

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 1039, S.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Thursday, March 18, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): Clare E. Connors, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to seek appropriations to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

The bill contains twenty-two (22) claims that total \$1,736,577.62. Twenty-one (21) claims are general fund appropriation requests that total \$741,577.62, and one (1) claim is an appropriation request from a departmental fund that totals \$995,000.00.

Attachment A provides a brief description of each claim in the bill.

Two claims in this bill against the Hawaii State Public Charter School Commission, Miller-Potter v. State of Hawaii, et al., and HGEA/AFSCME of Behalf of Ardith Renteria and Charter Volcano School of Arts and Sciences, were previously approved for payment by Act 11, Session Laws of Hawaii 2020. However, these claims could not be paid because the Act required that the funds to be paid from the fiscal year 2019-2020 budget by the state public charter school commission. By the time that Act 11 was passed, all the charter school commission funds intended for the charter schools had already been dispersed. These claims remain unpaid and are, therefore, included again in this year's appropriations bill. Because the charter school commission's schedule of disbursement will leave the charter school commission without funds by the time the appropriations bill is passed, we request that payment be

authorized not from the charter school commission's funds but by the general revenues of the State of Hawaii.

Since the bill was introduced, six (6) new claims have been resolved for an additional \$126,216.49. Five claims are appropriation requests from the general fund, and one claim is an appropriation request from a departmental fund. Attachment B provides a brief description of the new claims.

Including the new claims, the appropriation requests total \$1,862,794.11 allocated among twenty-eight (28) claims. Of this total \$817,794.11 are general fund appropriation requests, and \$1,045,000.00 are appropriation requests from departmental funds.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department also has complied with section 37-77.5, Hawaii Revised Statutes (HRS), which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We respectfully request passage of this bill with the additional appropriations and amendments.

ATTACHMENT "A"

AGRIBUSINESS DEVELOPMENT CORPORATION:

Na Kia'i Kai v. Nakatani, et al.
Civil No. 18-00005, USDC

\$ 131,849.15 *(General Fund)*
Settlement

Plaintiff filed a lawsuit against the Agribusiness Development Corporation (ADC) regarding the management of irrigation ditches in Kekaha, Kauai, that discharge into the ocean. The ADC inherited the network of ditches built by a sugar plantation that discharges into the ocean. Those discharges were regulated by the Clean Water Act under a National Pollutant Discharge Elimination System (NPDES) permit. The ADC applied to renew the permit and was informed by the Department of Health that one was not required. The ADC then withdrew its application and entered into an MOU with the Department of Health regarding the proper land management and water quality monitoring. The court found that an NPDES permit was required and discharging without a permit was a violation of the Clean Water Act. Plaintiff prevailed on summary judgment and the damages were ultimately resolved via settlement agreement. This claim is a separate settlement regarding attorney's fees and costs.

DEPARTMENT OF THE ATTORNEY GENERAL:

Nickel v. Connors, et al.
Civil No. 20-00330, USDC

\$ 5,000.00 *(General Fund)*
Settlement

Plaintiff is a U.S. national born in American Samoa who was not allowed by the Honolulu Police Department to apply for a permit to acquire a firearm. In denying Plaintiff the opportunity to apply, HPD was following section 134-2(d), HRS, which allows only U.S. citizens to apply for permits to acquire firearms. The Plaintiff challenged the constitutionality of the statute. The parties agreed that the result in Fotoudis v. City & County of Honolulu, 54 F. Supp. 3d 1136 (D. Haw. 2014) controlled in this case. The Fotoudis case involved a permanent resident alien who likewise was not allowed to apply for a permit to acquire. The same judge in this case ruled in Fotoudis that the statute violated the permanent resident alien's rights under the Second and Fourteenth Amendments to the U.S. Constitution, and that his attorney was entitled to an award of attorney's fees as the prevailing party. Given the Fotoudis result, the Plaintiff's attorney's fees was settled for \$5,000.00. Also, HPD has agreed to allow U.S. nationals to apply for a permit to acquire firearms.

