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1ST CIRCUIT COURT  
STATE OF HAWAII  
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A. MARPLE  
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

AMERICAN CIVIL LIBERTIES  
UNION OF HAWAI'I,

Plaintiff,

vs.

PATRICIA McMANAMAN,  
Director, Department of Human  
Services, State of Hawai'i, in her  
official capacity,

Defendant.

CIVIL NO. 14-1-0829-03

GWBC

(Civil Rights Action)

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF;  
SUMMONS

**COMPLAINT**

Plaintiff THE AMERICAN CIVIL LIBERTIES UNION OF  
HAWAI'I ("ACLU"), by and through its attorneys, for this complaint, allege  
and aver as follows:

I do hereby certify that this is a full, true, and  
correct copy of the original on file in this office.

Clerk, Circuit Court, First Circuit

## **INTRODUCTION**

1. This action challenges the State of Hawaii's expenditure of public funds for religious education by private schools, in violation of the establishment clause of both the Hawai'i and United States Constitutions.

2. Specifically, this action challenges the State of Hawaii's Preschool Open Doors ("POD") program, in which the State funds monthly preschool tuition subsidies to preschools. Many of these preschools are faith-based programs and as such include non-secular curricula, teaching and instruction.

3. The goal of the POD program – expanding preschool access for Hawaii's children – is commendable. Research shows that 85% of a child's brain develops before age five, and children who attend preschool are more likely to succeed, both academically and socially: they are more likely to graduate high school and attend college, and they are less likely to be homeless, commit crimes, or abuse drugs.

4. Given that tuition for preschool in Hawai'i averages over \$8,000 a year – an insurmountable barrier for many of Hawaii's families – the State of Hawai'i should take every lawful measure to ensure that every child in Hawai'i has the opportunity to attend preschool regardless of income.

5. The current POD program, however, is unconstitutional. The State places no limits on how a religious institution may spend the public funds it receives; as such, the State directly funnels public funds to religious institutions that embrace non-secular teaching and instruction for preschool children.. Both Article I, § 4 of the Hawai‘i Constitution and the First Amendment to the United States Constitution prohibit the State from doing exactly that.

6. To meet constitutional guidelines, the POD program would, at a minimum, need administrative rules – or terms in the contracts with providers – that limit the ways in which public funds may be spent. That is, administrative rules, contractual terms, or other programmatic requirements would have to mandate, *inter alia*, that public funds not be spent on religious observances (such as prayer), religious education, and/or religious proselytization.

7. No such restrictions exist in the statutes governing the POD program (Hawai‘i Revised Statutes (“HRS”) chapter 346) or the relevant administrative rules (Hawai‘i Administrative Rules (“HAR”) chapter 17-199) regarding the expenditure of public funds on religious observances, education, and/or proselytization.

8. On information and belief, there are either no contracts between POD providers and DHS or, if such contracts do exist, there are no restrictions in those contracts regarding the expenditure of public funds on religious observances, education, and/or proselytization.

9. While some POD providers are completely non-secular, other POD providers are based at churches, synagogues, and the like. Families that wish to use their private funds to send their children to religious institutions for preschool have a right to do so. While private preschool providers are entitled to base their curricula on religious teachings, and are likewise entitled to incorporate religious observances into their educational programs, a constitutional problem arises when public funds are funneled directly to these religious institutions for the purpose of instructing children regarding religious observances.

10. Until such measures are in place to prevent public funds from being spent on religious observances and instruction, the POD program violates both Article I, § 4 of the Hawai‘i Constitution and the First Amendment to the United States Constitution.

11. This action seeks a declaration that the POD program, as currently constructed, violates the Hawai‘i and United States Constitutions,

as well as an injunction prohibiting Defendant from paying religious providers to expend public funds on religious observances and instruction.

### **JURISDICTION AND VENUE**

12. This Court has jurisdiction in this case pursuant to HRS §§ 603-21.5(a)(3), 632-1, and Hawai‘i Rules of Civil Procedure (“HRCPP”) Rules 57 and 65.

13. This Court has concurrent jurisdiction over Plaintiff’s federal constitutional claim in this matter pursuant to 42 U.S.C. § 1983. *See Howlett v. Rose*, 496 U.S. 356, 378 n. 20 (1990); *Martinez v. California*, 444 U.S. 277, 283-84 n. 7 (1980); *Mankanui v. Dept. of Educ.*, 6 Haw. App. 397, 403-04, 721 P. 2d 165, 170 (App. 1986).

