

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

In the Matter of the Estate of

EQUITY NO. 2048

of

FINDINGS OF FACT AND CONCLUSIONS

OF LAW

BERNICE P. BISHOP,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Petition For Removal of Trustee Marion Mae Lokelani Lindsey ("Petition"), filed December 29, 1997, by Petitioners Oswald Stender and Gerard Jarvis, the Petition having been joined in by the Hawaii State Attorney General as parens patriae for the beneficiaries, Respondent Trustee Lindsey and Trustees Wong and Peters having opposed the Petition, and the Petition having been assigned from the Probate Court to the Civil Trials Calendar for trial making the Hawaii Rules of Civil Procedure and Rules of

the Circuit Court applicable, the Court having conducted trial on the Petition receiving evidence from November 9, 1998, through January 8, 1999, and February 1, 1999, through March 11, 1999, followed by argument on April 1, 1999; Petitioner Stender, having been represented by Douglas Ing, Crystal Rose and Bruce Voss; Petitioner Jervis, having been represented by Ronald Sakamoto and Carolyn Hayashi; the Attorney General, having been represented by Dorothy Sellers, Hugh Jones, Martin Basiszta and Daniel Morris; Respondent Marion Mae Lokelani Lindsey, having been represented by Michael Green, David Gierlach and Joe Wolsztyniak; Trustee Richard S. H. Wong, having been represented by Kenneth Nakasone and Wayne Sakai; Trustee Henry Haalilio Peters having been represented by Renee Yuen; the Court having considered the evidence, legal memoranda, counsels' arguments and having been fully informed in the premises makes the following Findings of Fact and Conclusions of Law based upon clear and convincing evidence thus granting the Petition for Removal of Trustee Marion Mae Lokelani Lindsey:

#### FINDINGS OF FACT

1. On February 26, 1993, Marion Mae Lokelani Lindsey was duly appointed and sworn as a Trustee of Kamehameha Schools/Bishop Estate ("KSBE") in accordance with the terms of the Will of Bernice Pauahi Bishop, Deceased ("Will"). In February 1993 the five-member Board of Trustees ("Board") consisted of Trustees Lindsey, Henry Peters, Oswald Stender, Myron "Pinkie" Thompson, and Richard S. H. Wong. [**Lindsey Trial Testimony, 1/6/99, Tr. p. 2**] Trustee Gerard Jervis replaced Thompson on December 1, 1994. [**Jervis Trial Testimony, 1/4/99, p.3-4**]
2. KSBE is a perpetual, charitable trust created by the Will which requires decisions by majority rule. [**Exhibit "A", p.19 to Exhibit A-629**] At the time of trial, the value of KSBE assets was at least two-billion dollars. [**Wong Trial Testimony, 3/9/99**] The Will devotes KSBE assets to Kamehameha Schools for educational purposes. [**Exhibit "A" to Exhibit A-629**] The principle offices of KSBE are located at Kawaihāo Plaza in Honolulu. The Kamehameha Schools main campus is located on Kapalama Heights in Honolulu.
3. During Lindsey's forty minute interview for the position as Trustee by four Hawaii Supreme Court justices she was asked about her education background, spoke of the changes she made in the educational system in the Maui district, said what changes she would make at Kamehameha Schools if selected, and described her personal management style. She applied for the position because "they were looking for a female and an educator. And that was publicized in the newspapers." [**Lindsey Trial Testimony, 1/6/99, Tr. p. 2-4; 1/8/99, Tr. p. 72-74**]
4. Trustee Lindsey attended and graduated from Kahuku High School in 1956. She continued to her education after her third child in 1961 when she went to the Church College of Hawaii. While Lindsey initially enrolled in pre-med classes she switched, choosing to become a teacher. She graduated from Church College in 1965 with a bachelor of science degree in physical education and biological science. Lindsey

continued her education at the Church College of Hawaii so she could get her teaching certificate in secondary education that same year. Lindsey went on to receive her masters degree in Pacific Island studies from the University of Hawaii in 1975. [**Lindsey Trial Testimony, 1/8/99, Tr. p. 35-39**]

5. Trustee Lindsey began her career in education as a Kahuku High School physical education teacher and student activities coordinator with the State of Hawaii, Department of Education ("DOE"), a position she held for 11 years from 1966 to 1977. [**Lindsey Trial Testimony, 1/8/99, Tr. p. 41, 45, 48-49**] She received a professional administrator's certificate in 1978. [**Id. at 39**]

6. In 1977-78 she was appointed vice principal at Campbell High School; in 1978-79, vice principal at Molokai High School; and then in 1979-81, vice principal at Baldwin High School. [**Id. at 48-49**] She next served as principal of Kaimuki High School from 1981-82 before achieving her highest DOE position as district superintendent of schools for the Maui district. The Maui district includes the islands of Maui, Molokai and Lanai. Lindsey served in that position for 10 years and 8 months. [**Id. at 52, 56-57**] A district superintendent reports to the superintendent who in turn reports to the board of education. Trustee Lindsey had no experience with private schools.

7. Trustee Lindsey had dealt with curriculum in a particular format. The format she knew from the DOE included goals, objectives, outcome measures and articulation between grade levels during her career in public education. [**Id. at 46, 51-58**]

8. Trustee Lindsey had dealt with strategic planning, operational plans, and student testing while in the DOE. [**Id. at 60-63, 66-71**]

9. Within six months of her KSBE appointment, Trustee Lindsey was designated lead Trustee for the Education Group which comprised Kamehameha Schools. The Board informally asked her to fill that position because of her education background. [**Lindsey Trial Testimony, 1/6/99, Tr. p. 10-11; 2/1/99, Tr. p. 4-5; accord, Wong Trial Transcript, 3/9/99**]

10. At that time the Board used a liaison system in which Trustee Lindsey was lead for education and communications, Trustee Peters was lead for asset management, and Trustee Jarvis upon his appointment became lead for legal. Trustee Stender was assigned special responsibility for specific investments, and Trustee Wong was the Board Chair and lead for political aspects. [**Lindsey Trial Testimony, 2/1/99, Tr. p. 5-7; Aipa Trial Testimony, 12/22/99**]

11. Trustee Lindsey understood, because of her thirty years of experience in education, that her fiduciary duty as a trustee embraced her expertise. She believed she would therefore be held to a higher standard of care under trust law. [**Lindsey Trial Testimony, 1/6/99, Tr. p. 9-10, see Exhibit A-208, p.3**]

12. Lindsey testified that one of her fiduciary responsibilities is the duty of loyalty, and she understood that to mean that she must put the interests of the Kamehameha Schools and its students before her own personal interests. [**Lindsey Trial Testimony, 1/7/99, Tr. p.3]**