DEPARTMENT OF EDUCATION:

Chavis v. State of Hawaii, et al.
Civil No. 17-1-1455-09, First Circuit

\$ 77,000.00 *(General Fund)*
Settlement

On September 11, 2015, Plaintiff EC was a student at Kaimuki Middle School with a 504 Plan that allowed her to sit in the front of the class near a friend, because of anxiety. A lockdown drill was conducted that morning, with an employee acting as an unauthorized person on campus (“UPOC”). The UPOC was dressed in jeans and a tee-shirt, and carried a carpenter’s hammer. The UPOC followed a script. He had a route through campus that he was to follow, and he was to also check if classroom doors were locked. The classroom door for Plaintiff EC’s class was not locked, and the UPOC opened the door, stood in the doorway for a second, then closed the door. The teacher yelled after the UPOC, and went out the door to check the identity of the UPOC. The teacher saw the school’s security coordinator, knew it was a drill, and returned to class and locked the door. Plaintiff EC claims that she became hysterical; she asked the teacher if they were going to die, and did not get a response. Plaintiffs claim that EC suffered extreme anxiety and PTSD after the lockdown drill. EC eventually received tutoring at home for the Spring semester, and transferred to Sacred Hearts School in the Fall of 2016. The case proceeded to the Court Annexed Arbitration Program (CAAP). Plaintiffs claimed medical expenses of \$88,663.63, general damages of \$300,000.00, and consortium damages to EC’s parents of \$100,000.00. The total CAAP award after apportionment was \$94,918.90. The case later settled for \$77,000.00.

Kenigton v. State of Hawaii, et al.
Civil No. 18-1-1443-09, First Circuit

\$ 80,000.00 *(General Fund)*
Settlement

On September 30, 2016, in the evening, Plaintiff attended a high school football game at Hugh Yoshida Stadium on the campus of Leilehua High School. While Plaintiff was walking down the concrete bleachers in the stadium, she lost her footing on a large, weathered crack in the bleachers, causing her to fall forward and twist her left foot and ankle. She sustained a sprained left ankle, and a tearing away of the tendon from the navicular bone, at the inside of her left foot, above the arch. She was also diagnosed with reflex sympathetic dystrophy, a chronic pain syndrome. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator found the State liable and awarded damages in the total amount of \$125,441.00. The case later settled for \$80,000.00.

Yoon v. State of Hawaii, et al.
Civil No. 15-1-1664-08, First Circuit

\$ 70,000.00 *(General Fund)*
Settlement

During an intercession break, Queen Ka’ahumanu Elementary School (“School”) offered a voluntary abbreviated school schedule with activities such as learning to play tennis. The school brought in a licensed tennis instructor and teaching assistant from the

Hawaii division of the United States Tennis Association (USTA) to provide all of the equipment and training for these tennis lessons. USTA instructor Johan Loo had taught at the school before. USTA is able to teach tennis at places like the school which do not have official tennis courts by setting up a rope net system on a hard asphalt surface like a basketball court. Mr. Loo set up the rope net system on the school's basketball court and instructed the children that no one was supposed to touch the rope. He told the children to take a warm-up lap around the net, and to not go underneath the rope. A schoolteacher watched Mr. Loo give his initial instructions, and right as the children began their warm-up lap, that teacher briefly put her clipboard down in the office next to the basketball court. As soon as she looked up, the teacher saw the children gathering around Plaintiff on the ground. Plaintiff, one of the students, had apparently run into the net and hit her head on the asphalt court when she fell. The case proceeded to the Court Annexed Arbitration Program which resulted in the settlement.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Mahuka, et al. v. Mansker, et al.
Civil No. 17-1-0973-06, First Circuit

\$ 115,000.00 *(General Fund)*
Settlement

An automobile accident occurred on October 29, 2013 involving Plaintiffs Mr. and Mrs. Mahuka, when their vehicle was rear-ended by a DLNR employee driving a state vehicle in the course of his employment. Mrs. Mahuka was a passenger in her husband's car, and she suffered neck, shoulder and other injuries for which she eventually needed a neck fusion surgery. Mrs. Mahuka continues to suffer pain from this accident, and Mr. Mahuka has a claim for loss of consortium. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded Plaintiffs \$116,676.08. The case later settled for \$115,000.00.

