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For Immediate Release
August 23, 2017

News Release 2017-110

STATE RESPONDS TO MCDERMOTT APPEAL

HONOLULU – Today the State of Hawaii filed its answering brief in *McDermott v. Mizumoto*, a lawsuit filed by state legislator Bob McDermott against the State, alleging that more money should have been allocated for school facilities and infrastructure at a school in his district.

The plaintiffs, Representative McDermott (District 40 – Ewa, Ewa Beach, Ewa Gentry and Iroquois Point) and his wife sued in October 2016. They claimed, among other things, that Campbell High School had inadequate facilities, and that the $35 million requested by the executive branch for upgrades to the school should have been appropriated by the state legislature. Three months later, in January 2017, circuit court judge Edwin C. Nacino dismissed the plaintiffs' complaint because it failed to allege the violation of any constitutionally protected rights and sought remedies that violated the separation of powers doctrine. The plaintiffs appealed.

The State's answering brief to the appeal states in part:

> It is ironic that a Hawai'i Legislator – Representative Bob McDermott (with his wife, Utufaasili McDermott) – initiated this lawsuit. The catalyst for Plaintiffs' complaint was the non-party Legislature's appropriation of less than $35 million (in 2016) for Campbell High School facilities improvements. The appropriation of moneys from the State general fund to pay for the maintenance and improvement of Campbell High School is a legislative matter, reserved to the Legislature pursuant to the separation of powers doctrine. It is thus entirely up to the *Legislature*, of which Plaintiff McDermott is a voting member, to determine the amount of funding to appropriate for construction projects at Campbell High School.

The brief also notes that since the plaintiffs filed their lawsuit, they have admitted that the $35 million they wanted to be allocated for improvements at Campbell High School has now been appropriated.

The State has asked the Intermediate Court of Appeals to affirm Judge Nacino's decision to dismiss the case. No date has yet been set for argument on the appeal.

A copy of the State's answering brief is attached.

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CAAP-17-0000079

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

BOB McDERMOTT and UTUFAASILI McDERMOTT, parents of S. and B., minor children,

Plaintiffs-Appellants,

vs.

LANCE MIZUMOTO, in his capacity AS CHAIRMAN OF THE BOARD OF EDUCATION, STATE OF HAWAI'I; KATHRYN S. MATAYOSHI, in her capacity as the SUPERINTENDENT OF EDUCATION, STATE OF HAWAI'I; GOVERNOR DAVID S. IGE, JOHN DOES 1-10; JANE DOES 1-10; DOE GOVERNMENTAL ENTITIES 1-10,

Defendants-Appellees.

Civ. No. 16-1-1908-10 ECN

APPEAL TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I FROM THE:

1) Order Granting Defendants' Motion to Dismiss Complaint Filed on October 12, 2016, and;

2) Final Judgment Re: Filed Judgment Re: Order Granting Defendants' Motion to Dismiss Complaint Filed on October 12, 2016, Filed on January 18, 2017

FIRST CIRCUIT COURT

HON. EDWIN C. NACINO,
Judge

DEFENDANTS-APPELLEES' ANSWERING BRIEF

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONS, STATUTES, LEG. HISTORY, and SESSION LAWS:

LEGAL TREATISES

STATE OF HAWAII'S ANSWERING BRIEF

I. INTRODUCTION

This case is about Plaintiffs' demands that the State provide Campbell High School students with "better" physical facilities and the "opportunity to participate in diverse extra-curricular activities." It is *not* about the adequacy of the educational instruction or academic curriculum being provided to Campbell High School students, and it is *not* about the state constitutional guarantee that Hawai'i children receive a public school education. The State fully acknowledges and respects that the Hawai'i Constitution provides for "the establishment, support and control of a statewide system of public schools." Haw. Const. Art. X, sec. 1. But that guarantee is in full effect here because, as Plaintiffs agree, Campbell High School students are in fact receiving a public school education. At its heart, this case is thus about legislative funding and Plaintiffs' dissatisfaction with the specific amount of funding that was allocated to Campbell High School in 2016 for the improvement of the school's facilities and infrastructure.

