

# LATE TESTIMONY

LINDA LINGLE  
GOVERNOR



MARK J. BENNETT  
ATTORNEY GENERAL

LISA M. GINOZA  
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
235 BERETANIA STREET, RM. 304  
Leiopapa A Kamehameha Building  
HONOLULU, HAWAII 96813  
EDUCATION DIVISION  
TELEPHONE: (808) 586-1255  
FACSIMILE: (808) 586-1488

February 11, 2009

The Honorable Norman Sakamoto  
Chair, Senate Committee on  
Education and Housing  
State Capitol, Room 230  
415 South Beretania Street  
Honolulu, HI 96813

The Honorable Will Espero  
Chair, Senate Committee on  
Public Safety and Military Affairs  
State Capitol, Room 207  
415 South Beretania Street  
Honolulu, HI 96813

Re: S.B. No. 1164 - Relating to Interstate Compact on  
Educational Opportunity for Military Children

Hearing: February 11, 2009, 1:30 P.M.,  
Conference Room 225

Dear Senators Sakamoto and Espero:

The Department of Attorney General has concerns regarding  
S.B. No. 1164, specifically Article XI(e) on page 32, lines 7-  
20.

Article XI(e)(1) of the bill states:

The liability of the Interstate Commission's executive  
director and employees or Interstate Commission  
representatives, acting within the scope of such

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person's employment or duties for acts, errors, or omissions occurring within such person's state may not exceed the limits of liability set forth under the Constitution and laws of that state for state officials, employees, and agents. **The Interstate Commission is considered to be an instrumentality of the states for the purposes of any such action.**  
[Emphasis added]

The provision above may expose the State to liability in the event a lawsuit is filed against the Commission by virtue of the State being a member of the Interstate Compact on Educational Opportunity for Military Children ("Compact"). The bill does not contain any provisions that provide immunity to member states in the event a lawsuit is filed against the Commission or officials, employees or agents of the Commission. The bill, however, contains wording that holds representatives or employees harmless "[t]o the extent covered by the state". Article XI(e) (3) of the bill on pages 33 to 34 states,

To the extent not covered by the state involved, a member state, the interstate commission, or the representatives or employees of the interstate commission shall be held harmless in the amount of a settlement or judgment, including attorney's fees and costs, obtained against such persons arising out of an actual or alleged act, error, or omission that occurred within the scope of interstate commission employment, duties, or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of interstate commission employment, duties, or responsibilities, provided that the actual or alleged act, error, or omission did not result from intentional or wilful and wanton misconduct on the part of such persons.

By including such wording in the bill, there is an implication that the member states would not only be exposed to liability but also may be required to pay for any settlement or judgment that arose from the actions of the Interstate Commission employees and representatives. Other than the

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provision in the bill that states that each member state shall have one voting representative in the commission (Article IX (a)), the bill does not contain wording indicating that the member states themselves would have any direct control over the employees or representatives of the commission. It would appear imprudent to be exposed to liability for an entity in which the State does not have full or direct control over.

In addition, the wording contained in Article XI(e) is inconsistent with the wording contained in the subsections within that section. The prefatory language in Article XI(e) provides immunity for the executive director and employees of the Interstate Commission for acts, errors, or omissions that occurred within the scope of interstate commission employment, duties, or responsibilities. However, the subsections within Article XI(e) contain wording that limits the liability for the Interstate Commission's executive director, employees, and representatives for acts, errors, or omissions that occurred within the scope of their interstate commission employment, duties, and responsibilities.

For the foregoing reasons, our office would recommend that the bill be amended to: (1) include wording that provides complete immunity to member states for lawsuits or other actions of the commission employees, representatives, or agents, and (2) delete subsections (1)-(3) of Article XI(e).

Sincerely,



Joanna B.K.F. Yeh  
Deputy Attorney General

APPROVED AS TO FORM:



for Mark J. Bennett  
Attorney General

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The Honorable Will Espero  
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C: The Honorable Michelle N. Kidani, Vice Chair,  
Senate Committee on Education and Housing

The Honorable Robert Bunda, Vice Chair,  
Senate Committee on Public Safety and Military Affairs