DEPARTMENT OF PUBLIC SAFETY:

Iuli v. State of Hawaii, et al.
Civil No. 19-1-0634-04, First Circuit

\$ 100,000.00 *(General Fund)*
Settlement

On May 17, 2017, a Plaintiff was an inmate at the Women's Community Correctional Center ("WCCC") attended a criminal hearing at the First Circuit Court. Following the hearing, adult correctional officers ("ACO's") locked her into the back of the transport van for transport back to WCCC in Kailua. She was restrained with handcuffs secured to a belly belt and seated on a plastic bench seat that ran the length of the passenger compartment. The van is equipped with seat belts, but she was not belted in. Between court and the correctional center, the van stopped suddenly for traffic on the Pali Highway. Plaintiff tried to brace herself but her little finger got tangled in the chains and she fell and hit her hand and head. She sustained a fractured finger, hematoma on her head, neck pain and a fractured jaw.

HAWAII STATE PUBLIC CHARTER SCHOOL COMMISSION:

Miller-Potter v. State of Hawaii, et al. **\$ 75,000.00** *(General Fund)*
Civil No. 16-1-0385K, Third Circuit **Settlement**

Plaintiff was at a meeting on the premises of Waimea Middle Public Conversion Charter School, a Charter School maintained and operated by the State Public Charter School Commission. During the meeting, and after it had become dark outside, Plaintiff excused herself to go to the restroom. Unknown to school administrators, the hallway lights had burned out. As a result, the hallway leading to the restroom was dark. While walking to the restroom, Plaintiff tripped over a low bench that was painted brown in color, fell, and injured her face, teeth and allegedly her left knee. As result of the accident, Plaintiff sustained facial and dental injuries and scarring, right shoulder pain, and aggravation of a pre-existing left knee condition that necessitated a total knee replacement. Plaintiff did not claim lost wages, or lost future earnings. Plaintiff's settlement demand listed related medical expenses of \$212,846.86. The case proceeded to mediation resulting in the settlement of \$75,000.

HGEA/AFSCME on Behalf of Ardith Renteria, and **\$ 74,053.25** *(General Fund)*
Charter Volcano School of Arts and Sciences **Judgment**

A Charter School principal was terminated. Principal was reinstated for the rest of the school year. The judgment is for back pay offset.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Siu, et al. v. State of Hawaii **\$ 995,000.00** *(Department*
Civil No. 16-1-1230-06, First Circuit **Settlement** *Appropriation)*

On July 12, 2014, at about 3:00 a.m., Decedent Nickolaus Siu and Plaintiff Aaron Baik were riding their motorcycles on the Likelike Highway on-ramp to the H-3 Freeway. Plaintiff Baik was riding behind Decedent Siu when Decedent braked just before the "hairpin curve" on the on-ramp. Baik slammed on his brakes when he saw Decedent's brake light engage, but lost control of his motorcycle and skid into Decedent's motorcycle, causing both riders to crash. Plaintiffs alleged that the signs on the on-ramp were inadequate to warn the Decedent and Plaintiff Baik of the approaching, severe "hairpin" curve. A third motorcycle rider who was trailing behind Decedent and Baik testified at his deposition that the lighting on the on-ramp was so poor that he could not see the hairpin curve until he was within 10 to 15 yards of the curve.

Decedent sustained multiple blunt force injuries which caused his death, including a severe fracture to the base of his skull, multiple fractures to his torso, and lacerations to the heart, lungs, and liver. Plaintiff Baik sustained multiple orthopedic injuries, including a T12 (mid-back vertebrae) compression fracture, an L4-5 (low back) disc extrusion,

multiple left rib fractures, a 3rd metatarsal shaft (long bone in the forefoot) fracture, and a left knee medial meniscus tear. Baik also suffered emotional distress over loss of his best friend, including possible PTSD, depression, anxiety, and suicidal ideation.