It is ironic that a Hawai'i Legislator – Representative Bob McDermott (with his wife, Utufaasili McDermott) – initiated this lawsuit. The catalyst for Plaintiffs' complaint was the non-party Legislature's[1] appropriation of less than $35 million (in 2016) for Campbell High School facilities improvements. The appropriation of moneys from the State general fund to pay for the maintenance and improvement of Campbell High School is a legislative matter, reserved to the Legislature pursuant to the separation of powers doctrine. It is thus entirely up to the *Legislature*, of which Plaintiff McDermott is a voting member, to determine the amount of funding to appropriate for construction projects at Campbell High School.

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[1] Plaintiffs named only the Governor, State Board of Education (Board) Chair, and State Superintendent as defendants to this lawsuit.

For the reasons set forth in this brief, this Court should affirm the circuit court's dismissal of Plaintiffs' Complaint.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE/ PLAINTIFFS' ALLEGED FACTS

Plaintiffs' Complaint sets forth a description of the Campbell High School facilities and extracurricular activities they allege to be "inadequate" and/or "deplorable." These allegations, even if taken as true for purposes of the State's motion, do not support their claim. As relevant to this appeal, Plaintiffs allege that:

- Campbell High School is "overcrowded" (ICA 12 at PDF 14-15 [Compl.]);
- Cafeteria services and conditions at Campbell High School are "inadequate" (ICA 12 at PDF 16 [Compl.]);[2]
- Toilet facilities at Campbell High School are "inadequate" (ICA 12 at PDF 17 [Compl.]);
- Classrooms are "inadequate" in number, and heat abatement measures currently being taken are also "inadequate" because they "do not include the installation of adequate air conditioning equipment" in each classroom[3] (ICA 12 at PDF 18 [Compl.]);
- Plaintiffs allege that the "excessive number of students enrolled at Campbell Hi" "deprive[s] [Plaintiffs' children] of the opportunity to participate in diverse extra-curricular activities (such as "team sports, band, cheer leading and various social and education clubs") (ICA 12 at PDF 20 [Compl.]);
- The full $35 million requested by the executive branch for Campbell High School students in 2016 should have been legislatively appropriated in 2016 (ICA 12 at PDF 20-21 [Compl.]).

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[2] Plaintiffs have not alleged that their children have ever been deprived of the opportunity to purchase or eat school lunches while attending Campbell High School.

[3] In support of this allegation, Plaintiffs attach an "Expanded Heat Abatement Priority List" of 32 schools that, according to the attachment: "are being evaluated for the potential for the recently announced expansion to cool more classrooms by the end of 2016. This does not mean all classrooms at these campuses would have air conditioning installed." (ICA 12 at PDF 42 [Ex. E to Compl.].) The attachment does not specify that the 32 listed schools are represented in order of most to least in need of heat abatement.

B. PROCEEDINGS BELOW

Plaintiffs filed their Complaint in October 2016 in the State circuit court of the first circuit. Plaintiffs set forth the above factual allegations as representing violations of Campbell High School students' equal protection and due process rights. (ICA 12 at PDF 23.) Plaintiffs purported to bring a class action. (*Id.* at 24.)

Plaintiffs set forth twelve prayers for relief. These generally include:

- Class action certification (ICA 12 at PDF 25);
- A finding that the "number of classrooms," "the size of the cafeteria," the "number of toilet facilities," and "heat abatement solutions" (i.e., lack of air conditioning in classrooms) are "woefully inadequate" to meet the needs of current and future Campbell High School students, and "threaten" student "health, safety and welfare," *id.*;
- A finding that "lack of extra-curricular activities and opportunities" "deprive" Campbell High School students of "an all around educational experience," *id.*;
- Declaratory judgment of State and Federal constitutional violations (ICA 12 at PDF 26);
- Declaratory judgment of the department of education's Educational Specifications for High Schools (EDSPECS) violations, *id.*;
- Declaratory judgment that Campbell High School's toilet facilities are "inadequate" to meet students' "health and safety welfare" needs, *id.*;
- Declaratory judgment directing the release of $35 million for "the construction of the additional building" on Campbell High School's campus to be completed within 18 months of a court order, *id.*;
- Declaratory judgment directing the release of "adequate funding" to commence the selection and construction of an "East Kapolei campus site," within 5 years of a court order, in order to alleviate Campbell High School overcrowding, *id.*;
- Declaratory judgment directing the immediate installation of "adequate air conditioning" at Campbell High School, *id.*;