## **I. TRUSTEE LINDSEY'S WASTE, MISMANAGEMENT AND MISUSE OF TRUST ASSETS**

### **A. Trustee Lindsey's Use of KSBE Staff and Resources on Her Punaluu Beach House**

13. On or about September 16, 1993, the City & County of Honolulu Building Department sent Trustee Lindsey and her husband a "Notice of Violation" regarding construction on her Punaluu beach house. [**Exhibit A-7**] Trustee Lindsey originally had a permit to do renovation work on up to 50 percent of the beach house. However, the renovation work exposed severe ground termite damage, requiring reconstruction of more than 50 percent of the beach house. [**Lindsey Trial Testimony, 1/6/99, Tr. p.83**] Because the extent of the work on the beach house exceeded 50 percent of its replacement cost, Trustee Lindsey was required to get a new building permit for a new single-family dwelling. [**Exhibit A-7**] To obtain a new building permit, she and her husband had to satisfy new shoreline and front yard setback requirements that were different from those in existence when the beach house was originally built. [**Lindsey Trial Testimony, 1/6/99, Tr. p.84**]

14. On or soon after November 9, 1993, Lindsey's architect William Benjamin received a work proposal from planning consultant Keith H. Kurahashi. [**Exhibit A-8**] Kurahashi proposed certain services to prepare and process the applications to obtain the shoreline setback and front yard setback variances for Lindsey's beach house property. [**Exhibit A-8**] Kurahashi proposed a fee of \$12,000. [**Exhibit A-8**] Trustee Lindsey's handwritten note on Kurahashi's proposal states: "Put in my construction file." [**Exhibit A-8**] She did not retain Kurahashi. [**Lindsey Trial Testimony, 1/6/99, Tr. p.89**]

15. Sometime in late 1993, Trustee Lindsey called Paul Cathcart and asked him to come to her office. Cathcart is the Manager of KSBE's suburban Oahu Land Department. Lindsey explained the circumstances regarding her beach house property to Cathcart and asked him to assist her in processing the permits needed to remedy the violations. [**Cathcart Trial Testimony, 12/15/98**]

16. Cathcart thought it was unusual for KSBE staff to be involved in a project of this nature. He spoke with Tony Sereno, who was then General Manager of KSBE's Asset Management Group, and told Sereno that he did not think it was appropriate for KSBE staff to be doing work on Trustee Lindsey's beach house. Sereno instructed Cathcart to continue processing the necessary permits for Lindsey. Sereno told Cathcart he was concerned that if they didn't do the work, Trustee Lindsey is a "vindictive person" and

"something would happen to the Asset Management Group." **[Cathcart Trial Testimony, 12/15/98]**

17. In order to obtain the county setback variances, it was necessary to get a shoreline determination and certification for the property. **[Cathcart Trial Testimony, 12/15/98]** On December 14, 1993, Cathcart submitted a letter to the State Department of Land & Natural Resources, seeking a shoreline determination for Lindsey's beach house property. **[Exhibit A-12]** Cathcart's letter noted that the survey of Lindsey's property was performed on November 18, 1993, under the supervision of Allen Young. **[Exhibit A-12]** Young is also a KSBE employee. **[Cathcart Trial Testimony, 12/15/98]**

18. Cathcart thereafter delegated responsibility for most of the work on Lindsey's Punaluu beach house to Alika Neves, a KSBE Land Manager. **[Cathcart Trial Testimony, 12/15/98]** However, Trustee Lindsey would periodically call Cathcart to learn the status of the project, and Cathcart sent Lindsey memos updating the progress. **[Exhibit A-16; Exhibit A-19]**

19. Trustee Lindsey testified that the reason she believed she was justified in having KSBE staff perform services for her was because there was a shoreline "boundary dispute" with the State of Hawaii involving her Punaluu property. **[Lindsey Trial Testimony, 1/7/99, Tr. p.5]** The Court finds there was no dispute.

20. Both Cathcart and Neves testified they were not aware of any boundary dispute involving Trustee Lindsey's property. **[Cathcart Trial Testimony, 12/15/98; Neves Trial Testimony, 12/15/98]**

21. Lindsey and her husband had purchased the fee interest in the Punaluu beach house property from KSBE in 1988, before Lindsey became a Trustee. **[Exhibit A-1]** In the deed, KSBE expressly made "no promises or statements" regarding "the location of the seaward boundary or the area of the property if the Property borders the sea." **[Exhibit A-1, p.4]** In the deed, KSBE also made "no promises or statements" regarding "whether or not the Property or any improvements meet the requirements of any building, health, zoning, land use, subdivision, setback or other law, ordinance, rule or regulation which may apply." **[Exhibit A-1, p.3]**

22. On February 7, 1994, Alika Neves, as "Applicant" for Trustee Lindsey, filed a Shoreline Certification Request for Lindsey's Punaluu property with the State Department of Land & Natural Resources. **[Exhibit A-17]** On February 15, 1994, State Land Surveyor Stanley Hasegawa wrote to Allen Young, the KSBE employee who supervised the survey of the Lindsey property, declaring that the State of Hawaii had "no objections to certifying the shoreline" for Lindsey's Punaluu property. **[Exhibit A-18; Lindsey Trial Testimony, 1/7/99, p.4]** At trial, Trustee Lindsey acknowledged that as of February 15, 1994, there was no longer any "boundary dispute" related to her Punaluu property. **[Lindsey Trial Testimony, 1/7/99, Tr. p.5]**

23. On March 4, 1994, Neves wrote a memorandum to Lindsey regarding the status of the project. **[Exhibit A-21]** Neves' memo advised the Trustee that her architect, Benjamin, had not yet submitted the variance applications for the shoreline and front-yard setbacks, and asked Lindsey to direct Benjamin to submit those variance applications to the county. **[Exhibit A-21]** On the top of the memo, Lindsey made a handwritten note: "3-9-94: Emalia. Schedule a mtg. ASAP with Paul, Alika, and Allan Young. Loke." **[Exhibit A-21]**

24. On May 4, 1994, Neves worked on an application to the City & County Department of Land Utilization for a front-yard setback variance for Lindsey's Punaluu beach house property. **[Exhibit A-27; Neves Trial Testimony, 12/15/98]** On May 10, 1994, he submitted the application to the government. **[Exhibit A-29]**

25. The City & County of Honolulu advised Neves by letter dated July 5, 1994, that it had approved Lindsey's front-yard setback variance. **[Exhibit A-36]** Thereafter, Neves had to walk around to the various departments at the City & County to obtain approval for Lindsey's building plans. **[Neves Trial Testimony, 12/15/98]**. In addition, there was a need to interface with the State Department of Health regarding the cesspool and its impact on the permit. **[Cathcart Trial Testimony, 12/15/98]**

