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Supreme Court
SCAP-16-0000475
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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

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.

Ka Papahana Kaiapuni (Kaiapuni Educational Program),
the State Department of Education's Hawaiian language immersion
program, offers public school students an education in the

Hawaiian language medium. Haw. State Bd. of Educ., Policy 2105: Ka Papahana Kaiapuni (2014). One of the Kaiapuni Educational Program's laudable goals is to provide "a Hawaiian bicultural and bilingual education based upon a rigorous Hawaiian content and context curriculum." Id. From its inception in 1987, the Kaiapuni Educational Program has been established at twenty-three sites across the state. Haw. State Dep't of Educ., Hawaiian Language Immersion Program. However, no Kaiapuni Educational Program currently exists on the island of Lāna'i.

In 2013, the leadership of Lāna'i High and Elementary School (Lāna'i School), the only public school on Lāna'i, made plans to begin a Hawaiian language immersion program in the 2014-15 school year. The principal of Lāna'i School pledged to commit a classroom and a teacher position to the program. Because of the high interest in the immersion program, Lāna'i School intended to start two immersion classes in the 2014-15 school year. However, because Lāna'i School could not recruit a qualified Hawaiian language immersion teacher to teach at the school, no immersion program was in place during the 2014-15 school year.

In October 2014, Clarabal, who had intended to enroll her elementary school-aged daughters in the program, filed a complaint in the Circuit Court of the First Circuit (circuit

court) which alleged in Count II that the Defendants-Appellees Department of Education, Board of Education, and Hawai'i Teacher Standards Board (the State) violated article X, section 4 of the Hawai'i Constitution by failing to provide her children with access to a Hawaiian language immersion program on Lāna'i.

Article X, section 4, the Hawaiian education provision, provides:

The State shall promote the study of Hawaiian culture, history and language.

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

Clarabal filed a motion for partial summary judgment on Count II, and requested that the circuit court declare, as a matter of law, that the State has a duty to provide her daughters with access to a Hawaiian language immersion program under article X, section 4. The State filed its own motion for partial summary judgment on Count II of Clarabal's complaint, contending that article X, section 4 did not constitutionally require the State to establish a Hawaiian language immersion program on Lāna'i. The circuit court granted the State's motion for partial summary judgment as to that Count, and denied Clarabal's motion for partial summary judgment.

Clarabal appealed. In vacating in part and affirming in part the circuit court's order granting partial summary judgment to the State, the Majority declines to adopt Clarabal's

position that the State must provide a Hawaiian language immersion program on the island of Lānaʻi. Instead, it decides that article X, section 4 of the Hawaiʻi Constitution requires the State to "take all reasonable measures to provide access" to a Hawaiian language immersion program. Majority at 43 n.34.

The Majority takes several steps to arrive at this conclusion. First, the Majority concludes that the language of article X, section 4 is ambiguous. Majority at 31-32. Because the language is ambiguous, the Majority looks to extrinsic aids to assist it in determining how to interpret the provision. Majority at 32. These extrinsic aids, the Majority explains, clearly indicate that the framers intended article X, section 4 "to require the State to provide a Hawaiian education program . . . that is reasonably calculated to revive and preserve 'ōlelo Hawaiʻi." Majority at 36. The Majority then turns to declarations offered by Clarabal, which state that a language immersion program is "the only realistic course of action" to revive 'ōlelo Hawaiʻi. Majority at 43. Accordingly, the Majority now holds that the State is constitutionally obligated to "take all reasonable measures" to provide access to a Hawaiian language immersion program. Majority at 43 n.34.

This is undoubtedly a good policy. The State should make every effort to provide as many students as possible with

access to a Hawaiian language immersion program. However, I cannot conclude that the Hawai'i Constitution demands this requirement of the State. In my view, the Majority's holding, while measured, still imposes a new affirmative obligation on the State that neither the language of article X, section 4, nor the constitutional debates and proceedings clearly support.

Therefore, while I agree with the Majority and the Concurrence that it was not improper for the circuit court to deny Clarabal's motion for summary judgment, I respectfully disagree with their decisions to vacate the circuit court's order granting summary judgment to the State on Count II of Clarabal's complaint.

Accordingly, I must respectfully concur in part and dissent in part.

I. DISCUSSION

When interpreting constitutional provisions, we must start with the text of the Constitution itself. State v. Kahlbaun, 64 Haw. 197, 201, 638 P.2d 309, 314 (1981). Article X, section 4 of the Hawai'i Constitution provides:

The State shall promote the study of Hawaiian culture, history and language.