- Injunctive relief "commanding" defendants to release $35 million for: (1) construction upgrades; (2) in the alternative, for site selection and construction of an "East Kapolei High School" campus; (3) immediate repair of "dilapidated and inadequate toilet facilities" and construction of new toilet facilities; and (4) installation of "adequate air conditioning in each and every classroom" (ICA 12 at PDF 26-27);
- Attorneys' fees and costs (ICA 12 at PDF 26-27).

In November 2016, Defendants moved to dismiss Plaintiffs' complaint on grounds that Plaintiffs failed to allege the violation of any constitutionally protected rights, and in fact sought remedies that violated the separation of powers doctrine. (ICA 12 at PDF 62.) Plaintiffs opposed the State's motion. (ICA 12 at PDF 94 [Opp., Dec. 20, 2016].) Defendants filed a reply. (ICA 12 at PDF 112 [Reply, Dec. 22, 2016].)

The circuit court heard the State's motion to dismiss on December 28, 2016, and dismissed Plaintiffs' complaint. (ICA 23 [Tr., 12-28-16].) The circuit court's order and final judgment were entered in January 2017. (ICA 12 at PDF 125 [Order]; ICA 12 at PDF 128 [J.].) Plaintiffs presently appeal the circuit court's judgment.

C. RELEVANT CONSTITUTIONAL PROVISIONS

Article X, section 1, of the Hawai'i Constitution states, in pertinent part: "The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control . . . including physical facilities therefore."

Article X, section 3, of the Hawai'i Constitution states, in its entirety: "The board of education shall have the power, as provided by law, to formulate statewide educational policy and appoint the superintendent of education as the chief executive officer of the public school system."

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the circuit court correctly dismissed Plaintiffs' Complaint because Plaintiffs' Complaint asks the Judiciary to address and decide non-justiciable political questions that, pursuant to the separation of powers doctrine, are properly left to the Legislative and Executive branches.
2. Whether the circuit court correctly dismissed Plaintiffs' Complaint because Plaintiffs cannot set forth any set of factual allegations that would support their due process and/or equal protection claims.

IV. STANDARD OF REVIEW

This Court reviews a circuit court's decision on a motion to dismiss *de novo*, and based on the following considerations:

> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory.

Wright v. Home Depot U.S.A., Inc., 111 Hawai'i 401, 406, 142 P.3d 265, 271 (2006) (*quoting In re Estate of Rogers*, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003)).

V. ARGUMENT

A. This Case is About Plaintiffs' Demands For Public School Facilities That Satisfy Their Own Subjective Standards; It is *Not* About the Adequacy of Public School Educational Curriculum or Instruction in Hawai'i

At the outset, the State acknowledges its respect for the Hawai'i Constitution's command that "The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control . . . including physical facilities therefore." Haw. Const. Art. X, § 1. That guarantee is in full effect here. As is clear from Plaintiffs' own pleadings, and their counsel's candid admissions below, the State is in fact providing Campbell High School students with a public school education:

> THE COURT: . . . And so that's what I'm sure Mr. Suganuma is arguing, that there is education being provided. It may not be what the BOE is – or you believe the BOE or the DOE is promising, but isn't there a baseline public school system and facility in place at this point?
>
> MR. MATSUMOTO: It is, your Honor . . .
>
> * * *
>
> THE COURT: Okay. All right. But you're admitting that the basic Hawaii constitutional right is being met; correct?
>
> MR. MATSUMOTO: Well –
>
> THE COURT: Mr. Carroll is shaking his head. You may disagree as to the degree of it, but there is an educational system in place pursuant to the State Constitution; yes?
>
> MR. MATSUMOTO: Well, yes. I mean, if you go by the language, sure.
>
> THE COURT: Yeah. Okay.
>
> MR. MATSUMOTO: I would agree there. [W]hat I'm saying is that that's the literal language of it, but then you have to go behind it to look at what is meant by the so-called baseline.
>
> THE COURT: Okay.
>
> MR. MATSUMOTO: We're saying it's not adequate.

