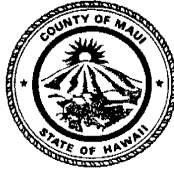


ALAN M. ARAKAWA
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
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TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

September 17, 2003

MEMO TO: Alice L. Lee
Director, Housing and Human Concerns

F R O M: Ed Kushi, Jr.
Deputy Corporation Counsel

A handwritten signature in black ink, appearing to read "Ed Kushi, Jr.", is written over the name and title in the "FROM" field.

SUBJECT: **COUNTY FINANCIAL ASSISTANCE TO RACE-BASED ORGANIZATIONS,
OR TO ORGANIZATIONS SOLELY SERVING BENEFICIARIES OF ONE
PARTICULAR RACE**

Responding to your request of April 28, 2003 which, upon further review and discussion, has evolved into the propriety of County financial assistance, by way of grants, to two (2) non-profits, specifically to Alu Like, Inc. for its "Kahua Ola Hou" program, and to Maui Economic Opportunity, Inc. for its "MEO Enlace Hispano Acculturation" program.

I) CONDITIONS AND LIMITATIONS ON GRANTS OF PUBLIC FUNDS

Attached for your reference, find copy of the February 8, 1996 opinion (Opinion No. 96-02) addressed to you, as then Council Chair, from our office. Although the issue/question involved in said opinion was the legality of County financial assistance to a religious-based preschool, said opinion's discussion and analysis is relevant to the questions at hand, specifically the reference and discussion of Article VII, Section 4 of the Hawaii State Constitution, which provision states, "No tax shall be levied nor appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose." Opinion No. 96-02 further cites the general rule in Hawaii that "the right to declare what shall be deemed a public use is vested in the legislature... [W]here... the Legislature declares a particular use to be a public use the presumption is in favor of this declaration, and will be binding upon the courts unless such use is clearly and palpably of a private character."¹ The upholding or denial of validity of municipal donations is dependent

¹ Citing Hawaii Housing Authority v. Schnack, 39 Haw. 543, 549-50 (1952).

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September 17, 2003
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on the interpretation of whether the purpose is or is not a public purpose.²

The appropriations in question are proposed to be in the form of County grants directly to the subject non-profits. Accordingly, such grants are subject to the provisions of Chapter 3.36 of the Maui County Code ("MCC"). In reviewing said chapter, we note that there are different methods of applying for and obtaining County grants, to-wit, via submission to the Grants Review Committee ("GRC")³, and/or directly to the Council.⁴ The GRC has adopted administrative rules⁵ which, in relevant part, require non-profit applicants seeking grants of County funds to "[p]rovide a policy statement that the organization does not discriminate either in the hiring of staff, use of volunteers, or delivery of client services on the basis of sex, national origin, age, race, color, religion or handicap."⁶ Council-approved grants (*i.e.*, "line item" grants) are also subject to this policy statement requirement.⁷

² McQuillin, Municipal Corporations, Section 39.25 (1995).

³ "Every request for a social grant shall be submitted in writing to the committee, in accordance with rules promulgated by the committee." Section 3.36.060, MCC.

⁴ "Nothing in this chapter shall restrict the council from making grants for public purposes, provided that sections 3.36.100 to 3.36.140 shall apply." Section 3.36.150, MCC.

⁵ "The committee shall adopt rules pursuant to chapter 91, Hawaii Revised Statutes, relating to the following:

1. Conditions for grants;

...
Section 3.36.020(D), MCC.

⁶ Section 07-1-4(a)(5), Title MC-07, Subtitle 02, Chapter 1, Rules and Regulations Relating to Grants.

⁷ "Every contract with a recipient shall be based on a request solicited in accordance with the rules adopted by the committee." Section 3.36.100(C), MCC.