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

On a plain reading of the provision, article X, section 4 requires the State to do two things: (1) promote the study of

Hawaiian culture, history and language; and (2) provide for a Hawaiian education program in the public school system consisting of Hawaiian language, Hawaiian culture, and Hawaiian history. It does not explicitly require the State to provide a Hawaiian language immersion program.

The Majority argues that the plain language of article X, section 4 is ambiguous as to how the State must achieve these ends, and therefore further investigates whether the debates, proceedings, and reports of the Constitutional Convention of 1978 can clarify what the framers envisioned in establishing a Hawaiian education program. Majority at 31-32. It is true that an examination of the debates, proceedings and committee reports are useful tools to determine the intent of the framers, but "the debates, proceedings and committee reports do not have binding force on this court and its persuasive value depends upon the circumstances of each case." Kahlbaun, 64 Haw. at 204, 638 P.2d at 316.

Notwithstanding the plain language of article X, section 4, I might be persuaded that the State must provide reasonable access to Hawaiian language immersion if the debates or committee reports from the 1978 Constitutional Convention clearly indicated that such a program had been contemplated by the framers. But in my view, the debates and committee reports

do not demonstrate that the framers intended Hawaiian language immersion to be a required component of the Hawaiian education program.

The constitutional debates and proceedings certainly reveal impassioned testimony from many delegates lamenting the history of state-sponsored suppression of the Hawaiian language and their inability to speak 'ōlelo Hawai'i. See II Proceedings of the Constitutional Convention of Hawai'i of 1978 (II Proceedings), at 429-31 (1980) (statement of Del. Kaapu ("[My father] related to me the story of how at school they were prohibited from speaking the Hawaiian language. This was not just in class, this was anywhere.")); (statement of Del. Hale ("My son went through [school] in his early days and took Hawaiian from a non-Hawaiian teacher who, unfortunately, didn't know very much herself.")).

But providing for a more rigorous study of the Hawaiian language, while foremost on some delegates' minds, was not the only deficiency that the delegates wished to remedy in establishing a Hawaiian education program.¹ Other delegates

¹ Moreover, no delegate expressed a desire to require students enrolled in the public schools to become fluent in 'ōlelo Hawai'i. If the framers had intended such a requirement, it would not have been difficult for them to include in the language of article X, section 4 a more specific course of study that would provide the requisite language instruction for fluency.

Yet for the reasons that the delegates to the 1978 Constitutional Convention placed limitations on the Hawaiian language provision of article XV, section 4, which permitted the Legislature to regulate that right, it is
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expressed a desire that Hawaiian culture and Hawaiian history be more thoroughly taught in the public schools. See II Proceedings, at 428-29 (statement of Del. Nozaki ("What we have now in the schools is fragmented and not even an introduction to Hawaiian culture - that's how sketchy it is.")); (statement of Del. Sterling ("The main thrust of this section is toward things of value - the sophisticated, proven culture that sustained thousands and thousands of people in a very healthy manner prior to contact with Western civilization.")).

Moreover, delegates expressed that the Hawaiian education program in the public school system be available to every student. See II Proceedings, at 429-431 (statement of Del. Hale ("I certainly feel that it is time we taught the Hawaiian language, culture and tradition to all the people and all the children in the State of Hawaii.")); (statement of Del. Nozaki ("All students will learn that there are not just differences between Hawaiians and others, but there are many things they all have in common.")). Accordingly, the Committee on Hawaiian Affairs' Standing Committee Report No. 57 stated that the Hawaiian education program should have three broad goals: to "insure the general diffusion of Hawaiian history on a wider

¹(...continued)
logical that they would not have intended to require the State to provide a Hawaiian education program that included a fluency requirement.

basis, to recognize and preserve the Hawaiian culture . . . and to revive the Hawaiian language[.]” Stand. Comm. Rep. No. 57 in I Proceedings of the Constitutional Convention of Hawai‘i of 1978 (I Proceedings), at 637 (1980).

We have stated that in construing constitutional provisions, “the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.” Hawai‘i State AFL-CIO v. Yoshina, 84 Hawai‘i 374, 376, 935 P.2d 89, 91 (1997) (emphasis added). Here, when interpreting the phrase “revive the Hawaiian language,” the Majority must take into account the specific context with which the framers used that phrase: to provide a Hawaiian education program capable of being implemented in every public school and made available to every public school student.² The specialized requirements of a Hawaiian language immersion program indicate

² Without placing the framers’ wish to “revive the Hawaiian language” into this context, the Majority creates a holding that appears to be constitutionally inadequate.