(ICA 23 at PDF 22-23 [Tr., 12-28-16].)

The circuit court properly dismissed Plaintiffs' complaint because Plaintiffs' alleged facts, even if taken as true for purposes of the motion to dismiss, do not support any cognizable legal theory upon which relief could be granted. The funding of improvements to Campbell High School facilities raises political and policy questions – not a constitutional question – that are best left to the legislative and executive branches.

B. Plaintiffs' Lawsuit Violates the Separation of Powers Doctrine

1. The Appropriation of Funds to the Department of Education Is A Non-Justiciable Political Question for the Legislature

Plaintiffs' Complaint is driven by their dissatisfaction with the Legislature's decision during the 2016 legislative session *not* to appropriate $35 million to the State department of education for the construction of a new building at Campbell High School. Instead of the full $35 million requested by the State Executive, the Legislature appropriated $12 million for FY 2016-17. Plaintiffs' Complaint thus asked the circuit court to issue "a temporary restraining order, preliminary injunction, and permanent injunction, commanding" *defendants* to "release the entire $35,000,000.00 to begin the construction of the upgrades to the Campbell Hi campus facilities." (ICA 12 at PDF 27 [Compl.].) Plaintiffs feel that this money is necessary in order to fund facilities improvements that would "ameliorate" the alleged "deplorable" facilities that currently exist at Campbell High School. There are several reasons why the courts cannot give Plaintiffs the relief they seek.

First, Plaintiffs represent that the full $35 million *has*, after the filing of their lawsuit, been appropriated for construction of the desired Campbell High School building. (Open. Br. at 7, n. 2.) In 2016, the Legislature appropriated an initial $12 million. *See* ICA 12 at PDF 45 [LRB Mem.] (noting that it "appears . . . the Legislature intends to appropriate additional funds for the 2017-18 fiscal year"). In 2017, the Legislature appropriated the additional $27 million

needed to complete the facilities improvements at Campbell High School. *See* 2017 Haw. Sess. L. Act 49. The Legislature's appropriation of the full $35 million (and more) moots, at the very least, that portion of Plaintiffs' claims that demand and are based upon this specific amount of funding. *Wong v. Board of Regents, UH*, 62 Haw. 391, 394, 616 P.2d 201, 203 (1980) (mootness doctrine applies "where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised")

Second, the Defendants themselves – i.e., the department of education, Chair of the Board of Education, and Superintendent -- have no authority to "release the entire $35,000,000.00." Plaintiffs agree that only the Legislature has the power to appropriate moneys. (Open. Br. at 22.) Thus, the Plaintiffs did not name the proper defendants for the relief that they seek. An injunction ordering Defendants to fully fund facilities improvements at Campbell High School would not give Plaintiffs the relief they seek because Defendants have no power to appropriate general fund moneys.

Third, this Court cannot grant the relief Plaintiffs request without running afoul of the separation of powers. The Hawai'i courts cannot command the Legislature – a co-equal branch of government – to appropriate the desired $35 million for specific construction that Plaintiffs deem desirable. The Legislature's determination of how much public funding should be appropriated for facilities upgrades at Campbell High School is a non-justiciable political question.

"[A] holding of nonjusticiability [from an application of the political question doctrine] is absolute in its foreclosure of judicial scrutiny." *Board of Educ. of State of Hawai'i v. Waihee*, 70 Haw. 253, 260, 768 P.2d 1279, 1283 (1989) (*quoting* Nowak, Rotunda & Young, *Constitutional*

Law 102 (3d ed. 1986)). The amount of money that the Legislature does (or does not) appropriate is a political question that is immune from judicial review.