26. Over a period of 13 months, from late 1993 to around December 1994, Neves met with Lindsey on 10 to 15 occasions regarding her Punaluu beach house. **[Neves Trial Testimony, 12/15/98]** Neves inspected the Punaluu property five or six times. **[Neves Trial Testimony, 12/15/98]** He and Cathcart also appeared with Trustee Lindsey at a public hearing on the front-yard variance application. **[Exhibit A-36; Neves Trial Testimony, 12/15/98]**

27. On February 5, 1995, the Honolulu Advertiser published a story regarding Lindsey's use of KSBE staff on her Punaluu beach house. **[Exhibit A-44]**. Prior to the article, Communications Director Elisa Yadao had received a call from the Honolulu Advertiser reporter, Jim Dooley. **[Yadao Trial Testimony, 2/23/99, Tr. p.57]** After receiving the inquiry, Yadao discussed the Punaluu situation with Trustee Lindsey and Sereno. **[Yadao Trial Testimony, 2/23/99, Tr. p.58]** Lindsey explained "there was some kind of a surveying discrepancy and that this was part of an effort to clear that up." **[Yadao Trial Testimony, 2/23/99, Tr. p.58]** While Lindsey was explaining what happened, Sereno said "we'd better go find someplace else we made a survey mistake and fix it." **[Yadao Trial Testimony, 2/23/99, Tr. p.60]**

28. In her role of spokesperson for KSBE, Yadao provided comments to reporter Dooley that were published in the Honolulu Advertiser article on February 5, 1995. **[Exhibit A-44]** In the article, Yadao is quoted as saying "it is not a violation of policy" for Trustees to use staff for personal work. **[Exhibit A-44]** Yadao is also quoted as saying KSBE made a "mistake" on the shoreline survey of Lindsey's property and "helped correct it," and KSBE "would do the same for anyone else in that position." **[Exhibit A-44]** At trial Lindsey denied approving Yadao's response while admitting having no knowledge of any KSBE policy providing that KSBE "would do this for anyone in that position." **[Lindsey**

**Trial Testimony, 1/6/99, Tr. p.109]** Lindsey was at the time and had been since March 1994 lead Trustee for communications **[Exhibit A-28]** and Yadao was required to clear all statements to reporters on all subjects with Lindsey. **[Yadao Trial Testimony, 2/23/99, p.10, 26]** Yadao credibly testified the content of her response to Dooley was approved by Lindsey. **[Yadao Trial Testimony, 2/23/99, Tr. p.58]**

29. Lindsey testified she felt Tony Sereno could authorize KSBE staff to perform personal services for her Punaluu property. **[Lindsey Trial Testimony, 1/7/99, Tr. p.6]** General Counsel Aipa testified Lindsey did not ask him for an opinion as to whether it was appropriate for KSBE staff to work on her Punaluu beach house. **[Aipa Trial Testimony, 12/22/98]** Trustee Jervis credibly testified that KSBE employees such as Sereno are not authorized to approve the use of personal services by KSBE staff members on behalf of Trustees. **[Jervis Trial Testimony, 1/4/99, Tr. p.88-89]**

30. At no time did the KSBE Board of Trustees authorize staff to perform services for Lindsey's Punaluu residence. **[Stender Trial Testimony, 2/12/99; Tr. p.106]**

31. Neves testified he was not aware of any circumstances under which KSBE would be required to obtain shoreline certifications for a person who previously had purchased property from KSBE, and there was no benefit to KSBE in doing the application for Trustee Lindsey. **[Neves Trial Testimony, 12/15/98]** KSBE staff never before obtained a shoreline certification for a person who previously had purchased property from KSBE. **[Neves Trial Testimony, 12/15/98; Cathcart Trial Testimony, 12/15/98]** General Counsel Aipa also confirmed that Lindsey was the exception. Never before had KSBE staff assisted either its lessees or fee owners of former KSBE property in obtaining variances or building permits. **[Aipa Trial Testimony, 12/22/98]**

32. Lindsey testified she made "numerous offers" to reimburse KSBE for the work done on her Punaluu beach house, but none of those offers were in writing. **[Lindsey Trial Testimony, 1/6/99, Tr. p.101]** She further testified, "most of my offers" were made to Sereno. **[Id. at 102]** By the time of trial Tony Sereno had been dead for several years.

33. The credible evidence shows Trustee Lindsey made no offers to reimburse KSBE before the Internal Revenue Service (IRS) inquiry.

34. Neves and Cathcart credibly testified that Trustee Lindsey never in their presence offered to pay them or reimburse KSBE for the time they spent working on her beach house. Lindsey did give each of them a gift around Christmas 1994. **[Cathcart Trial Testimony, 12/15/98 (\$200); Neves Trial Testimony, 12/15/98 (\$250)]**

35. At trial Neves estimated he worked approximately 150 hours on matters related to Lindsey's Punaluu beach house. **[Neves Trial Testimony, 12/15/98]** Cathcart estimated he worked 25 to 30 hours on matters related to Lindsey's beach house. **[Cathcart Trial Testimony, 12/15/98]** All of the time Neves and Cathcart spent on the project was during normal business hours. **[Neves Trial Testimony, 12/15/98; Cathcart Trial Testimony, 12/15/98]** They provided work estimates to General Counsel Nathan Aipa in 1997, after

the IRS questioned them about the work they did on Lindsey's beach house. [**Cathcart Trial Testimony, 12/15/98; Neves Trial Testimony, 12/15/98**]

36. On March 17, 1997, General Counsel Aipa wrote a memo to Trustee Peters regarding the IRS Information Document Request about Trustee Lindsey's Punaluu beach house. [**Exhibit A-167**] Aipa's memo included an "assessment of KSBE Staff Time" spent working on the Punaluu beach house, and suggested "we re-examine the focus of KSBE's response" to the IRS. [**Exhibit A-167**]

37. In the Fall of 1997, in response to recurring media coverage, the Board of Trustees discussed the issue. [**Stender Trial Testimony, 2/12/99, Tr. p.106**] Trustee Stender suggested that Lindsey reimburse KSBE for the cost of the services and Lindsey responded that Aipa had stated repayment was not necessary. [**Stender Trial Testimony, 2/12/99, Tr. p.106-107**] Trustee Stender asked Aipa to confirm Lindsey's statements. [**Id. at 107; Exhibit A-260**] When Stender later confronted Lindsey with Aipa's denial, Lindsey then said Sereno, not Aipa, had told her repayment was not necessary. [**Stender Trial Testimony, 2/12/99, Tr. p.108-109**] Sereno was already deceased when Lindsey and Stender discussed the matter. [**Id. at 109**].