II) THE SUBJECT GRANT APPLICANTS AND THEIR GRANT APPLICATIONS

A) Alu Like, Inc.'s "Kahua Ola Hou" Program

Alu Like, Inc. ("ALI") is a Hawaii non-profit corporation, its principal office being situated in Honolulu, Hawaii. For purposes of this discussion, relevant excerpts of ALI's specific and primary purposes, as taken from its Amended Charter of Incorporation approved by the State of Hawaii Department of Commerce and Consumer Affairs on July 1, 1986, are:

1. The relief, the advancement of education and job training, and the removal of barriers and the creation of opportunities to the social, educational, occupational, economic, physical, and emotional well-being of the poor, the distressed, the disadvantaged, or the underprivileged:

4. The combating of community deterioration and juvenile delinquency; and

6. The raising of the economic, educational and social levels of underprivileged residents of the Hawaiian and part Hawaiian community and other underprivileged groups, which have substantial unemployment or low-income families, to foster and promote community-wide interest and concern for the problems of such community.

A review of ALI's By-Laws reveals a racial preference requirement in the composition of its Board of Directors, specifically that "[t]he Board shall consist of not less than nine Directors, the majority of whom shall be Hawaiian natives, and at least one each from the islands of Hawaii, Maui, Molokai, Oahu and Kauai."⁹ However, neither ALI's charter nor By-Laws include provisions that discriminate in the hiring of staff, use of volunteers, or delivery of client services.

Lastly, attached as Exhibit "A" is a copy of ALI's "Kahua Ola Hou" program description dated December 6, 2002. As described in the "Program Description" section, the purpose of said program is

⁸ Article III(A)(1), (4), and (6); Amended Charter of Incorporation of Alu Like, Inc.

⁹ Article VI(B), By-Laws of Alu Like, Inc., January 10, 2003.

to provide a place of refuge for high-risk Molokai youths (i.e., the target or client-service base) who are affected and influenced by drug abuse and addiction. The program will be guided by and infused with Hawaiian values. The primary source of referrals of Molokai youths to the program will be from the "Ho'ikaika" program, in addition to other community sources. On information, the "Ho'ikaika" program is a separate, independent program under the auspices of another community-based, non-profit organization on Molokai.

B) Maui Economic Opportunity, Inc.'s ("MEO") "Enlace Hispano Acculturation" Program

MEO is a Hawaii non-profit corporation, its principal office being located in Kahului, Hawaii, and its business operations being the County of Maui, generally. For purposes of this opinion, we will not delve into nor discuss MEO's corporate articles or by-laws, specifically with respect to any discriminatory policies or practices, as we take official notice, based on the long-standing history and relationship by and between MEO and the County, that there are no such policies or practices.

Attached hereto as Exhibit "B" is a copy of MEO's grant application concerning its proposed "Enlace Hispano Acculturation" program. As expressly stated in the Executive Summary section, the program proposes to "provide cultural integration, needs assessment, service delivery, civic engagement, community education, and workforce development to the Hispanic community of Maui County." (emphasis added)¹⁰ The overall goal of the proposed program is for the Hispanic community's families and individuals to achieve self-sufficiency through education, outreach, intervention, referrals, and direct service.¹¹ Lastly of note, the subject "Hispanic community" is referenced as consisting of Spanish-speaking peoples, including immigrants from Mexico, Guatemala, El Salvador, Argentina, Chile and Columbia, who collectively represent approximately 9% of the population of Maui County.¹²

¹⁰ Exhibit "B" attached hereto; Program/Service Description, A. Executive Summary, page 1.

¹¹ Exhibit "B" attached hereto; Program/Service Description, C. Goals and Objectives, page 2.

¹² Exhibit "B" attached hereto; Program/Service Description, B. Need, page 1.

III) DISCUSSION

For both of the proposed programs, we believe that the stated goals, objectives and purposes would qualify and be deemed "public purposes" as required by Article VII, Section 4 of the Hawaii State Constitution, to-wit: ALI's Kahua Ola Hou purpose to provide a place of refuge for high-risk Molokai youths affected and influenced by drug abuse and addiction; and MEO's Enlace Hispano Acculturation purpose to achieve self-sufficiency through education, outreach, intervention, referrals, and direct service. Further, we believe that neither recipient non-profit has organizational policies or procedures, as set forth in their respective charters or by-laws, that evidence discrimination on the basis of sex, national origin, age, race, color, religion or handicap in hiring, use of volunteers, or delivery of services.