2. The Department of Education's Budgetary and Funding Decisions Are Non-Justiciable Political Questions for the Executive Branch

It is within the purview of the executive branch of state government to set the department's budget, based upon the amount appropriated by the Legislature. The department of education is one of eighteen principal departments within the State's executive branch of government. The department's budget is prepared and executed by the department of budget and finance, pursuant to HRS § 26-8. *Board of Educ. of State of Hawaii*, 70 Haw. at 265, 768 P.2d at 1286, *quoting* HRS § 26-8 ("[The Board's authority] does not include the actual preparation and execution of the DOE's budget; for as we noted at the outset, the *Department of Budget and Finance is responsible for 'the preparation and execution of the executive budget of the state government.*'") (emph. added).

The Hawai'i Supreme Court has characterized the Executive's budgetary authority as follows:

> "the policy and intent of the legislature [is] that the total appropriations made by it . . . for any department [is] the maximum amount authorized to meet the requirements of the department . . . for the period of the appropriation," and "the governor and the director of finance [have been] given the powers [to effect savings] by careful supervision throughout each appropriation period[.]" HRS § 37-31. Moreover, **when advised by the director of finance "that the probable receipts from taxes or any other sources for any appropriation will be less than was anticipated, and that consequently the amount available for the remainder of the term of the appropriation or for any allotment period will be less than the amount estimated or allotted therefore," the Governor is obliged "to redetermine the allotment ceiling**[.]" HRS § 37-37(b).

Board of Educ. of State of Hawaii, 70 Haw. at 268, 768 P.2d at 1288 (emphases added). Budgetary decisions, like the Legislature's appropriations, are policy matters that this Court cannot second guess. Here, the State's plans with respect to construction or improvement of

Campbell High School's facilities directly correlated with the appropriation amount. As Plaintiffs themselves acknowledge, the State had various contingency plans and construction schedules based upon the different future appropriation amounts that it anticipated receiving from the Legislature. This is clearly within the scope of the Executive's authority. In asking the Judiciary to direct the Executive's budgeting and spending decisions – based on Plaintiffs' own subjective view of what constitutes appropriate public school facilities and access to extracurricular activities – Plaintiffs present this Court with a non-justiciable political question.[4]

Moreover, it is for the board and department of education to determine, as a policy matter, what extracurricular opportunities should be offered to Campbell High School students. Article IX, section 3 of the State Constitution, adopted in 1959, established the board and vested it with power "to formulate policy, and to exercise control over the public school system through its executive officer, the superintendent of public instruction [in accordance with law]." *Id.* at 263, 768 P.2d at 1285. In 1978, this provision was renumbered and amended "to give the [Board] jurisdiction over the internal organization and management of the public school system to the fullest extent possible." *Id.* at 264, 768 P.2d at 1286 (*quoting* Comm. Whole Rep. No. 6, in *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 1006). Extracurricular public school activities are, by their very nature, *extra* to the regular academic curriculum. The specific extracurricular offerings – which vary school-by-school, and which students have no

[4] To the extent Plaintiffs suggest that the alleged "deplorable" and/or "unsanitary" conditions at Campbell High School could violate State statutes or administrative rules (open. br. at 20-21), those claims do not present a legally cognizable theory for relief. Plaintiffs fail to identify any specific statutory or rule violation, or to specifically establish how the generally alleged "lack of sanitation" violates enforceable State health code standards. These kinds of claims would, as "administrative remedial issues," moreover, be more properly directed to the appropriate administrative agencies in the first instance. (ICA 23 at PDF 32-33 [Tr., pp. 32-33].)

constitutionally protected interest in demanding (*infra* note 8) – reflect executive-level policy and budgetary considerations.

The separation of powers doctrine precludes the Judiciary from interfering with the Executive's policy and budgetary decisions.