14. Venue is proper in this Court pursuant to HRS § 603-36, because the acts and omissions complained of occurred in this Circuit.

### **THE PARTIES**

15. The ACLU is a statewide, nonpartisan, non-profit organization of approximately 2,000 members dedicated to protecting the principles of liberty and equality enshrined in the United States Constitution, including the right to be free from the establishment of religion by government, guaranteed by the First Amendment. Protecting the First Amendment rights

of individuals within Hawai‘i is fundamental to the purpose of the ACLU, insofar as the ACLU frequently litigates, lobbies, and educates the public on First Amendment issues involving and/or affecting Hawai‘i residents and visitors.

16. Some of the ACLU’s members are taxpayers within the State of Hawai‘i.

17. Defendant PATRICIA McMANAMAN (“McMANAMAN”), in her official capacity as Director of the State of Hawaii’s Department of Human Services (“DHS”), directs and coordinates DHS’ management of a wide range of State programs and activities. In this role, she directs, coordinates, and has managerial control over the POD program.

18. The violations of Plaintiffs’ First Amendment rights, as set forth herein, were the result of employees and/or agents of McMANAMAN acting pursuant to the official policies and/or customs of the State, and because those actions have been approved, ratified, and/or enforced by persons and/or entities with decision-making authority. At all times relevant herein, McMANAMAN was acting under color of state law.

McMANAMAN is sued in her official capacity for prospective relief intended to prevent future violations of Plaintiff’s members’ First Amendment rights.

## **FACTUAL ALLEGATIONS**

19. It appears that, for several years, the Department of Human Services (“DHS”) administered the POD program pursuant to HRS § 346-14 and HAR §§ 17-798.1 and 17-798.2, disbursing grants pursuant to HRS chapter 42F in coordination with the non-profit organization People Attentive to Children (“PATCH”).

20. In 2013, the State Legislature enacted HRS § 346-181, which formally established the POD program in DHS. DHS promulgated HAR chapter 17-799 as interim administrative rules.

21. The POD program provides qualified families with monthly preschool tuition subsidies. This program allows hundreds of children to attend preschool, providing invaluable benefits to those children, their families, and the community at large.

22. Many State officials, community advocates, and families are seeking ways to expand access to preschool for more families. Plaintiff fully supports the goal of expanded preschool access, insofar as community investment in preschools yields myriad benefits to the students themselves and the community at large.

23. Nevertheless, HRS § 346-181 contains no restrictions on expenditures of funds for religious purposes, nor are there any restrictions in HRS § 346-14 or HRS chapter 42F.

24. DHS promulgated administrative rules to regulate the POD program. Neither the most recent version of the rules (HAR 17-799) nor previous versions of the rules (HAR 17-798.1 and HAR 17-798.2) require a POD provider to refrain from using public funds for religious observances or instruction.

25. A child whose family meets certain eligibility criteria may receive financial assistance from DHS to attend preschool. Once DHS determines that a family is eligible for assistance, the family may choose to apply that subsidy to a licensed provider or to a license-exempt provider.

26. As of June 2013, there were 1050 licensed childcare providers statewide. See PATCH, *Report on Facilities and Capacity as of June 2013*, available at [http://www.patchhawaii.org/files/content/community/stats/Facilities\\_Capacity\\_June\\_13\\_for\\_web.pdf](http://www.patchhawaii.org/files/content/community/stats/Facilities_Capacity_June_13_for_web.pdf) (last accessed March 31, 2014). Of those, 410 are “preschools” and of the 410, a significant number are preschools that are religious in nature.



27. Once the family chooses its preferred childcare facility, DHS may either: (a) provides the funds directly to the child's family; or (b) pay the preschool directly (HAR 17-799.15).

28. On information and belief, regardless of the manner in which DHS funds the childcare facility, there are insufficient restrictions on the use of public funds for religious observances or instruction.