The Enlace Hispano Acculturation program's express and stated purpose is to serve the Hispanic community on Maui. The definition as to what and/or who constitutes the "Hispanic" community is not specifically defined in the grant application, except for statements that the community includes Maui County's "immigrant population from Mexico, Guatemala, El Salvador, Argentina, Chile, Columbia, ..." If the intent, goal and purpose of this program were to serve clients on the basis of race or national origin, said program would not meet the requirements of Chapter 3.36, MCC. From the program description provided in MEO's grant application, it does not appear that program services will be solely or exclusively reserved to people of a certain race, ethnic group, or national origin, and, although the term "Hispanic" is used, it does not appear that such term is used to denote a particular racial, ethnic, or national origin classification. This matter could be clarified by obtaining from MEO a statement that the program will not discriminate in the delivery of client services on the basis of race, color, or national origin.

IV) CONCLUSION

Based on the above, we believe that a grant of County funds for ALI's Kahua Ola Hou program, as presented and described in its grant application, is proper and would withstand a legal challenge.

Based on the information submitted, we do not believe that a grant of County funds for MEO's Enlace Hispano Acculturation program, as presented and described in its grant application, would be improper, or subject to legal challenge, provided that the delivery of client services is not limited or determined on the basis of race, color, or national origin. Although it does not appear that the Enlace Hispano Acculturation Program will

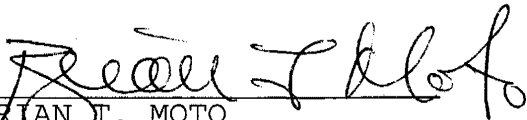
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discriminate on the basis of such classifications, it would be advisable to obtain reassurances from MEO to that effect.

Please note that our response is based on reviewing the subject grant applications against the requirements, conditions and provisions of Article VII, Section 4 of the Hawaii State Constitution, and Chapter 3.36, MCC. We have not reviewed nor contrasted the facts presented against recent, federal case law concerning "reverse discrimination" issues, including but not limited to such cases as Rice v. Cayetano, 941 F.Supp. 1529, or Arakaki v. Cayetano, 198 F. Supp 2d 1165.

Call if further discussion/clarification is needed.

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

S:\ALL\ESK\Advisory\memo to lee re alu like and meo grants.wpd
cc: Alan M. Arakawa, Mayor

LINDA CROCKETT LINGLE
MAYOR



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February 8, 1996

The Honorable Alice Lee, Chair
Maui County Council
200 South High Street
Wailuku, Hawaii 96793

Re: **Fiscal year 1996 Budget Appropriation of \$5,000 to
Emmanuel Lutheran Preschool**

Dear Ms. Lee:

This is in response to the inquiry by the Council into whether the appropriation of \$5,000 to the Emmanuel Lutheran Preschool made in the County fiscal year 1996 budget is constitutional.

Several state and federal constitutional provisions are implicated by the appropriation. The First Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion" (commonly referred to as the "Establishment clause"). Similarly, Article I, Section 4 of the Hawaii State Constitution prohibits the enactment of any law "respecting an establishment of religion."

In addition, Article VII, Section 4 of the Hawaii State Constitution prohibits appropriations of public money for private purposes. Article X, Section 1 of the Hawaii State Constitution provides that no public funds shall "be appropriated for the support or benefit of any sectarian or private educational institution."

It is our opinion that expenditure of the appropriated funds for Emmanuel Lutheran Preschool ("ELPS") would violate the Establishment clause of the federal and state constitutions, and therefore, we advise that the 1996 budget be amended to delete the appropriation. We do not, however, believe that the appropriation violates either Article VII, Section 4 or Article X, Section 1 of the Hawaii State Constitution.

96-02

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Expenditure of the ELPS appropriation would violate the Establishment clause because it is direct aid to a pervasively sectarian institution that would have the effect of advancing religion.

