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IN THE SUPREME COURT OF THE STATE OF HAWAII

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CHELSEA-MARIE KEALOHALANI CLARABAL, individually and as next
friend of C.M.K.C. and C.M.M.C., minors,
Plaintiff-Appellant,

vs.

DEPARTMENT OF EDUCATION OF THE STATE OF HAWAII;
BOARD OF EDUCATION OF THE STATE OF HAWAII; CHRISTINA M.
KISHIMOTO, in her official capacity as Superintendent of the
Department of Education; CATHERINE PAYNE, in her official
capacity as Chairman of the Board of Education;
BRIAN J. DELIMA; DAMIEN BARCARSE; MAGGIE COX; NOLAN KAWANO;
CHRISTINE NAMAU'U; DWIGHT TAKENO; KENNETH UEMURA;
AND BRUCE VOSS, in their official capacities as members
of the Board of Education; HAWAII TEACHER STANDARDS BOARD,
Defendants-Appellees.

SCAP-16-0000475

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-16-0000475; CIV. NO. 14-1-2214)

AUGUST 13, 2019

RECKTENWALD, C.J., CONCURRING IN THE JUDGMENT

Article X, section 4 of the Hawai'i Constitution states that "[t]he State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools." This appeal requires us to define the extent of that mandate and to determine whether the State fulfilled its obligations under article X, section 4 with respect to two children on the island of Lāna'i.

I conclude that article X, section 4 required the State to provide those students with a reasonable opportunity to become fluent in 'ōlelo Hawai'i through the public education system. Because the record does not establish as a matter of law that such an opportunity was afforded here, partial summary judgment was improperly granted to the State.

I. THE EXTENT OF THE STATE'S DUTY

This case requires us to determine whether a particular school's Hawaiian education program meets the mandate set forth by the framers in article X, section 4.

Because constitutions derive their power and authority from the people who draft and adopt them, we have long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent.

Sierra Club v. Dep't of Transp., 120 Hawai'i 181, 196, 202 P.3d 1226, 1241 (2009) (quoting Hanabusa v. Lingle, 105 Hawai'i 28,

31, 93 P.3d 670, 673 (2004)).

In order to ascertain the intent of the framers, we first look to the plain language of the provision. "The general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written[.]" Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 197, 277 P.3d 279, 291 (2012) (quoting Spears v. Honda, 51 Haw. 1, 6, 449 P.2d 130, 134 (1968)). "The words in a constitutional provision are "presumed to be used in their natural sense." Id. at 197-98, 277 P.3d at 291-92 (quoting Emps.' Ret. Sys. v. Ho, 44 Haw. 154, 159, 352 P.2d 861, 864 (1960)).

The Hawaiian education program provision is contained in article X, section 4, which states:

The State shall promote the study of Hawaiian culture, history and language.^[1]

The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community experience shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.

The plain language of this provision provides an explicit and significant limitation on the Board of Education's

¹ This provision reflects the belief that "the study of Hawaiian culture, history and language should be vigorously promoted and encouraged," and was adopted to "facilitate the preservation and growth of the Hawaiian culture." Stand. Comm. Rep. No. 39 in 1 Proceedings of the Constitutional Convention of 1978 (1980) (I Proceedings), at 587.

discretion over the content of the curriculum in the state's public schools.² This is the only provision in the Hawai'i Constitution that requires public schools to teach specific subject matter, demonstrating the great import that the framers placed on the revitalization of 'ōlelo Hawai'i and the preservation of Hawaiian culture.

However, the plain language of the provision does not provide clear guidance regarding the extent of the State's duty. Where the text of a constitutional provision is ambiguous, "extrinsic aids may be examined to determine the intent of the framers and the people adopting the proposed amendment." State v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314 (1981). Indeed, "a constitutional provision must be construed in connection with other provisions of the instrument, and also in [] light of the circumstances under which it was adopted and the history which preceded it." Sierra Club, 120 Hawai'i at 196, 202 P.3d at 1241 (quoting Hanabusa, 105 Hawai'i at 32, 93 P.3d at 674). I therefore look to the history of the provision for guidance.

Article X, section 4 was adopted as a result of the 1978 Constitutional Convention. Delegates to the convention

² Article X, section 3 of the Hawai'i Constitution provides, in part, "[t]he board of education shall have the power, as provided by law, to formulate statewide educational policy[.]"

recognized that the Hawaiian people had been subject to "200 years of deliberate and inadvertent obliteration of the soul and values of a nation," and many delegates noted the shortcomings of their own cultural knowledge and their inability to pursue fluency in 'ōlelo Hawai'i as children. I Proceedings, at 274 (statement of Del. Takehara); 2 Proceedings of the Constitutional Convention of 1978 (1980) (II Proceedings), at 428 (statement of Del. Hagino ("It embarrasses me that I know very little of my own culture and the hardships that my grandparents suffered to make me what I am today.")); II Proceedings, at 429 (statement of Del. Kaapu ("[W]hen I was growing up . . . I didn't even have a chance to take the Hawaiian language because it wasn't offered.")).