38. Lindsey reimbursed KSBE for the work performed on her Punaluu beach house on October 22, 1997 [**Exhibit A-268; Aipa Trial Testimony, 12/20/98**] She repaid \$5,877.48. [**Exhibit A-268**] The payment did not include reimbursement for the time spent by KSBE surveyor Allen Young, nor did it include the cost of KSBE legal administration and outside counsel's time spent analyzing Lindsey's problems. [**Aipa Trial Testimony, 12/20/98; Stender Trial Testimony, 2/12/99, Tr. p.110**] In a memo dated October 30, 1997, Trustee Stender objected to the calculation for the reimbursement by Trustee Lindsey. [**Stender Trial Testimony, 2/12/99, Tr. p.110-111; Exhibit A-276**]

39. Although at trial Neves estimated he worked 150 hours on Lindsey's beach house, Lindsey reimbursed KSBE for 112.5 hours of Neves' time. [**Exhibit A-268**] Although at trial Cathcart estimated he worked 25 to 30 hours on Lindsey's beach house, Lindsey reimbursed KSBE for 20 hours of Cathcart's time. [**Exhibit A-268**]

40. When Lindsey reimbursed KSBE, the other Trustees did not release her from any claims relating to her Punaluu residence. [**Stender Trial Testimony, 2/12/99, Tr. p.111**]

## **B. Trustee Lindsey's Involvement in the Contract and Escrow Payments for the Baker-Van Dyke Collection**

### **1. The Purchase of the Van Dyke Collection**

41. Sigrid Southworth is the Hawaiian Collection librarian for the Midkiff Learning Center on the Kamehameha Schools' campus. She has worked as a librarian at

Kamehameha Schools for 35 years. **[Southworth Trial Testimony, 12/15/98]** In 1995, Southworth was asked by Trustee Stender to review a portion of a book collection that had been offered for sale to KSBE by Robert Van Dyke. **[Southworth Trial Testimony, 12/15/98; Stender Trial Testimony, 2/12/99, Tr. p.102]** Southworth reviewed 45 book titles from a sampling offered by Van Dyke. After checking her database, Southworth determined that Kamehameha Schools already had 55 percent of the 45 titles in the sampling offered by Van Dyke, and of the remaining 45 percent, there was only one book that would be educationally appropriate for the Hawaiian Collection at the Midkiff Learning Center. **[Southworth Trial Testimony, 12/15/98]** Southworth recommended to Trustee Stender that KSBE not purchase the collection. **[Southworth Trial Testimony, 12/15/98]** Based on this recommendation, Trustee Stender informed Van Dyke that KSBE would not be interested in his collection. **[Stender Trial Testimony, 2/12/99, Tr. p.103; Accord, Exhibit A-314, p.23]**

42. On June 2, 1996, Van Dyke wrote to Lindsey and offered to sell KSBE his library of Hawaiian books and other materials ("the Van Dyke Collection") and his collection of photographs by the late Ray Jerome Baker ("the Baker Collection") (collectively "the Baker-Van Dyke Collection"). **[Exhibit A-83, p. 1-2]** Lindsey visited the collection on three occasions. **[Exhibit A-83, p.2; Lindsey Trial Testimony 2/2/99, Tr. p.112-114]** Van Dyke told Lindsey that Trustee Stender had previously looked at the collection. **[Lindsey Trial Testimony, 2/5/99, Tr. p.71 (deposition)]** Lindsey did not seek Stender's input regarding the potential purchase. **[Lindsey Trial Testimony, 2/5/99, Tr. p.72]**

43. Lindsey negotiated a purchase price for the collection with Van Dyke. **[Lindsey Trial Testimony, 2/5/99, Tr. p.74]** What she did was ask him once, "can't you make it cheaper"? **[Lindsey Trial Testimony, 2/2/99, Tr. p.125]** In response, Van Dyke immediately lowered the price from \$500,000 to the "negotiated" sum. **[Lindsey Trial Testimony, 2/5/99, Tr. p.82-83]** Lindsey and Van Dyke agreed on a proposed price of \$422,831.86 **[Exhibit A-83, p. 2]**

44. After negotiating the price, Lindsey called KSBE senior counsel Stacy Rezendes into her office and asked her to draft a bill of sale for the anticipated transaction. **[Rezentes Trial Testimony, 12/16/98]** Rezendes expressed concern that there was no inventory or appraisal for the collection and explained the need for both. **[Id.]** Lindsey agreed and then instructed Rezendes to prepare a Staff Report to present to the other Trustees, based on information provided by Lindsey. **[Id.]**

45. Rezendes drafted a proposed Staff Report. **[Exhibit A-82]** In her initial draft, under the "Alternatives" for the Trustees to consider, Rezendes listed three options, the third being "Reject offer." **[Exhibit A-82 (original emphasis)]** Lindsey instructed Rezendes to delete the third option from the final version of the Staff Report presented to the other Trustees, and Rezendes complied. **[Rezentes Trial Testimony, 12/16/98; Exhibit A-83]** The two remaining were both purchase options.

46. Other than Lindsey's visits to the collection, KSBE did no "due diligence" on the Baker-Van Dyke Collection prior to the time the proposed purchase was presented to the

Board. [Rezentes Trial Testimony, 12/16/98; see Lindsey Trial Testimony, 2/5/99, Tr. p.73]

47. Rezentes discussed with Trustee Lindsey the advisability of recording the sale with the State Bureau of Conveyances because it was a big purchase. Lindsey rejected the request saying she did not want the sale to be public record and thus vulnerable to any media coverage. [Rezentes Trial Testimony; 12/16/99]

48. The Staff Report on the Baker-Van Dyke Collection was not on the Trustees' meeting agenda for July 16, 1996; Lindsey walked the report into the meeting. [Lindsey Trial Testimony, 2/5/99, Tr. p.74] Trustee Stender was not in attendance at the July 16, 1996 Trustees meeting. [Id.]

49. The Trustees in attendance at the July 16, 1996 meeting approved the purchase of the Baker-Van Dyke Collection, "subject to total or partial cancellation upon completion of due diligence." [Exhibit A-84] The required "due diligence" at the minimum included both an inventory and an appraisal of items in the collection. [Jervis Trial Testimony, 1/4/99, Tr. p.85-86; see Exhibit A-83, p.3, bullet 1 re: due diligence] The Trustees approved purchasing the collection for "educational purposes." [Lindsey Trial Testimony, 2/5/99, Tr. p.75-76 (deposition)]

50. Specifically, the Trustees approved Option A as recommended [Exhibit A-84] which read as follows:

A. Pay full balance now, and execute bill of sale subject to total or partial cancellation upon completion of due diligence. If Trustees are inclined to purchase, this option is not recommended unless an escrow is opened.

[Exhibit A-83 (original emphasis)] The Court finds Trustees' approval required creation of an escrow account.