29. Prior to the enactment of HRS § 346-181, however, the Executive Office on Early Learning ("EOEL") warned of the need to address potential establishment clause violations. In a "Talking Points" memo dated February 22, 2013, EOEL stated:

Faith-based programs are a critical part of Hawaii's preschool landscape. EOEL would like to work with faith-based providers to bring them into the State's early learning system as much as possible.

At the same time, EOEL must work within legal parameters to do this. The proposed [Constitutional Amendment to Article X, § 1 – to allow public tax dollars to be used for private educational institutions – which will appear on the November 2014 ballot] does not change issues surrounding the separation of church and State.

We know that contract terms will include guidelines that participating faith-based providers must adhere to. And there are existing practices in place that include faith-based organizations in government programs such as DHS' Preschool Open Doors and other social service programs. There are also mechanisms that other states have employed to make it feasible for public funds to go to faith-based providers

(ensuring that faith-based providers use state funds for “secular services for secular purposes on a religion-neutral basis”<sup>[1]</sup>).

Office of the Governor, Executive Office on Early Learning, *Private Providers in the State’s Early Learning System*, TALKING POINTS Vol. 4 (February 22, 2013), available at [http://earlylearning.hawaii.gov/wp-content/uploads/2013/03/Talking-Points.v4.PrivateProviders.WEB\\_.pdf](http://earlylearning.hawaii.gov/wp-content/uploads/2013/03/Talking-Points.v4.PrivateProviders.WEB_.pdf) (hereinafter “EOEL Talking Points”) (citing *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 843-44 (1995)).

30. The EOEL Talking Points memorandum suggested following the example set by Connecticut’s School Readiness Program, including the following guidelines:

1. The program must be open to all children, and cannot exclude a child based on the family’s religious creed or lack thereof;
2. The program cannot be used to proselytize or attempt to persuade or convert children or their families to religion or a particular religious persuasion;
3. The program may not contain religious observances, such as prayer, grace, confession, church attendance, religious instruction, etc.;
4. The program must accommodate the practice of a child or staff member’s personal religious beliefs where the practice is required during program hours; e.g. Islamic designated time for prayers;

5. The program may not require children or their families to participate in faith-based or church sponsored activities or services which are not part of the school readiness program;
6. Programs may not discriminate in hiring based on religious affiliation or lack of religious affiliation; and
7. Unless it is not practicable, classes should be conducted in rooms that are free of religious symbols and other religious items.

EOEL Talking Points at 2 (citing Connecticut School Readiness Program, School Readiness Alert SR-02-02).

31. In addition, Connecticut requires that any program conducted in a faith-based setting must, as a whole, be non-religious: “It is not enough to allow students or their families to ‘opt out’ of portions of the program which are religious in nature.” Education Law Center, *Integrating Faith-Based Organizations Into State-Funded Pre-k Programs: Resolving Constitutional Conflict*, PRE-K POLICY BRIEF SERIES (June 2010) at 10 (quoting Connecticut School Readiness Program, School Readiness Alert SR-02-02), available at <http://www.edlawcenter.org/assets/files/pdfs/publications/IntegratingFaithBasedOrganizations.pdf>.

32. Neither the Legislature nor DHS has implemented any of these guidelines for the POD program.

33. As such, the Hawai‘i Revised Statutes, the Hawai‘i Administrative Rules, and the contracts with providers (if any) are silent when it comes to preserving the separation of church and state. Consequently, religious preschools can – and do – use public funds for religious observations and instruction.

34. Other states, however – like Connecticut, as discussed *supra* – have successfully established preschool programs like those in Hawai‘i (in which the state pays private institutions to provide preschool services) while better respecting the proscriptions of the Establishment Clause an Article 10, § 1.

#### **DECLARATORY AND INJUNCTIVE RELIEF**

35. An actual and immediate controversy has arisen and now exists between Plaintiff’s members and Defendant, which parties have genuine and opposing interests and which interests are direct and substantial. Defendant has failed and continues to fail to comply with the Hawai‘i Constitution and the United States Constitution. Plaintiff is therefore entitled to a declaratory judgment as well as such other and further relief as may follow from the entry of such a declaratory judgment.

36. Specifically, Plaintiff seeks a declaration that the POD program violates Article I, § 4 of the Hawai'i Constitution and the First Amendment to the United States Constitution.