MISCELLANEOUS CLAIMS:

Gregory Au **\$ 240.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Caitlyn LD Cagaoan **\$ 50.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Christopher Carreon **\$ 815.40** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Holiday Jewelers of Hawaii, Inc. **\$ 1,080.21** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Robert D. Linn **\$ 728.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Matthew Lutey \$ **94.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Mercede Nacion \$ **150.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Barbara J. Nakagawa \$ **75.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Donna Noguchi \$ **503.00** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Leon Richards \$ **2,297.45** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Jerome and Anne Ryan \$ **5,536.61** *(General Fund)*

Claimants request reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Lana Wold \$ **2,105.55** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

ATTACHMENT "B"

DEPARTMENT OF EDUCATION:

Unga v. Board of Education, et al.
Civil No. 20-0000576, First Circuit

\$ 8,250.00 (*General Fund*)
Settlement

This case involves an alleged violation of Hawaii's Sunshine Law, chapter 92, HRS, in relation to the Board of Education's (BOE) February 6, 2020 denial of Plaintiff's January 15, 2020 petition for the adoption of an administrative rule.

On January 15, 2020, the Plaintiff submitted a "Petition for Adoption of a Rule" (Petition) to the BOE and filed the Petition in accordance with sections 8-2-2 and 8-3-6(a), Hawaii Administrative Rules (HAR). On February 6, 2020, the BOE convened to consider the Petition. This was not an open meeting, which is not explicitly required by section 8-3-6, HAR, nor by section 91-6, HRS. After reviewing the Petition, the BOE, pursuant to sections 8-2-2 and 8-3-6, HAR, by unanimous vote of the members present, denied the Petition because, among other things: 1) the Petition did not disclose sufficient reasons to justify the institution of public rulemaking proceedings for the Petitioner's proposed rule; 2) Petitioner failed to include in the Petition any facts, views, arguments, or data that sufficiently support the Petitioner's reasons for seeking the adoption of the rule; and 3) the applicable state or county agency or private landowner is responsible to obtain public input on proposed developments or land use changes, not the DOE/BOE. A written denial stating the basis for the BOE's denial of the Petition was sent to Plaintiff.

On April 14, 2020, Plaintiff filed her Complaint, Civil No. 20-0000576, in the Circuit Court of the First Circuit, State of Hawaii. The Complaint contained allegations that the BOE was in violation of various sections of the HRS, including Hawaii's Sunshine Law, as well as exceeding the authority of law. Plaintiff sought judgment against the BOE and specifically sought: 1) voiding of the BOE's actions taken on February 6, 2020, because any such actions were allegedly inconsistent with sections 92-7 and 92-3 of the HRS; 2) a determination that part I, chapter 92, HRS, is applicable to the BOE's decision; and 3) pursuant to section 91-7, HRS, the invalidating of section 8-3-6(c), HAR, which states "No public hearing or other proceedings shall be held with respect to such determination." Plaintiff also sought attorneys' fees and costs.

Subsequent to the filing of the Complaint, a determination was made, that for consistency amongst all State Boards and Commissions, section 91-6, HRS, petitions are to be addressed in an open meeting. We continue to believe that section 8-3-6(c), HAR, is not in excess of the authority provided by section 91-6, HRS, or in violation of chapter 92 (Sunshine Law); the subject HAR section neither prohibits nor requires that the BOE address the Petition in an open meeting. However, because section 8-3-6(c), HAR, can be implemented while being in compliance with chapter 92, it is our department's position that petitions submitted pursuant to section 91-6, HRS, be addressed in an open meeting.