## **2. Trustee Lindsey Makes Changes to the Baker-Van Dyke Contract and Unilaterally Authorizes Payments to Van Dyke**

51. Pursuant to the Trustees' instructions, Rezentes opened an escrow account at Title Guaranty on July 19, 1996, for KSBE's purchase of the Baker-Van Dyke Collection. [Exhibit A-88] The escrow instructions noted that Van Dyke had been paid two earnest money deposits totaling \$100,000, and the balance of \$322,831.86 was deposited into escrow. [Exhibit A-88] The escrow instructions stated that Title Guaranty could "close this transaction" subject to certain conditions, including "completion of KSBE's due diligence review, which will include, but not be limited to . . . [an] [i]nventory and appraisal of the subject materials." [Exhibit A-88]

52. Rezendes drafted a Purchase and Sale Agreement for the transaction. **[Exhibit A-93]**. Section 2.c. of the Purchase and Sale Agreement provided, among other things, that Van Dyke would receive the \$322,831.86 balance upon completion of KSBE's inventory and appraisal of the collection. **[Exhibit A-93, bates no. 01005114]** Section 8.a. also provided that if KSBE's appraisal of the property resulted in a lower value than the proposed purchase price, Van Dyke would accept the lower value as the "modified purchase price." **[Exhibit A-93, bates no. 01005115]**

53. Van Dyke objected to the provisions. **[Rezendes Trial Testimony, 12/16/98]** Rezendes advised Lindsey of the risks to KSBE of deleting the provisions from the contract. **[Id. (deposition)]** Van Dyke also objected to inclusion of Section 8b., which protected KSBE against legal defects in his title, saying he wasn't certain he had all the documents and threatening to sell to another full-price buyer who would not insist on the provision. Rezendes so informed Lindsey, including the risks of acquiescing to Van Dyke. **[Rezendes Trial Testimony, 12/16/98]** Lindsey then approved Van Dyke's requests to delete those provisions. **[Id.]** None of these contract changes were brought to the attention of other board members including the other signatories for KSBE on the final contract, Trustees Peters and Jervis. **[Id.]**

54. The final Purchase and Sale Agreement was executed between KSBE and Van Dyke on September 3, 1996. **[Exhibit A-104]** Although the provisions requiring an appraisal, a possible reduction in the price, and protection against legal defects had been deleted from the agreement, the contract still provided that Van Dyke would not receive the \$322,831.86 balance of the purchase until "Purchaser's completion of the inventory". **[Exhibit A-104, p.2]**

55. Notwithstanding the provisions of the contract, \$152,500 in payments were released out of escrow to Van Dyke before KSBE's inventory of the Baker-Van Dyke Collection was completed. **[Rezendes Trial Testimony, 12/16/98]** Van Dyke received payments of \$20,000 on September 10, 1996; \$50,000 on October 18, 1996; \$50,000 on December 23, 1996; \$20,000 on January 22, 1997; and \$12,500 on February 21, 1997. **[Exhibit A-496; Rezendes Trial Testimony, 12/16/98]** Van Dyke called Rezendes to request the advance payments out of escrow. Rezendes conveyed each request to Lindsey. Lindsey approved the release of funds out of escrow to Van Dyke. **[Rezendes Trial Testimony, 12/16/98]** The advance payments ceased only after Trustees Stender and Jervis objected. **[Id.]**

56. As of trial no inventory of the photos had begun. Van Dyke was supposed to identify the photo contents to facilitate inventory, but he complained of ill health after a few days' effort. **[Rezendes Trial Testimony, 12/16/98]** An appraisal cannot be done without the inventory; nor can defects in title be determined.

57. Lindsey testified she kept hearing from Van Dyke that he was "very, very ill and that he might pass away at any minute." Lindsey said she later found out that's what Van Dyke says all the time, but she was "concerned about getting the collection." **[Lindsey Trial Testimony, 2/2/99, Tr. p.120]** At the time of trial Van Dyke was still alive and still had not identified any of the photo collection **[Rezendes Trial Testimony, 12/16/98]**.

58. Other than the initial \$100,000 deposit, the Board never authorized Lindsey to approve advance payments to Van Dyke prior to the completion of an inventory and appraisal. [**Jervis Trial Testimony, 1/4/99, Tr. p.87; Stender Trial Testimony, 2/12/99, Tr. p.105**] Lindsey admitted that she authorized the release of funds to Van Dyke and that she never informed the other Trustees she had authorized those advance payments. [**Lindsey Trial Testimony, 2/5/99, Tr. p.49; Stender 2/12/99, Tr. p.105**] Lindsey testified she was "operating on the premise that he was supposed to be paid everything up front." [**Lindsey Trial Testimony, 2/5/99, Tr. p.49**] She further asserted her belief that the Trustees had not required escrow for the transaction. These assertions are contrary to Lindsey's own actions and the credible evidence; specifically, the express recommendation as to Option A in the staff report which the Trustees adopted [**Exhibit A-83; Exhibit D-944, p.8**], the subsequent actions of legal counsel Rezentes who established escrow, and the fact that Lindsey only released partial payments rather than the entire amount up front. [**See also Exhibit A-314, p.24 (Response to Finding #5)**] In addition, Rezentes credibly testified that Lindsey informed counsel of the Trustees' decision the day after the board meeting and complained that Option A had included an escrow provision, saying had she seen it before walking in the report, she would have asked Rezentes to delete it. [**Rezentes Trial Testimony, 12/16/98**] Months after this Petition to oust Lindsey was filed and more than two years after the initial decision to purchase the collection was made, a majority of Trustees could not say what their intent had been in 1996. [**Exhibit A-994, p.9**] This does not diminish the impact of the credible evidence which is contemporaneous.

59. In her drive to complete the transaction, Lindsey changed material provisions of the purchase agreement to KSBE's disadvantage, ordered escrow payments to KSBE's disadvantage, disregarded minimal requirements of due diligence, and rejected advice of counsel to KSBE's disadvantage.

### **3. The "Educational Value" of the Baker-Van Dyke Collection**

60. Trustee Lindsey assigned a "team" of KSBE employees and others to handle the inventory and packing of the books and documents portion of the Baker-Van Dyke Collection. Included on the team was the Hawaiian Collection librarian Southworth and Al Jeremiah, an attorney who does contract legal work for KSBE. [**Southworth Trial**

**Testimony, 12/15/98**] The team began working on the inventory in September 1996.

61. Van Dyke's collection of books and documents was stacked and piled, from floor to ceiling, in three rooms in the Hawaiian Life building in Honolulu. [**Exhibit A-607**] Most of the books were dusty and dirty, some books had active mold, and some books showed evidence of cockroach and termite damage. [**Southworth Trial Testimony, 12/15/98**] With help from other team members, Southworth cleaned, inventoried, and packed some 23,000 books and other items in 449 boxes. [**Southworth Trial Testimony, 12/15/98**] For seven-and-a-half months, she worked full-time on the cleaning and inventory.