If, as the Majority states, the framers intended that the Hawaiian education program be “reasonably calculated to revive and preserve ‘ōlelo Hawai‘i,” Majority at 36, and Hawaiian language immersion is currently the only realistic way to revive ‘ōlelo Hawai‘i, Majority at 43, then one would think that the State’s Hawaiian education program must include access to Hawaiian language immersion. The Majority’s more measured holding only requires the State to “take all reasonable measures” to provide access to a Hawaiian language immersion program. Majority at 43 n.34.

But even if the State takes “reasonable measures to provide access” to Hawaiian language immersion, it is unlikely that these measures by themselves would “revive and preserve ‘ōlelo Hawai‘i” if, despite the State’s reasonable efforts, access to an immersion program is not feasibly possible. Taken to its logical conclusion, the Majority’s holding would not satisfy the new obligations it has imposed on the State under article X, section 4.

that it cannot be implemented in every public school.

Moreover, the phrases "comprehensive" and "as part of the regular curriculum," on which the Majority relies to interpret the contours of the Hawaiian education provision, were removed from the proposed provision on the floor of the Convention. The provision which was ultimately adopted reads, with additions underlined and deleted provisions bracketed:

The State shall promote the study of Hawaiian culture, history, and language.

The State shall provide for a [comprehensive] Hawaiian education program, consisting of language, culture and history, [as part of the regular curriculum of] in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian [language, culture and history] education program.

Convention Journal in I Proceedings, at 273.³ The removal of the words "comprehensive" and "as part of the regular curriculum" from article X, section 4 indicate to me that on the convention floor, delegates expressed a desire to place fewer requirements on the State in developing a Hawaiian education program, as long as it consisted of Hawaiian language, culture and history. It also suggests to me that the framers did not intend article X, section 4 to require the State to provide a specialized, intensive Hawaiian language immersion program to public school

³ It appears that the original proposal from the Committee on Hawaiian Affairs was reconciled with the Committee on Education's Hawaiian education provision, which simply provided, "The State shall promote the study of Hawaiian culture, history and language." Stand. Comm. Rep. No. 39 in I Proceedings, at 590; Convention Journal in I Proceedings, at 274.

students. Contra Majority at 32-33.

Under these circumstances, I cannot conclude that the framers of article X, section 4 intended to require the State to provide a Hawaiian language immersion program. The Majority recognizes this possibility, but notes that the framers "may not have anticipated the contours of a Hawaiian education program reasonably calculated to revive 'ōlelo Hawai'i under current circumstances." Majority at 40. Based upon declarations submitted by Clarabal, the Majority concludes that Hawaiian language immersion is currently the only realistic way to revive the Hawaiian language. Majority at 43.

I am wary of a court dictating the methods that the State must employ to satisfy broad constitutional mandates. Instead, if there is a need to determine "the specifics of the Hawaiian education program required by article X, section 4," or "the contours of a Hawaiian education program reasonably calculated to revive 'ōlelo Hawai'i under current circumstances," Majority at 40-41, I believe that responsibility is best left to the Legislature, not the courts.

It is the responsibility of the courts to interpret the Hawai'i Constitution. Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 197, 277 P.3d 279, 291 (2012). However, where the framers broadly described the State's obligation to provide a

Hawaiian education program and did not specify the means with which to fulfill that obligation, any decision to offer a specific, specialized education program to meet that mandate becomes a question of policy and not a question of constitutional interpretation. See McCleary v. State, 269 P.3d 227, 247 (Wash. 2012) ("[W]hile the judiciary has the duty to construe and interpret the word 'education' by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that [education]."). Therefore, the Legislature is best equipped to determine how to specifically implement article X, section 4's Hawaiian education requirement. As the Washington Supreme Court stated in McCleary, "[t]he legislature's 'uniquely constituted fact-finding and opinion gathering processes' provide the best forum for addressing the difficult policy questions inherent in forming the details of an education system." Id. (emphasis added).

This is not to say that the courts have no role in evaluating the adequacy of the State's Hawaiian education program. If a party is unsatisfied with a school's current program, it may file a complaint in court explaining how the current program is inadequate and request the appropriate relief. It would then be proper for a court to determine whether the

State's current program fulfills its article X, section 4 mandate. This is the general practice when courts in other jurisdictions have evaluated the adequacy of their state's public education program. See McCleary, 269 P.3d at 257 ("By the Legislature's own terms, it has not met its duty to make ample provision for 'basic education.'"); Conn. Coalition for Justice v. Rell, 990 A.2d 206, 222 (Conn. 2010) ("In the present case, . . . the complaint clearly requests a declaration of a constitutional violation, with the precise remedy being left to the [State] defendants in the first instance."); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 667 (N.Y. 1995) ("[P]laintiffs allege and specify gross educational inadequacies that, if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity.").

