may use loans guaranteed under the Facilities Loan Guarantee Program for the construction of new school buildings.
Oklahoma : Charter Schools	Yes. The charter school incentive fund provides support for costs associated with renovating or remodeling existing buildings and structures for use by a charter school.
Oregon : Charter Schools	No.
Pennsylvania : Charter Schools	Yes. The state department of education calculates an approved reimbursable annual rental charge for leases of buildings or portions of buildings for charter school use which have been approved by the secretary of education on or after July 1, 2001. This charge is the lesser of (1) the annual rental payable under the provisions of the approved lease agreement or (2) the product of the enrollment times \$160 for elementary schools, \$220 for secondary schools or \$270 for area vocational-technical schools.
Puerto Rico : Charter Schools	No.
Rhode Island : Charter Schools	Yes. A school district may access aid for reimbursement of school housing costs for school district sponsored charter schools. Charter schools not sponsored by a school district may apply for 30% reimbursement of school housing cost on a need basis.



South Carolina : Charter Schools	Yes. The state department of education must make available, upon request, a list of vacant and unused buildings and vacant and unused portions of buildings that are owned by school districts and that may be suitable for the operation of a charter school. If a school district declares a building surplus and chooses to sell or lease the building, a charter school's board of directors or a charter committee operating or applying within the school district must be given the first refusal to purchase or lease the building under the same or better terms and conditions as it would be offered to the public.
Tennessee : Charter Schools	No.
Texas : Charter Schools	No. An approved bonding authority, however, may issue bonds to finance or refinance education facilities to be used by an authorized charter school.
Utah : Charter Schools	Yes. The state has created a charter school revolving loan fund. This fund provides loans to charter schools for the costs of constructing, renovating, and purchasing charter school facilities. This fund was initially capitalized with \$2,000,000 in the 2003 general legislative session.
Virginia : Charter Schools	Yes. No rent may be charged, and other fees are negotiable.
Wisconsin : Charter Schools	No.
Wyoming : Charter Schools	Yes. If a school district deems it has available space, the charter school may use the space without having to pay rent for it.

## Appendix E

### Comparison of State Policies for Charter Schools

<b>Does the state require the state education agency or another entity to report on the effectiveness of charter schools?</b>	
Alaska : Charter Schools	No.
Arizona : Charter Schools	No. However, the state board for charter schools must annually report to the legislature for funding for its operation. This report includes reporting on agency goals which include the number of new charters and the accountability systems for charter schools.
Arkansas : Charter Schools	Yes. The state board of education must report on the status of the charter school program to the legislature each biennium and to the House and Senate Interim Committees on Education during the interim between legislative sessions.
California : Charter Schools	Yes. The legislative analyst is required to contract for a neutral evaluator to conduct an evaluation of charter schools and report to the governor and the legislature on or before July 1, 2003.
Colorado : Charter Schools	Yes. Beginning in the 2004-05 budget year, and at least every three years thereafter, the state department of education shall prepare a report and evaluation for the governor and the house and senate committees on education on the success or failure of charter schools, their relationship to other school reform efforts, and suggested changes in state law necessary to strengthen or change the charter school program.
Connecticut : Charter Schools	Yes. The state commissioner of education must prepare an annual report for the legislature's joint standing committee on education.
Delaware : Charter Schools	Yes. The state department of education must prepare an annual report for the governor and the legislature.
District of Columbia : Charter Schools	Yes. Each eligible chartering authority that issues a charter shall submit an annual report to the mayor, the District of Columbia Council, the Board of Education, the Secretary of Education, the appropriate congressional committees and the Consensus Commission.
Florida : Charter Schools	Yes. The state department of education must prepare an annual report comparing test scores of charter school students with test scores of comparable public school students in their school district. It must submit this report to the state board of education, the state commissioner of education, the governor, the president of the senate, and the speaker of the house of representatives. In addition, a charter school review panel reviews issues, practices, and policies regarding charter schools and makes recommendations to the legislature, the state department of education, charter schools, and school districts for improving charter school operations and oversight and for ensuring best business