37. Plaintiffs have no adequate remedy at law. Unless enjoined by the Court, Defendant will continue to infringe upon Plaintiff's members' constitutionally protected rights. This threat of injury to Plaintiffs' members from continuing violations requires preliminary and permanent injunctive relief.

### **FIRST CLAIM FOR RELIEF**

#### **VIOLATION OF ARTICLE I, SECTION 4 OF THE HAWAI'I CONSTITUTION (Establishment Clause)**

38. Plaintiff realleges and incorporates by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 37, above.

39. As currently structured, the State pays private religious institutions to provide religious instruction and conduct religious observances with children.

40. There are no safeguards in place to ensure that public funds are used only for non-secular purposes.

41. As such, Defendant McMANAMAN enforces policies wherein public funds are used for religious instruction and to conduct religious observances with children.

42. Plaintiff's members, as taxpayers, have standing to challenge establishment clause violations such as those detailed herein.

43. Plaintiff's members, as taxpayers, are injured as a direct and proximate result of Defendant McMANAMAN's actions, by virtue of having their tax dollars spent on the establishment of religion, in violation of Article I, § 4 of the Hawai'i Constitution.

### **SECOND CLAIM FOR RELIEF**

#### **VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, ACTIONABLE PURSUANT TO 42 U.S.C. § 1983 (Establishment Clause)**

44. Plaintiff realleges and incorporates by reference as though fully contained herein, the allegations set forth in Paragraphs 1 through 43, above.

45. As currently structured, the State pays private religious institutions to provide religious instruction and conduct religious observances with children.

46. There are no safeguards in place to ensure that public funds are used only for non-secular purposes.

47. As such, Defendant McMANAMAN enforces policies wherein public funds are used for religious instruction and to conduct religious observances with children.

48. Plaintiff's members, as taxpayers, have standing to challenge establishment clause violations such as those detailed herein.

49. Plaintiff's members, as taxpayers, are injured as a direct and proximate result of Defendant McMANAMAN's actions, by virtue of having their tax dollars spent on the establishment of religion, in violation of the First Amendment to the United States Constitution.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court:

- A. Assume jurisdiction over this action;
- B. Issue a declaratory judgment stating that Defendant has violated the Hawai'i Constitution and the First Amendment to the United States Constitution;
- C. Issue a preliminary and permanent injunction enjoining Defendant (and its divisions, officers, servants, employees, attorneys, agents and representatives, successors-in-office and all persons acting or purporting to act in concert or in cooperation with Defendant or pursuant to

Defendant's authority) from subjecting Plaintiff to the customs, policies, practices, rules, regulations, acts and omissions set forth in this Complaint;

D. Retain jurisdiction over Defendant until such time as the Court is satisfied that Defendant's unlawful customs, policies, practices, rules, regulations, acts and omissions complained of herein no longer exist and will not recur;

E. Award reasonable attorneys' fees, costs and other expenditures incurred as a result of bringing this action, pursuant to the private attorney general doctrine, 42 U.S.C. § 1988, and other applicable laws;

F. Order such other relief as this Court deems just and proper.

Dated: Honolulu, Hawai'i, March 31, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "LKP" followed by "DMG", written over a horizontal line.

LOIS K. PERRIN  
DANIEL M. GLUCK  
ACLU OF HAWAI'I FOUNDATION

*Attorneys for Plaintiff*



IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

AMERICAN CIVIL LIBERTIES UNION  
OF HAWAI'I,

Plaintiff,

vs.

PATRICIA McMANAMAN, Director,  
Department of Human Services, State of  
Hawai'i, in her official capacity,

Defendant.

CIVIL NO. \_\_\_\_\_

(Civil Rights Action)

**SUMMONS**

**SUMMONS**

STATE OF HAWAI'I

TO: PATRICIA McMANAMAN,

Director, Department of Human Services, State of Hawai'i

In her official capacity

You are hereby summoned and required to file with the court and serve upon DANIEL M. GLUCK, Attorney at Law, Plaintiff's attorney, whose address is P.O. Box 3410, Honolulu, Hawaii 96801, an answer to the Complaint which is herewith served upon you, within twenty (20) day after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-

entitled court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawai'i, \_\_\_\_\_ MAR 3 1 2014

A. MARPLE



\_\_\_\_\_  
CLERK OF THE ABOVE-ENTITLED COURT