C. Plaintiffs Do Not Assert A Cognizable Constitutional Claim Upon Which Relief Could Be Granted

1. No Fundamental Right Has Been Infringed In This Case

Plaintiffs concede that education is not a fundamental right protected by the federal Constitution. As the Supreme Court recognized in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973): "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35; *see also Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("Nor is education a fundamental right."). Thus, the U.S. Supreme Court has held that although "undisputedly important," education is *not*, in and of itself, a fundamental right.

Plaintiffs thus instead allege that Campbell High School students "arguably" have a fundamental right under the *State Constitution* to a school experience that meets their own self-defined standards of adequacy.[5] (Open. Br. at 15.) They contend that this guarantee is set forth in: (1) Article X, Section 1 of the Hawai'i Constitution, which provides: "The State shall provide for the establishment, support and control of a statewide system of public schools"; and

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[5] Though it is central to their argument, Plaintiffs are reluctant to state with any certainty that the "right [to a type or quality] of education" of their own choosing is a fundamental right: ***"[a]ssuming arguendo*** the Campbell Hi students have a constitutional right of education under the State of Hawaii constitution, then any attempt which infringes upon such a right by State action warrants a 'strict scrutiny' review," and ***"[a]ssuming further*** that the Campbell Hi students do not have a fundamental right to an education under Hawaii State constitution, nonetheless, they have the fundamental right to 'acquire knowledge' under both the State of Hawaii and the U.S. Constitutions." (Open. Br. at 17.)

(2) Article X, Section 3 of the Hawai'i Constitution, which states: "The board of education shall have the power, as provided by law, to formulate statewide educational policy and appoint the superintendent of education as the chief executive officer of the public school system."[6]

The above constitutional provisions must be construed and read in their "natural sense." *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 404, 235 P.3d 1103, 1116 (2010) ("the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them"). In their natural sense, they guarantee the "establishment, support and control of a statewide system of public schools," that is governed by a State board of education that has the authority to "formulate statewide educational policy."

Plaintiffs would have this Court read Article X, sections 1 and 3 a step beyond their natural sense, as creating a fundamental right to more desirable facilities and increased student access to extracurricular offerings. But these are not "explicitly or implicitly guaranteed by the Constitution." *In re Herrick*, 82 Hawai'i 329, 345, 922 P.2d 942, 958 (1996). The concept of a fundamental right arises out of the recognition that certain "fundamental principles of liberty and justice" are "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." *KNG Corp. v. Kim*, 107 Hawai'i 73, 110 P.3d 397 (2005) (*quoting Baehr v. Lewin*, 74 Haw. 530, 556, 852 P.2d 44, 57 (1993)).

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[6] Plaintiffs also ask this Court to take judicial notice of a Board of Education "mission statement" that they found on the Board's website. (Open. Br. at 14.) To be clear, the Board's statement articulates the Board's own aspirational commitment to providing a safe and healthy physical and educational environment for students. It does not in any way affect the natural language of Article X, Sections 1 and 3's *constitutional* commands, nor does it independently establish mandatory benchmarks with respect to public school facilities and/or access to extracurricular activities.

The logic underlying *San Antonio Independent School Dist.* is highly instructive to this Court's consideration of Article X, sections 1 and 3's public education guarantee. In *San Antonio Independent School Dist.*, the Court emphasized that *even if* it recognized that the federal Constitution protects an individual's right to a baseline education – which it does not – the argument that some individuals in fact receive a "better" quality public education than others does not "give rise to inference of a fundamental right":

> Whatever merit appellees' argument might have if a State's financing system occasioned an **absolute denial** of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where **only relative differences in spending levels are involved** and where – as is true in the present case – **no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills** necessary for the enjoyment of the rights of speech and of full participation in the political process.

San Antonio Independent School Dist., 411 U.S. at 37 (emphases added).