Florida Cont'd	practices at and fair business relationships with charter schools. Lastly, the legislature shall review the operation of charter schools during the 2005 regular session of the legislature.
Georgia : Charter Schools	Yes. The state board of education must report to the legislature no later than November 1 of each year.
Hawaii : Charter Schools	No.
Idaho : Charter Schools	Yes. The state board of education is required to review the education effectiveness of charter schools and report to the legislature not later than July 1, 2004.
Illinois : Charter Schools	Yes. The state board of education must annually submit a report on charter schools to the legislature and the governor.
Indiana : Charter Schools	No. However, the state department of education is required to report to the state charter school review panel and the legislative council within six months after 20 charter schools have been approved by universities. It is also required to annually report to the legislative council regarding the receipt of proposals, the acceptance of proposals and the rejection of proposals, including the reasons for rejection.
Iowa : Charter Schools	Yes. Not later than December 1, 2003, and annually thereafter, the state board shall submit a comprehensive report, with findings and recommendations, to the senate and house standing committees on education.
Kansas : Charter Schools	Yes. The state board of education must review, assess and compile the evaluations of charter schools submitted by local school boards and must submit the compilation of evaluations and other relevant material, including specification of school district and state board of education waivers granted with respect to the operation of each charter school, to the governor and the legislature.
Louisiana : Charter Schools	Yes. The state board of education had to report to the legislature and governor by 2001, comparing performance of charter school students with that of other students.
Maryland : Charter Schools	Yes.
Massachusetts : Charter Schools	No.
Michigan : Charter Schools	Yes. The state board of education must prepare an annual report for the legislature that includes, among other items, aggregate test scores of charter school students.

Minnesota : Charter Schools	No.
Mississippi : Charter Schools	Yes. The state board of education must prepare a report by January 1 of each year for the legislature.
Missouri : Charter Schools	Yes. The state department of elementary and secondary education is required to commission a study of the performance of charter students every two years with results disseminated to the public, charter governing boards, charter sponsors, and the school boards and the superintendents of the Kansas City and St. Louis school districts.
Nevada : Charter Schools	Yes. On an annual basis, the superintendent of public instruction must submit to the state department of administration and the fiscal analysis division of the legislative counsel bureau a compilation of the annual reports submitted by the charter schools.
New Hampshire : Charter Schools	Yes. The state board of education shall convene one or more working committees to study and make recommendations regarding the implementation and effectiveness of charter schools. The recommendations shall be provided to the joint legislative oversight committee.
New Jersey : Charter Schools	Yes. By October 1, 2001, the state commissioner had to submit an evaluation of the charter school program to the governor, the legislature and the state board of education.
New Mexico : Charter Schools	No.
New York : Charter Schools	Yes. The state board of regents is required to submit an annual report to the governor, the temporary president of the senate and the speaker of the assembly.
North Carolina : Charter Schools	Yes. The state board of education shall review and evaluate the educational effectiveness of charter schools and the effect of charter schools on the public schools in the school district in which the charter schools are located. No later than January 1, 2002, the state board of education shall report to the Joint Legislative Education Oversight Committee with recommendations to modify, expand or terminate charter schools.
Ohio : Charter Schools	Yes. The legislative office of education oversight must produce and issue an annual report on charter schools to the speaker of the house of representatives, the president of the senate and the governor. By December 31 of each year, the state department of education must issue a report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the house and senate committees principally responsible for education matters.

Oklahoma : Charter Schools	Yes. The state board of education is required to issue an annual report to the legislature and the governor outlining the status of charter schools in the state.
Oregon : Charter Schools	No.
Pennsylvania : Charter Schools	Yes. The secretary of education must commission an evaluation by an independent consultant for the governor, secretary and general assembly, including recommendations for continuation, modification, expansion or termination of the program.
Puerto Rico : Charter Schools	Yes. The Education Reform Institute is required to render a report to the legislature and the governor.
Rhode Island : Charter Schools	No.
South Carolina : Charter Schools	Yes. The state board of education shall review the implementation and effectiveness of the state's charter school law, review comprehensive reports issued by local school boards concerning successes or failures of charter schools, report to the governor and general assembly interim results by July 1, 1998, and issue a final report and recommendations to the governor and general assembly during 2001.
Tennessee : Charter Schools	Yes. The state department of education is required to collect data on the status of charter applications, the total number of charter school applications, the total number of applications denied, the total number of appeals and the status or outcome of such appeals. Additionally, the state commissioner of education is required to submit an annual progress report on charter schools to the general assembly.
Texas : Charter Schools	Yes. The state commissioner of education must designate an impartial organization with experience in evaluating school choice programs to conduct an annual evaluation of open-enrollment charter schools.
Utah : Charter Schools	Yes. A charter school governing board must provide an annual progress report to the legislature through the Education Interim Committee.
Virginia : Charter Schools	Yes. The state board of education is required to report annually its findings and evaluations of charter schools to the governor and the legislature.
Wisconsin : Charter Schools	No.
Wyoming : Charter Schools	No.