62. Of the 23,000 items, Southworth found exactly one item that she had been actively searching for to include in the Hawaiian Collection at Kamehameha Schools. Southworth found numerous items that were inappropriate for the school's Hawaiian Collection, including books on manure and condom use in Japan. **[Southworth Trial Testimony, 12/15/98]**

63. The 449 boxes of books and other items from Van Dyke's collection now fill an entire classroom in the Midkiff Learning Center at Kamehameha Schools. **[Southworth Trial Testimony, 12/15/98]** Before it was filled with boxes, the classroom was heavily used by teachers, who have complained that their scarce classroom space is now being used for storage. **[Id.]** The 449 boxes have not been unpacked. In addition, the books must be classified and catalogued before they can be used in the library, and that process will take years to complete. **[Id.]**

64. KSBE did obtain an appraisal of all the books except for 16 boxes stored in the legal department. The appraisal did not consider educational value per se and did not involve the photo collection. The appraisal amount for those books was approximately \$300,000. This compares with the purchase price for books of \$200,000; for photos, \$200,000; leaving the balance for rental and storage through 1996. **[Rezentes Trial Testimony; 12/16/98]**

65. Lindsey conceded the "actual cost" of the Baker-Van Dyke Collection would include whatever additional costs KSBE incurred in transporting, inventorying, and storing the collection. **[Lindsey Trial Testimony, 2/5/99, Tr. p.79]** KSBE staff have calculated that it cost approximately \$174,886 to inventory, treat, and move the books and documents in the collection. **[Exhibit D-944, p.7]** KSBE is spending about \$125,000 to inventory the Ray Jerome Baker photographs from the collection; additional costs also will be incurred if the photographs are appraised. **[Rezentes Trial Testimony, 12/16/98]** Librarians will have to spend as-yet-undetermined but substantial time to classify and catalog the books. **[Southworth Trial Testimony, 12/15/98]** There are also concerns that Van Dyke did not convey clear title to the Ray Jerome Baker photographs in his collection. **[Rezentes Trial Testimony, 12/16/98; Exhibit D-944, p.2-5]**

## **C. KDP Technologies LLC/Trustee Lindsey's Failure To Disclose Potential Conflicts**

### **1. Trustee Lindsey's Gold Bullion Investment**

66. Between January and May of 1995, Trustee Lindsey invested approximately \$400,000 in an investment program promoted by Robert Kerkez. **[Exhibit A-107]**. The investment program was described to Trustee Lindsey as involving the sale of gold bullion by a seller in the Philippine Islands to Arab buyers. **[Exhibit A-107]** Benjamin Bush invested approximately \$800,000 in the same investment program. **[Exhibit A-107]** Kerkez died in April 1996, and Trustee Lindsey lost her entire investment. **[Lindsey Trial Testimony, 1/7/99, Tr. p.79-80]**

67. In September 1996, Lindsey and Bush, as co-plaintiffs, filed a lawsuit in Clark County, Nevada, seeking to recover some of the funds they had invested in the gold bullion investment venture from Kerkez's former wife, Janet Wang-Kerkez. **[Exhibit A-107]**. Lindsey agreed to split the legal fees for the lawsuit equally with Bush. **[Lindsey Trial Testimony, 1/7/99, Tr. p.82]** Lindsey remained as a co-plaintiff with Bush in the lawsuit until at least February 19, 1997, when they filed a Joint Case Conference Report. **[Exhibit A-153]** Sometime after February 1997, Lindsey withdrew as a plaintiff in the lawsuit. **[Lindsey Trial Testimony, 1/7/99, Tr. p.83]**

## **2. KSBE's Investment in KDP Technologies, LLC and Trustee Lindsey's Failure To Disclose Potential or Actual Conflicts of Interest**

68. In January 1997 Trustee Lindsey went to the Super Bowl with Bush and others after she arranged a private jet for their trip. **[Lindsey Trial Testimony 1/7/99, Tr. p.117-118]**

69. In January 1997 the Trustees were presented with an opportunity to invest up to \$2 million in KDP Technologies, LLC, a Delaware limited liability company (KDP). **[Exhibit A-137; Exhibit A-621 (for precise name)]** KDP was a fledgling software development and production company trying to develop an Internet database called "STAR\*BOOK" for aspiring models, actors, and entertainers to showcase their talents over the Internet to casting agencies, promoters, and producers. **[Exhibit A-137]** The KSBE Staff Report, dated January 9, 1997, notes that "[t]his investment opportunity was introduced to KSBE by Mr. Ben Bush III." **[Exhibit A-137, p.2]** Following KSBE's investment, Bush would be paid a \$90,000 annual salary by KDP and would be repaid a \$53,750 "bridge loan" he had made to the company. **[Exhibit A-137, p.8]** Bush owned 2% or 10,000 shares (\$50,000 contribution) and was one of five (5) shareholders. **[Exhibit A-137, bates no. 01014230; Au Trial Testimony]**

70. Lindsey testified she brought the KDP investment to the KSBE Board after Bush brought the KDP investment opportunity to her attention. **[Lindsey Trial Testimony, 1/7/99, Tr. p.83]**

71. The KDP investment opportunity was first presented to the KSBE Board at its meeting on January 9, 1997. **[Lindsey Trial Testimony, 1/7/99, Tr. p.84]** As of January 9, 1997, Lindsey was still a co-plaintiff with Bush in their Nevada lawsuit to recover money lost in their gold bullion investment venture. **[Lindsey Trial Testimony, 1/7/99, Tr. p.85]** At the time the KDP investment was presented to the full Board of Trustees, Lindsey did not advise her fellow Trustees that she was a co-plaintiff with Bush **[Id.]** Lindsey also did not advise the other Trustees of any relationship with Bush or any of her business dealings with Bush. **[Id. at 85-86; Stender Trial Testimony, 2/12/99, Tr. p.111]**

72. Trustee Jervis credibly testified that if Lindsey had disclosed the failed gold bullion investment scheme and her co-plaintiff relationship with Bush, he would have made different inquiries regarding KSBE's proposed investment in KDP. **[Jervis Trial**

**Testimony, 1/5/99, Tr. p.109-110]** Specifically, had the disclosure been made, Trustee Jervis would have inquired into Bush's "business track record." In addition, regarding the gold bullion investment, Trustee Jervis testified he would have wanted to test Bush's "business judgment": "I would want to know why he entered into that investment, what type of diligence, how much money, over what kind of period. I would want to know my partner, because essentially this guy is going to be my partner." **[Id. at 110]**

73. Aaron Au, who did the staff report and KSBE due diligence, credibly testified he would have told the Trustees that Bush and Lindsey were co-plaintiffs had he known. Bush told Au in Lindsey's presence that Bush had a prior business relationship with Lindsey, and this incomplete information was not reported by Au but became one factor enhancing Bush's credibility when Au prepared the staff report. **[Au Trial Testimony]** Au performed no due diligence as to Bush.