Again, the natural language of Article X, section 1 provides for a statewide public school system; the natural language of article X, section 3 establishes a State board of education with the power to formulate statewide educational policy and appoint a superintendent. Plaintiffs have not alleged any facts that would support the State's failure to meet these constitutional requirements. The language of Article X, sections 1 and 3 is crystal clear, and this Court "is not at liberty to search for its meaning beyond the instrument." *UPW, AFSCME, Local 646 v. Yogi*, 101 Hawai'i 46, 50, 62 P.3d 189, 193 (2002) (quoted reference omitted). In response to Plaintiffs' demands that Campbell High School facilities must meet their own "adequacy" criteria, the State points out that, as is the opinion of our nation's highest court, "relative differences" in the amounts spent to finance individual schools in a statewide system do not infringe upon any student's fundamental rights.

Plaintiffs rely heavily on a Kentucky case, *Rose v. Council for Better Educ., Inc.,* 790 S.W.2d 186 (Ky. 1989), for the proposition that the "specific language" of a State constitution can give rise to a fundamental right to education. *Rose* is distinguishable. As Plaintiffs acknowledge, section 183 of the Kentucky Constitution directs the state legislature to "provide for an *efficient* system of common schools throughout the State." (Open. Br. at 15, *citing* Kentucky Const. § 183.) Consideration of what an "efficient" school system entails was thus central to the *Rose* court's analysis. As the framers contemplated, "efficient" means, among other things, that "[the Kentucky Legislature] must not finance our schools in a *de minimis* fashion," and that "[a]ll [Kentucky] schools and children [must] stand upon one level in their entitlement to equal state support." *Rose*, 790 S.W.2d at 206. The *Rose* court's holding thus centered upon the framers' inclusion and use of the term "efficient school system," as well as their own guidance in interpreting that term's meaning – none of which finds an analog with respect to Article X, sections 1 and 3.

Here, Plaintiffs do not argue that Campbell High School students are being denied a public school education; they argue that Campbell High School students are being provided what they subjectively characterize as "inadequate" and "deplorable" facilities and access to extracurricular activities.[7] In other words, Plaintiffs effectively agree that students are being provided with a "baseline public school system and facility." In arguing that Campbell High School students have "decreased" opportunities to engage in extracurricular activities, due to

[7] Although Plaintiffs contend that students are being denied their constitutional right to "acquire knowledge," this contention is contrary to their admission (*supra*, at 6) that students are not being denied (at the very least) a baseline level of education. Moreover, neither their arguments (*see* Open. Br. at 17-18), nor their factual allegations, support this contention.

student body size, they implicitly agree that such opportunities *are* being offered.[8] Their complaint is not with the denial of public education, per se, but with the subjective "adequacy" of the school facilities and the access to extracurricular activities that Campbell High School in fact provides. The natural language of Article X, Sections 1 and 3 does not support Plaintiffs' argument that Campbell High School students have a fundamental entitlement to "better" physical facilities. And the Supreme Court, interpreting the federal Constitution, has flatly and persuasively rejected Plaintiffs' argument.

2. Plaintiffs Are Not Members of A Suspect Class, Such That Heightened Judicial Scrutiny Applies

Plaintiffs, who bring this lawsuit in their capacity as parents of Campbell High School students, are not members of a suspect class. "A suspect classification exists where the class of individuals formed has been *saddled with such disabilities*, or subjected to such a *history of purposeful unequal treatment*, or relegated to such a position of *political powerlessness* as to command extraordinary protection from the majoritarian political process." *Nagle v. Board of Educ.*, 63 Haw. 389, 392 n.2, 629 P.2d 109, 112 n.2 (1981) (*citing San Antonio Independent School Dist.*, 411 U.S. at 28) (emphases added). Plaintiffs have alleged no "such disabilities" or "history of purposeful unequal treatment," and, far from being "politically powerless," one of the named Plaintiffs is an elected member of the House who, in that capacity, wields significant political power.

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[8] Plaintiffs do not have a property or liberty interest in public school extracurricular activities or offerings. In *Makanui v. Dept. of Educ.*, 6 Haw.App. 397, 721 P.2d 165 (1986), this Court held that "The right to participate in interscholastic athletics is not a 'liberty' or 'property' interest entitled to protection under the due process clause." And again, the logical extension of this Court's holding, that students have no protected interest in public school extracurricular activities, is that Plaintiffs have no protected interest in demanding the "better" facilities that they seek.