Accordingly, the framers expressed a firm commitment to counter this history through the revitalization of 'ōlelo Hawai'i and the preservation of Hawaiian culture. II Proceedings, at 430 (statement of Del. Kaapu ("I support this . . . [b]ecause those who study the Constitution and find in it an indication of the importance we place upon the Hawaiian culture and language, and who gain this opportunity in the schools, will come to know the Hawaiian culture . . . and they will therefore preserve it and not destroy it.")).

The framers substantiated this commitment through the contemporaneous adoption of article X, section 4 and article XV,

section 4. Article XV, section 4, which establishes English and 'ōlelo Hawai'i as the official languages of the state, was adopted "to overcome certain insults of the past where the speaking of Hawaiian was forbidden in the public school system, and of today where Hawaiian is listed as a foreign language in the language department at the University of Hawai'i." Comm. of the Whole Rep. No. 12 in I Proceedings, at 1016. And, as discussed above, article X, section 4 was adopted to mandate the institution of a Hawaiian education program in the public schools in order to "revive the Hawaiian language, which is essential to the preservation and perpetuation of Hawaiian culture." Stand. Comm. Rep. No. 57 in I Proceedings, at 637.

In contemplation of these amendments, the framers emphasized the importance of reviving 'ōlelo Hawai'i through the public education system, in order to ensure that all children in the State of Hawai'i have exposure to Hawaiian language, culture and history. For example, Delegate Nozaki stated:

It is time to wipe out the alienation of the Hawaiian people in the schools. . . . The time is right for change. . . . We must start with education.

. . . .

[L]anguage, history and culture . . . are necessarily tied together. Language is essential to gain insight into the feel of the culture; through language we realize the innuendos and beauty of a culture. By studying his own ethnic history, the Hawaiian student becomes politically aware and develops into an effective citizen. By studying his own culture, he becomes socially aware and develops individual pride, identity and self-realization. . . . All students

will learn that there are not just differences between Hawaiians and others, but that there are many things they all have in common. Through these kinds of developments, we can look forward to a decrease in alienation in the community. And all this can be the result of providing for a comprehensive Hawaiian education program in the schools.

It is the duty and responsibility of this State to preserve all aspects of Hawaiiana in education[.]

II Proceedings, at 428 (statement of Del. Nozaki).

In addition to general exposure for all public school students, the framers expressed the intent to provide children who wish to become fluent in 'ōlelo Hawai'i with a reasonable opportunity to do so. See I Proceedings, at 274 (statement of Del. de Costa ("I want my kids to grow up and be able to speak Hawaiian.")). As Delegate Kaapu articulated, the framers viewed the inability of children throughout the state to pursue fluency in 'ōlelo Hawai'i as a great wrong that needed to be addressed:

When my father was growing up . . . they were prohibited from speaking the Hawaiian language. This was not just in class, this was anywhere. If any student was caught speaking the Hawaiian language, he was made to do detention.

. . . .

Many years later when I was growing up . . . I didn't even have a chance to take the Hawaiian language because it wasn't offered. Courses were offered very infrequently in [] very few places throughout the State.

. . . .

I was not privileged to learn the Hawaiian language because . . . it was not offered in the schools I went to. . . . [M]y son - who just left for [college] a few days ago . . . was only learning Hawaiian as he got aboard the plane. He took his language book with him, and he's trying to master the phrases contained therein, although at his school (a public school) he

had already had seven years of Japanese and could read, write and speak it.

II Proceedings, at 429-30 (statement of Del. Kaapu).

Delegate Hale echoed Delegate Kaapu's sentiment, explaining the difficulties she encountered in attempting to afford her children an opportunity to become fluent in 'ōlelo Hawai'i:

Keaukaha school was the only school located in the whole State of Hawaii that taught Hawaiian [language] in the fourth grade. My son went through this school in his early days and took Hawaiian from a non-Hawaiian teacher who, unfortunately, didn't know very much herself. So I can't say that he knows very much Hawaiian, because it was taught not by somebody who really knew Hawaiian but by a certified teacher who picked up a few words - enough to stay ahead of the students, for the next day.

.

I think it's time - my son is grown up now and will not get the advantage of this. But perhaps my grandchildren, if and when I ever get any, will be able to take advantage. I certainly feel that it is time we taught the Hawaiian language, culture, and tradition to . . . all the children in the State of Hawaii.

II Proceedings, at 431 (statement of Del. Hale).