74. Au's staff report noted the high risk nature of the proposed venture capital investment. His due diligence as to the two principles noted their lack of expertise and experience in the particular field and their personal financial histories of bankruptcy, delinquent or unpaid loans and general lack of creditworthiness. **[Exhibit A-137]** Trustees twice rejected the KDP investment proposal before finally approving it after renegotiations and insisting upon an outside consultant for additional due diligence that also did not include Bush. **[Au Trial Testimony]**.

75. The KSBE Board of Trustees approved a Conflict of Interest policy on or about August 22, 1996. **[Exhibit A-101; Aipa Trial Testimony, 12/22/98]** Lindsey understood that, under the policy, she was to disclose to her fellow Trustees any potential conflicts of interest. **[Lindsey Trial Testimony, 1/7/99, Tr. p.87]** Under the policy, potential conflicts of interest included information about "personal financial interests or external activities which present potential or actual conflicts of interest". **[Exhibit A-101, p.1; Lindsey Trial Testimony, 1/7/99, Tr. p.87]**

76. Lindsey did not disclose any conflicts of interest on the "Disclosure of Financial Interests and External Activities" she signed on September 24, 1996. **[Exhibit A-114]** That form document reads in pertinent part as follows: "To the best of my knowledge, information and belief, KSBE has not undertaken any transactions with . . . business associates . . . of which I am affiliated except as are disclosed above . . . and that I excused myself from participating in any manner and/or in influencing the decisions relating to such transaction." **[Exhibit A-114]**

77. The Conflict of Interest policy requires accurate board minutes of disclosures and recusals. **[Exhibit A-101, bates no. 03027090]** After reviewing the Board minutes, General Counsel Aipa could find no disclosure of a conflict of interest or any recusal by Trustee Lindsey from August 22, 1996 to January 21, 1997, the date the Trustees approved the investment in KDP. **[Aipa Trial Testimony]**

78. Lindsey testified she did not recuse herself from discussion and decision-making by the Board on the KDP investment in January 1997 because she "didn't think it was a

conflict of interest." [Lindsey Trial Testimony, 1/7/99, Tr. p.88] Lindsey further testified she understands the Conflict of Interest policy better and "would have recused myself now." [Lindsey Trial Testimony, 1/7/99, Tr. p.88]

79. Trustee Stender objected to the KDP Investment because KSBE had no experience in this area, there was no patent, it was an unknown, non-exclusive service and the quality or creditworthiness of the principals was questionable. [Stender Trial Testimony, 2/12/99, Tr. p.112-113; Exhibit A-676]

### **3. Trustee Lindsey's Actions as Manager of KDP Technologies, LLC and President of KDP, Ltd.**

80. After the Trustees approved the investment in KDP, Lindsey became a manager of KDP, and also became president, vice-president, and director of KDP, Ltd., the company through which KSBE ultimately made its equity investment in KDP [Lindsey Trial Testimony, 1/7/99, Tr. p.88-89] As president, vice-president, and director of KDP, Ltd., Lindsey understood her fiduciary duty was to "protect the interests of the trust." [Lindsey Trial Testimony, 1/7/99, Tr. p.89]

81. On July 1, 1997, KDP, Ltd. was initially capitalized with \$500,000 by KSBE profit entity Royal Hawaiian Shopping Center, Inc. (RHSC). [Exhibit A-222; R. Wong Trial Testimony, 12/23/98]

82. Lindsey testified that in July 1997, she received a phone call from an FBI Special Agent from the Los Angeles office. The agent questioned her about the gold bullion investment venture with Kerkez, and upon the agent's request she sent all her documents to the FBI. [Lindsey Trial Testimony, 1/7/99, Tr. p.94-95] Lindsey did not tell KDP nor KDP, Ltd., nor the KSBE Board that she had been contacted regarding the investigation until after Bush was indicted. [Lindsey Trial Testimony, 1/7/99, Tr. p.95-97; Stender Trial Testimony, 2/12/99, Tr. p.112; Exhibit A-474, bates no. 01033003]

83. At trial Lindsey denied the FBI specifically questioned her about Bush or implied the investigation also focused on him. The credible evidence is to the contrary. Richard Sau Hung Wong, president of Pauahi Management Corp. (previously RHSC) and a co-officer and director of KDP, Ltd. contemporaneous with Lindsey, credibly testified that Lindsey informed him she had spoken to the FBI regarding Bush. She did not reveal this to Wong until after the news of the Bush indictment broke in January 1998. [R. Wong Trial Testimony; 12/23/98]. Further corroboration that Lindsey failed to timely disclose her knowledge that Bush was a target of criminal investigation is found in the October 15, 1998 resignation letter of another KDP Manager, Dean Jensen, as follows [Exhibit A-474, bates no. 01033003]: "The Trustee originally responsible for this transaction failed to disclose her conversations with the Federal Bureau of Investigation in regards to the alleged illegal activities of Ben Bush, her main contact with KDP, back in July 1997. Subsequently, the Trust continued to fund KDP activities and support Ben Bush." Finally, Lindsey's testimony is improbable to the extent it suggests the July 1997 FBI

investigation only focused on Kerkez, who had been dead since April 1996. **[Exhibit A-107 at p.4]**

84. As an officer of KDP and KDP, Ltd., Lindsey was aware that KDP was negotiating a consulting contract with Randy Stone, Trustee Wong's brother-in-law. **[Lindsey Trial Testimony, 1/7/99, Tr. p.90]** Lindsey and fellow Trustees Wong and Peters were provided Stone's proposed contract. **[Exhibit A-217]** The Stone-KDP contract or "incentive plan" is capped at \$500,000 upon KDP reaching \$75.0 million in book value. **[Exhibit A-217]** Pursuant to his July 15, 1997 contract with KDP, Stone actually was paid \$100,000 in consulting fees (\$50,000 on October 22, 1997, and \$50,000 on December 3, 1997), the last payment being made just before RHSC stopped funding KDP. **[Au Trial Testimony, 12/22/98; Exhibit A-621]**

85. By October 1997, KDP was nearly insolvent and in need of an emergency loan of \$105,00 from KSBE to pay its bills. **[Exhibit A-270; R. Wong Trial Testimony, 12/23/98]** On October 18, 1997, Lindsey told Richard Sau Hung Wong, who was also an officer of KDP, Ltd.: "Tell me how we're going to save the company." **[Exhibit A-622]** Despite KDP's serious financial problems, Lindsey never provided the KSBE Board with financial or other reports on the status of KSBE's investment in KDP nor the KDP contract with Stone **[Lindsey Trial Testimony, 1/7/99, Tr. p.92]**