Likewise, Plaintiffs *nowhere* in their opening brief argue or allege that students themselves are members of a suspect class. They thus concede what the case law makes clear: Campbell High School students are not members of a "disfavored" class. *See San Antonio Independent School Dist.*, 411 U.S. at 19 (Texas school system did not disadvantage or discriminate against any definable class of "poor" students and families within any school district); *Plyler*, 457 U.S. at 223 (undocumented aliens challenging denial of public education based on immigration status are not members of suspect class).

The rational basis test applies to Plaintiffs' constitutional claims.

3. There Is A Rational Basis for the Decisions Made by the Legislature And Executive Agencies With Respect to Campbell High School

As the Hawai'i courts have long recognized, "Where 'suspect' classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test." *Nagle v. Board of Educ.*, 63 Haw. 389, 393, 629 P.2d 109, 112 (1981). In applying the rational basis test, this Court should not "engag[e] in a rigorous determination of the [State's] objectives"; it need only "seek to determine whether **any** reasonable set of facts can be conceived" to uphold the challenged policy. *Daoang v. Dept. of Educ.*, 63 Haw. 501, 505, 630 P.2d 629, 631 (1981). The rational basis test thus requires this Court to uphold the State's decisions vis-à-vis Campbell High School if there is *any* reasonable basis, whether or not articulated by the Legislature. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.") There is a rational basis for the State to provide the particular facilities and extracurricular activities that Campbell High School offers.

Here, it is "reasonable [to] conceive" that the Legislature and Executive were in fact considering Campbell High School within the context of the collective needs of Hawaii's "statewide [public school] system." Haw. Const. Art. X, Sec. 1. Thus, it would be reasonable for the Legislature to allocate the full $35 million necessary for facilities improvements at Campbell High School over two years, rather than in one lump sum, given the State's overall budgetary requirements and the general nature of construction project funding timelines. Campbell High School's present facilities reflect the reasonable exercise of the department of education's authority to manage Campbell High School based on the funds appropriated by the State legislature. The board and department of education cannot contract for the improvements that Plaintiffs seek without sufficient *legislative* appropriations.

Plaintiffs allege that the Legislature's appropriations, and the Executive's management of those funds, are insufficient to address the "deplorable" and/or "inadequate" Campbell High School facilities. But the presumptive validity of these governmental decisions puts the burden on Plaintiffs "to negative *every conceivable basis* which might support [them]." *F.C.C.*, 508 U.S. at 315 (emphasis added) (quoted ref. omitted). Dismissal is proper here because Plaintiffs have not met this burden. They have alleged no set of facts that would negate the rational bases for the Legislature's limited funding of new construction at Campbell High School, and the department's management of those funds and its decisions with respect to improving and maintaining the school's existing facilities.

VI. CONCLUSION

For all of the above reasons, this Court should affirm the circuit court's proper dismissal of Plaintiffs' complaint.

DATED: Honolulu, Hawai'i, August 23, 2017.

Respectfully Submitted,

/s/ Kimberly Tsumoto Guidry
Deputy Solicitor General
Counsel for Defendants-Appellees

STATEMENT OF RELATED CASES

Defendants-Appellees are aware of the following case involving the issue of whether Article X, Section 1 of the Hawai'i Constitution creates a fundamental right: *Clarabal v. Dept. of Education, et al.*, SCAP-16-0000475. In *Clarabal*, appellant appeals from the circuit court's ruling that Article X, Section 1 of the Hawai'i Constitution does not create a fundamental right to a Hawaiian language immersion education. That case is currently pending on appeal before the Hawai'i Supreme Court (on transfer).

DATED: Honolulu, Hawai'i, August 23, 2017.

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CERTIFICATE OF SERVICE

I certify that on August 23, 2017, Defendants-Appellees' Answering Brief was served electronically (through the Court's JEFS system), or conventionally (by mailing copies via USPS, first class, postage prepaid), upon the following:

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