Thus, it is clear that through the adoption of article X, section 4, the framers intended to provide each child in the public schools with a reasonable opportunity to become fluent in 'ōlelo Hawai'i.

The framers understood that the State's Hawaiian education program would need to embody certain characteristics in order to carry out this serious undertaking. First, the framers

explained that the program must be comprehensive, meaningful, and structured:

The State should provide for a comprehensive Hawaiian education program. The State must mandate the provision for Hawaiian studies for two main reasons. First, it will guarantee a meaningful program - not the piecemeal kind of program that now exists. What we have now in the schools is fragmented and not even an introduction to Hawaiian culture.

II Proceedings, at 428 (statement of Del. Nozaki).

Second, the framers explained that the program must be permanent. Delegate Villaverde related that just a year and a half prior to the constitutional convention, discontinuation of the Hawaiian education program at the University of Hawai'i at Hilo had been threatened in order to provide for other course offerings. II Proceedings, at 432 (statement of Del. Villaverde). Mandating the institution of a Hawaiian education program in the public schools through a constitutional amendment would protect the program from similar threats of termination and shield it from the impact of shifting priorities.

Finally, the framers emphasized the importance of utilizing formally trained teachers as well as community experience, recognizing value in the "opportunity to learn by the formal method . . . but also [from] experiences [that kūpuna] gained as children."³ II Proceedings, at 432 (statement of Del.

³ "Kūpuna" is the plural form of "kupuna," which means "[g]randparent, ancestor, relative or close friend of the grandparent's generation, grandaunt, granduncle." Mary Kawena Pukui & Samuel H. Elbert, (continued...)

Villaverde); I Proceedings, at 274 (statement of Del. Anae (urging support of the amendment because it "mandate[s] the State to train teachers and to use community expertise")). With regard to the necessity of professional instruction, the framers noted that by mandating the Hawaiian education program through the adoption of article X, section 4, they could "be assured that ['ōlelo Hawai'i] will be taught properly." II Proceedings, at 431 (statement of Del. Hale, lamenting that her son did not have an opportunity to become fluent in 'ōlelo Hawai'i because he was not taught "by somebody who really knew Hawaiian"); II Proceedings, at 428 (statement of Del. Nozaki ("[I]f it is mandated we can be assured that it will be taught properly.")).

With regard to the necessity of utilizing community experience, the framers expressed concern that "men and women who have significant information are dying and the information they could provide is being lost forever." II Proceedings, at 427 (statement of Del. Ching). Accordingly, the framers sought to encourage the preservation of inherited knowledge and shared cultural experience by expressly enumerating the use of community experience "as a suitable and essential means in furtherance of the Hawaiian education program." Haw. Const. art. X, § 4.

³(...continued)
Hawaiian Dictionary: Revised and Enlarged Edition 186 (University of Hawai'i Press 1986).

Indeed, one stated purpose of adopting article X, section 4 was "to provide for the employment in the public school system of persons who have knowledge of Hawaiian language, culture, and history but not necessarily the necessary formal educational achievements." Stand. Comm. Rep. No. 57 in I Proceedings, at 637.

In sum, the framers clearly articulated the purpose of instituting a Hawaiian education program in the public schools and discussed the characteristics that the program must embody in order to achieve that purpose. However, the framers did not contemplate the methods of instruction that the program would employ, nor did they require the program to take any particular form.

Therefore, the State is required to institute a Hawaiian education program in the public schools that consists of language, culture, and history, and that affords each child in the State of Hawai'i a reasonable opportunity to become fluent in 'ōlelo Hawai'i. The program must be structured, comprehensive, and permanent. Furthermore, the program should draw upon community experience. However, the particular form of the program and the methods of instruction that it utilizes may vary over time as needs change, knowledge increases, and technology improves.

II. PARTIAL SUMMARY JUDGMENT WAS IMPROPERLY GRANTED

Applying the principles discussed above, I conclude that the circuit court did not err in denying Clarabal's motion for partial summary judgment with respect to Count II of the complaint. However, I further conclude that the circuit court erred in granting the State's motion for partial summary judgment with respect to Count II of the complaint.

In her motion for partial summary judgment, Clarabal sought a declaration that, "as a matter of law, [the State has] a duty to provide the plaintiff-schoolchildren with access to a Hawaiian language immersion program under Article X, Section 4 of the Hawai'i State Constitution (Count II of the Complaint)." (Emphasis added). The record before us establishes that Hawaiian immersion education clearly would satisfy the State's mandate under article X, section 4. However, as discussed above, the State is not required to discharge its constitutional duty through immersion, and may instead institute a program that utilizes alternative methods of instruction, provided that the program provides each student who wishes to learn 'ōlelo Hawai'i with a reasonable opportunity to become fluent in the language during the course of the student's public education. I therefore concur that the circuit court did not err in denying Clarabal's motion for partial summary judgment.