To withstand an Establishment clause challenge, a government action's primary effect must neither advance nor inhibit religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613, 29 L.Ed.2d 745 (1971); Druz v. Commissioner of Internal Revenue Service, 48 F.3d 1120, 1124 (9th Cir. 1995). In Bowen v. Kendrick, the U.S. Supreme Court stated that "[o]ne way in which direct government aid might have [the effect of advancing religion] is if the aid flows to institutions that are 'pervasively sectarian' . . . there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission.'" 487 U.S. 589, 610, 101 L.Ed.2d 520 (1988).

A pervasively sectarian organization has been defined as one where "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." Bowen, 487 U.S. at 610 (citations omitted). Religious schools are one type of institution that the courts have found to be pervasively sectarian. See Grand Rapids School District v. Ball, 473 U.S. 373, 87 L.Ed.2d 267 (1985) and Meek v. Pittenger, 421 U.S. 349, 363, 44 L.Ed.2d 217 (1975). In Meek, the Court reasoned that "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." 421 U.S. at 366 (citations omitted).

Following this analysis, we are of the opinion that ELPS is a pervasively sectarian institution. In Article VI, Section G of the Bylaws of Emmanuel Lutheran Church of Maui, ELPS is referred to as a Christian preschool. The preschool is governed by the church body, the pastor of Emmanuel Lutheran supervises the preschool, and the Voters Assembly of the church considers the need for facilities and equipment for the preschool. Although ELPS attracts and serves children of diverse religious and ethnic backgrounds, a religious mission is being carried out in the preschool. The children are taught Bible stories, sing Christian songs, and attend chapel once a week. Teacher qualifications include a requirement that the teacher be a Christian. It is evident from these facts that the religious mission is an integral part of the ELPS curriculum and a primary reason for the preschool's existence.

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Despite our conclusion in this case, the Establishment clause does not preclude the Maui County Council from ever making appropriations that result in funding religious institutions. The courts have "never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." Bowen, 487 U.S. at 609. Even aid to sectarian schools does not always violate the Establishment clause. In Meek, the Supreme Court stated that "a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities--secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school. The indirect and incidental benefits to church related schools from those programs do not offend the constitutional prohibition against establishment of religion." 421 U.S. at 364.

Furthermore, we note that the latest Supreme Court decision applying the Establishment clause, Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. ____, 132 L.Ed.2d 700 (1995), appears to narrow the application of the Establishment clause.

The issue in Rosenberger was whether the University would violate the Establishment clause if it used money from the Student Activity Fund to pay the outside contractors' costs for printing a student newspaper published by a Christian student group.

The Court determined that the use of the funds to pay the publishing costs of the newspaper would not violate the Establishment clause because the funding program was completely neutral toward religion. Under the guidelines governing the use of the Student Activity Fund, the Christian newspaper was treated no differently than the many other student newspapers. "[T]he guaranty of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." Rosenberger, 132 L.Ed.2d at 722.

Other factors affecting the Rosenberger decision included the countervailing free speech rights asserted by the student group; the fact that the money went directly to the private contractors who printed the newspaper, not into the hands of the Christian student group (the Court specifically noted that this case was not one where the "government is making direct money payments to an institution or group that is engaged in religious activity"); and the fact that the Student Activities Fund consisted entirely of funds collected

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from the students, the government did not pay into it with taxpayers' money. Id. at 723-726.

Although we do not suppose the Maui County Council members' decision to appropriate the money for ELPS was anything other than subjectively neutral towards religion, in the absence of other factors similar to those present in Rosenberger, we are unable to distinguish the expenditure of the ELPS appropriation from the many other cases involving direct aid to a pervasively sectarian institution which the courts have found unconstitutional. Therefore, we advise the Council to amend the 1996 budget to eliminate this appropriation.

The appropriation of the \$5,000 to ELPS does not violate Article VII, Section 4 of the Hawaii State Constitution. This provision reads, "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose."