Here, the State has implemented a Hawaiian education program which it believes satisfies its constitutional duty under article X, section 4.⁴ Students, parents, and other stakeholders

⁴ Specifically, the State has implemented policies that (1) require all public school students to take three courses in Ancient Hawaiian Civilization, the Hawaiian Monarchy, and Modern Hawaiian History and (2) utilize community expertise through kūpuna who visit elementary school classrooms and offer cultural enrichment lessons. Haw. State Dep't of Educ., FAQs: Hawaiian education program.

Additionally, in 2004, the Legislature passed legislation to "establish the Hawaiian language medium education program and to enable its full implementation." 2004 Haw. Sess. Laws Act 133, § 1 at 577. Pursuant to that legislative act, the Department of Education and Board of Education

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may disagree. If properly raised, we could decide whether the State's current Hawaiian education program at Lāna'i School passes constitutional muster.

But this is not the issue raised in this appeal. In this case, Clarabal did not specifically ask the circuit court to review the adequacy of the State's Hawaiian education program at Lāna'i School. While Clarabal made several allusions to the inadequacy of the Hawaiian education program at Lāna'i School, her motion for partial summary judgment specifically prayed that the circuit court declare, as a matter of law, that the State "have a duty to provide the [Clarabal children] with access to a Hawaiian language immersion program" under article X, section 4. Therefore, the pertinent issue in this appeal is whether the State must provide the Clarabal children with access to a Hawaiian language immersion program under article X, section 4, of the Hawai'i Constitution. On this specific issue, I conclude that it does not.⁵

⁴(...continued)
developed the Kaiapuni Educational Program and implemented it with success at twenty-three schools statewide.

⁵ Even if a State-run Hawaiian language immersion program is not constitutionally mandated by article X, section 4, the Legislature has specifically established such a program, see Hawai'i Revised Statutes Chapter 302H (2004), and the Department of Education has promulgated numerous policies effectuating these statutory provisions. Therefore, any attempt by the State to do away with the Kaiapuni Educational Program now could violate Hawai'i law.

Regardless, the State has never indicated that it intends to
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II. CONCLUSION

Delegates to the Constitutional Convention of 1978 sought to enshrine in the Hawai'i Constitution a right to a Hawaiian education consisting of culture, history and language for all public school students. As the Majority recounts, this provision was adopted in response to the distressing history of state-sponsored Hawaiian language suppression, the dismal Hawaiian Studies program that had been offered in the public schools, and the desire to convey to Hawaii's children a lasting appreciation of "the Hawaiian culture, the Hawaiian feeling, the Hawaiian spirit and our land." II Proceedings, at 427-31; Majority at 8-12. Accordingly, the Hawai'i 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 the public schools." Haw. Const. art. X, sec. 4.

The State has implemented a Hawaiian education program which consists of culture, history and language, and has established a Hawaiian language immersion program which provides "a bilingual education based upon a rigorous Hawaiian content and

⁵(...continued)
abandon the Kaiapuni Educational Program. In fact, the State has repeatedly stated that it wishes to begin a Kaiapuni Educational Program on the island of Lāna'i.

context curriculum." Haw. State Bd. of Educ., Policy 2105: Ka Papahana Kaiapuni. The Kaiapuni Educational Program plays an invaluable role in educating young leaders who will perpetuate Hawaiian language, culture and history. In accordance with the Board of Education's own policy, "[e]very student within the [State's] public school system should have reasonable access to the Kaiapuni Educational Program," and the State should utilize every available tool to make this possible.

Whether the State is required by the Hawai'i Constitution to provide access to a Hawaiian language immersion program, however, is the issue raised in this appeal. In my view, we must use caution when expanding the State's affirmative constitutional duties to be sure that the duty is rooted in the language of a constitutional provision or clearly contemplated by the framers. Here, the plain language of article X, section 4 and the history surrounding its adoption do not suggest to me that the State is constitutionally required to provide access to a Hawaiian language immersion program.

I would therefore affirm the circuit court's order granting summary judgment to the State on Count II of Clarabal's complaint. I respectfully concur in part and dissent in part.

/s/ Paula A. Nakayama