DEPARTMENT OF HEALTH:

Dasalia, et al. v. Onaka, et al.
Civil No. 13-1-0373-02, First Circuit

\$ 44,903.62 *(General Fund)*
Judgment

In 2013, three unrelated plaintiffs filed a complaint seeking amendment of their birth certificates to include the name and race of their biological fathers. Plaintiffs argued the Office of Health Status Monitoring of the Department of Health (DOH) had the authority to make the amendments without a court order. The Circuit Court agreed, separately made a judicial determination of paternity, ordered the amendments, and awarded Plaintiffs their attorneys fees and costs. The State appealed. While on appeal, the Legislature passed Act 26 in 2016, which amended section 338-15, HRS, to clarify that a court order is required for DOH to change or establish the name of a parent on a birth certificate. The appellate court concluded the substantive issues were moot, affirmed the Circuit Court's fees and costs order, and issued an award of appellate attorneys' fees to Plaintiffs.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Link v. State of Hawaii
Civil No. 20-0000681, First Circuit

\$ 50,000.00 *(Department*
Settlement *Appropriation)*

On June 9, 2019, Plaintiff was operating his motorcycle heading eastbound on Nimitz Highway and onto the H-1 freeway eastbound on-ramp. When a motorcycle in front of him drove over one of the expansion joints on the ramp, a metal spacer broke off, flew into the air, and struck Plaintiff's front wheel. The impact blew out the front tire causing Plaintiff to lose control of the motorcycle. He sustained injuries to his neck, right shoulder, right knee, and left foot.

MISCELLANEOUS CLAIMS:

Melvin Ishizu

\$ 6,041.40 *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Gregory and Sarah Rocheleau

\$ 1,367.00 *(General Fund)*

Claimants request reissuance of an outdated check that was misplaced or lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

Waste Management of Hawaii, Inc.

\$ 15,654.47 *(General Fund)*

Claimant requests reissuance of an outdated check that was lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, HRS.

DAVID Y. IGE
GOVERNOR



JOHN S.S. KIM
CHAIRPERSON

STATE OF HAWAII
STATE PUBLIC CHARTER SCHOOL COMMISSION
(‘AHA KULA HO‘ĀMANA)

<http://CharterCommission.Hawaii.Gov>
1164 Bishop Street, Suite 1100, Honolulu, Hawaii 96813
Tel: (808) 586-3775 Fax: (808) 586-3776

FOR: SB 1039 SD1 Making Appropriations for Claims Against the State, its Officers, or its Employees

DATE: March 18, 2021

TIME: 2:00 P.M.

COMMITTEE: Committee on Judiciary & Hawaiian Affairs

ROOM: Room 325

FROM: Yvonne Lau, Interim Executive Director
State Public Charter School Commission

Chair Nakashima, Vice Chair Matayoshi, and members of the Committee:

The State Public Charter School Commission (“Commission”) appreciates the opportunity to submit this testimony in **STRONG SUPPORT of SB 1039**, particularly Section 1, Item 6, which appropriates funds for the claim and settlement payments for two public charter schools.

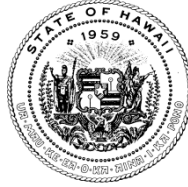
The Commission supports this appropriation so that the Department of the Attorney General may be reimbursed for the cost of the claim and settlement. The Department of the Attorney General, in the interest of ensuring that the claim and settlement was honored, has already paid the settlement on behalf of one of the charter schools and the state.

It is important to note that public charter schools in Hawaii receive an annual lump sum appropriation that is intended to cover all personnel, operational, and facility costs for the school, its students, and its staff. Unlike other state agencies and the Hawaii Department of Education, public charter school funding is distributed on a schedule delineated by Hawaii Revised Statutes, Chapter 302D-28.

Without specific appropriations for claims and settlement payments, a public charter school may be required to pay for these costs with the funds intended to instruct students and operate the school. Additionally, the timing of the appropriations for such settlements do not align with the timing of the funding that charter schools receive.

Thank you for the opportunity to provide this testimony.

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

March 18, 2021
2:00 P.M.
State Capitol, Teleconference

S.B. 1039, S.D. 1
RELATING TO MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE,
ITS OFFICERS, OR ITS EMPLOYEES.

House Committee on Judiciary & Hawaiian Affairs

The Department of Transportation **supports** this bill as it provides the necessary appropriation to fund settlement agreements and judgements against the Department.

Thank you for the opportunity to provide testimony.