It is undisputed that the State failed to provide Clarabal's daughters with access to a Hawaiian immersion program. However, the record reflects that the State provided Lānaʻi High and Elementary School students with alternative instruction in the areas of Hawaiian language, history, and culture. The principal of Lānaʻi High and Elementary School, Elton Kinoshita, described the extent of this instruction as follows:

Students at Lanai school are provided a standards-based curriculum for grades kindergarten to twelfth grade (K-12) that includes Hawaiian education courses at the elementary, intermediate, and high school levels.

In the fourth grade, students are provided a course called "Pre-Contact Hawaii History." In the seventh grade, students are taught a course entitled "History of the Hawaiian Kingdom." Students are also required to take "Modern Hawaiian History" in high school in order to graduate.

In addition, for the current school year, students in grades preschool through the fifth grade are receiving additional instruction in Hawaiian language, history and culture from Mr. Simon Tajiri, a respected member of the Lanai Community and former Program Manager of Lanai Culture & Heritage Center.

Although Mr. Tajiri does not possess the formal education required to be a regular teacher, he was hired as a long-term substitute teacher based on his fluency in the Hawaiian language and his vast knowledge of the history of Lanai, as well as his being born and raised on Lanai and his reputation within the local community.

Lanai school has had Hawaiian language summer school for the past four or five summers.

Kinoshita further provided that, as of the 2015-2016 school year, Tajiri was providing elementary and intermediate level students with instruction in Hawaiian language and culture for forty-five minutes to three hours per week, in accordance

with the chart below:

<u>Grade Level</u>	<u>Time</u>
Preschool	50 minutes per week
Kindergarten	50 minutes per week
1st grade	70 minutes per week
2nd grade	45 minutes per week
3rd grade	80 minutes per week
4th grade	75 minutes per week
5th grade	90 minutes per week
6th-8th grade	180 minutes per week

William O'Grady, a linguistics professor at the University of Hawai'i at Mānoa, opined that Tajiri's instruction is "not an effective way to make the children fluent in the Hawaiian language," and is thus insufficient to meet the State's duty under article X, section 4. Professor O'Grady explained:

Instruction in Hawaiian for periods of 1 to 3 hours a week can be expected to contribute only very slightly to children's knowledge of the language. . . . With the very limited exposure to Hawaiian that would come from just a few hours a week of exposure, the children's prospects of becoming fluent in the language are negligible. Moreover, . . . the chances that they will ever become fluent in Hawaiian are very significantly reduced.^[4]

⁴ Professor O'Grady explained that providing children with a reasonable opportunity to become fluent in 'ōlelo Hawai'i is absolutely essential for the revitalization of the language:

[B]eing able to speak Hawaiian means you can use that language for all the activities in your daily life. You communicate with your friends, your spouse, ultimately your children in that language comfortably and talk about all the things that are important to them.

. . . .

(continued...)

(Emphasis in original).

Although the State introduced some evidence that immersion is not the only effective means of teaching 'ōlelo Hawai'i, there is no evidence in the record that Tajiri's instruction alone was sufficient to provide Lāna'i High and Elementary School students with an opportunity to become fluent in 'ōlelo Hawai'i during the course of their education.⁵ The State has thus failed to show that it met the mandate of article X, section 4, and that it is therefore entitled to judgment as a matter of law. Accordingly, the circuit court erred in granting the State's motion for partial summary judgment with respect to Count II of the complaint. Yoneda v. Tom, 110 Hawai'i 367, 371, 133 P.3d 796, 800 (2006) ("[S]ummary judgment is appropriate if

⁴(...continued)

Being comfortable in the language is absolutely essential for the revitalization, preservation, perpetuation. If you're not comfortable in the language you're not going to speak it. You're not going to speak it to your spouse and you're not going to speak it in front of your children. And the language is going to be lost on the next generation.

⁵ The State submitted a declaration of Dawn Kauī Sang, Director of the Office of Hawaiian Education, stating:

Hawaiian language can be taught through the medium of English the way other foreign languages are taught. The method for teaching Hawaiian language through English instruction is different than the method for teaching Hawaiian in an immersion context.

In addition, in a deposition taken by the State, Professor O'Grady acknowledged that it is possible for someone who is not in an immersion program to become fluent in 'ōlelo Hawai'i.

the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.").

III. CONCLUSION

For the foregoing reasons, I respectfully concur with the Majority's judgment vacating the circuit court's June 7, 2016 Order insofar as it granted the State's motion for partial summary judgment as to Count II of the complaint, and remanding the case to determine whether the State can meet the mandate of article X, section 4.

/s/ Mark E. Recktenwald