There are no clear guidelines for determining when a public purpose exists. Generally, the Council's determination as to what is a public purpose is given great weight. The Hawaii Supreme Court has stated that "the right to declare what shall be deemed a public use is vested in the legislature . . . [W]here . . . the Legislature declares a particular use to be a public use the presumption is in favor of this declaration, and will be binding upon the courts unless such use is clearly and palpably of a private character." Hawaii Housing Authority v. Schnack, 39 Haw. 543, 549-50 (1952) (citations omitted). Furthermore, the fact that a private individual incidentally receives private gain is immaterial. 2 McQuillin, Municipal Corporations, §39.19 (1988).

The appropriation of funds to ELPS to be used for the purchase of playground equipment is not "clearly and palpably of a private character" even though it benefits Emmanuel Lutheran. The appropriation serves a public purpose because it is part of the County's aim to promote the social and physical development of young children through providing recreational opportunities for them. To this end, it accomplishes the same purpose that is behind the construction of playgrounds on County property.

Finally, it is our opinion that the appropriation to ELPS does not violate Article X, Section 1 of the Hawaii State Constitution, which provides that no public funds shall "be appropriated for the support or benefit of any sectarian or private educational institution." The preschool is not an "educational institution" as contemplated by this provision of the Constitution.

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The intent of a statute or constitutional provision should be determined primarily from the language contained therein. Crosby v. State Department of Budget and Finance, 76 Haw. 332, 340 (1994). However, the Hawaii Supreme Court has stated that where the letter of the law produces a harsh result contrary to intent, resort to policy is permissible to ameliorate harshness or qualify apparent absolutes. Montalvo v. Chang, 64 Haw. 345, 356 (1982).

Article X, Section 1 was put into the Constitution, at least in part, to address the discrepancy in quality between private and public schools. In Spears v. Honda, the court explained that the emphasis on public education in the Constitution is largely attributable to the fact that nonpublic schools were considered better than the public schools, but that it was the public schools that had to serve the bulk of the students despite shabby treatment by the legislature. 51 Haw. 1, 7 (1968). If any money was to be spent on education, it should go to the public schools to increase the quality of education the public system could offer. Public funds going to private schools merely promoted the private school at the expense of the public school system. (See The Proceedings of the Constitutional Convention of Hawaii of 1978, Volume 1, Journal and Documents, Standing Committee Report No. 39, at 588, where the committee considered using state funds for post-secondary education in order to take advantage of federal funding. The committee decided this would have the undesirable effect of decreasing funds available to public schools and therefore rejected the proposal.)

The reasoning behind the constitutional prohibition does not suitably apply to grants of County funds to ELPS and other preschools. The preschools do not compete with the public education system for funding. Rather, the appropriated funds are social grants going to organizations that meet a need of the community not met otherwise by the state or county government. The state does not operate a public preschool system, therefore, the grant funds received by preschools contribute towards meeting a social need the government cannot address on its own.

Preschools play a valuable societal role by contributing to the early social development of the child and preparing young children for entry into the educational system, as well as by providing child care for working parents. These are social, rather than educational, characteristics. The overriding importance of the social role of the preschools is reflected by the fact that ELPS and other preschools are not licensed by the State Department of Education, but rather by the State Department of Human Services.

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If the County were to discontinue awarding grants to preschools because of the prohibition in Article X, Section 1, many of the organizations that provide preschool services to the County would be forced to shut their doors. The government does not offer an alternative for the children that would be turned away. This is a harsh result not intended by the framers of the Constitution. We believe that a grant of funds to a sectarian or private preschool, if challenged based on Article X, Section 1 of the Hawaii State Constitution, can be successfully defended.

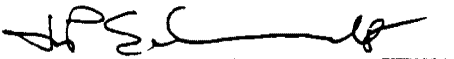
Nevertheless, with regard to the appropriation of \$5,000 to Emmanuel Lutheran Preschool, for the reasons stated above, expenditure of these funds would violate the Establishment clause of the U.S. and State Constitutions. We therefore advise that Council amend the 1996 budget to eliminate the appropriation.

Very truly yours,



KELLY A. CAIRNS
Deputy Corporation Counsel

APPROVED:



J.P. SCHMIDT
Corporation Counsel