86. Bush was indicted before January 16, 1998, on federal security charges unrelated to the KDP investment. **[R. Wong Trial Testimony, 12/23/98; Au Trial Testimony 12/22/98]** KDP already had advanced payments to Bush. **[Au Trial Testimony]** The indictment resulted in additional problems for KDP. **[R. Wong Trial Testimony; Exhibit A-354]**

87. On January 16, 1998, Lindsey sent a letter to Richard Sau Hung Wong, resigning as a manager of KDP, and as president, vice-president, and director of KDP, Ltd. **[Exhibit A-350]** Lindsey did not advise Trustees Stender and Jervis that she had resigned her positions with KDP and KDP, Ltd. **[Lindsey Trial Testimony, 1/7/99, Tr. p.97-98]** Lindsey testified she had "no idea" if anyone from KSBE filled her positions as a board member for either KDP company. **[Id. at 98]**

88. KSBE invested a total of \$1,338,000 in KDP; \$500,000 as a direct loan from KSBE, and \$838,000 as debt and equity from KSBE's for-profit subsidiary Pauahi Management Corp. **[Exhibit A-474, p.1]** KSBE has received no return on its investment. KSBE also faces potential lender liability claims arising out of the KDP investment. **[Exhibit A-474, p.1]**

#### **D. Educational Management Group**

89. In 1993, Lindsey introduced Education Management Group, Inc. ("EMG") to the Kamehameha Schools. **[Lindsey Trial Testimony, 1/7/99, p.102; Park Trial Testimony, 2/25/99]** School officials had not previously heard of EMG. **[Tachino Trial**

**Testimony, 12/17/98; Park Trial Testimony, 2/25/99]** Lindsey was familiar with EMG executives from the work they did on Maui with the DOE during her tenure as District Superintendent. **[Lindsey Trial Testimony, 1/7/99, p.102-103]**

90. In October or November 1993, EMG offered to install seven demonstration workstations at Kamehameha Schools as a "pilot" program free of charge. **[Tachino Trial Testimony, 12/17/98]** EMG simultaneously submitted a conceptual "glossy" proposal that Kamehameha Schools purchase 500 computers, along with network infrastructure, training and support for approximately \$30 - 50 million dollars. **[Tachino Trial Testimony, 12/17/98]** The contract proposal consisted of \$27.5 million initial outlay with \$2 million annual recurring charges. **[Exhibit A-25, bates no. 1301378]**

91. Lance Tachino is a systems analyst supervisor in the Education Technology Production Division at Kamehameha Schools. He began analyzing EMG's proposal and directly contacting EMG's staff. On November 15, 1993, Trustee Lindsey wrote President Chun that Tachino should have no more contact with EMG. **[Exhibit A-9; Lindsey Trial Testimony, 1/7/99, Tr. p.111]** According to Lindsey, mixed messages were sent to EMG and "Tachino was interfering with what Gil Tam [of KSBE] was trying to do as the point person for the Educational Management Group." **[Lindsey Trial Testimony, 1/7/99, Tr. p.111]** At the time Rodney Park was KSBE Director of Information Systems Division, reporting directly to Tam. **[Park Trial Testimony, 2/25/99]**

92. Tachino completed his analysis of EMG's glossy proposal and on November 22, 1993, concluded the proposal was too vague and too expensive. **[Exhibit A-11, p. 1; Tachino Trial Testimony, 12/17/98]** He calculated that EMG's cost per teacher workstation in the K-8 and 9-12 grades was "an outrageous" \$28,000 and \$41,000, respectively. **[Exhibit A-11, p.1]**

93. The companion EMG proposal to install at no cost to KSBE seven satellite workstations and dishes on campus as the "Kamehameha Schools Demonstration Project" was to occur over Christmas 1993 break. A draft staff report addressing both proposals was circulated, and Tachino critically analyzed it in his December 29, 1993, memo to campus personnel. **[Exhibit A-14; Tachino Trial Testimony, 12/17/98]**

94. As to the demonstration project Tachino wrote: "There is no clear indication of the objective of this project, except to say 'The plan for this demonstration is to install and test the systems over the Christmas vacation.'" **[Exhibit A-14, p.1]** Nevertheless, EMG installed the seven satellite workstations over Christmas vacation, most in the secondary school classrooms. **[Tachino Trial Testimony, 12/17/98]** Ultimately, KSBE paid \$1.2 million for the hardware installed and \$800,000 more for maintenance. **[Park Trial Testimony, 2/25/99]**

95. As to EMG's glossy proposal, Tachino noted the draft report did not address how the multi-million dollar concept fit into the Education Group's recently completed Educational Technology Plan. **[Exhibit A-14]** The plan had been developed from 1991 over a sixteen month period with teacher and administrator input establishing a vision

and strategy for classroom technology [**Tachino Trial Testimony 12/17/98**] and was published in June 1994 [**Exhibit A-33**].

96. In February 1994, EMG sent to Lindsey's attention an invoice for goods and services to be supplied to Kamehameha Schools for \$1,250,000. [**Exhibit A-51; Lindsey Trial Testimony, 1/7/99, Tr. p.111-112**] The invoice was based on a verbal purchase order. [**Exhibit A-51**] The \$1,250,000 invoice specified payment for 8 ES 2000 teacher workstations and future services for the period July 1, 1994 through June 30, 1995. [**Exhibit A-51**]. However, as of February 1994, the Board had not yet approved any funds for EMG. [**Park Trial Testimony, 2/25/99**]

97. Following its April 14, 1994 meeting the Board authorized spending \$18 million for technology at Kamehameha Schools. [**Exhibit A-25, p. 1-2; Park Trial Testimony, 2/25/99**] Although none of it was then earmarked for EMG, soon after Trustees' approval EMG's president called Rodney Park (KSBE Information System Division Director who in 1994 became Administration Group Director) assuming EMG would receive an \$18 million contract, consistent with Phase I of its \$27.5 million proposal. [**Park Trial Testimony; Exhibit A-25, bates no. 13001380**]

98. On April 17, 1994, Tachino completed and sent to Park a "technical cost analysis" of EMG's multi-million dollar proposal. Tachino concluded that KSBE could save \$1.6 million by purchasing the hardware (workstations) itself instead of purchasing it from EMG. [**Exhibit A-26, p. 6**] He detailed the high cost of EMG's proprietary software, questioned whether EMG's secondary school curriculum was limited, noted the inflexibility of EMG's shell software and questionable campus usage absent school staff involvement to integrate curricula. [**Exhibit A-26, p. 5-6**]

99. In May 1994, the secondary school teachers were already reporting to Park the problems they were experiencing with the EMG system. In her May 27, 1994 memo to Park, Kathy Kukea, curriculum coordinator for the secondary school, noted that the "custom" curriculum had not worked. [**Exhibit A-31**] Teachers had difficulty given the time difference between Arizona and Hawaii. [**Exhibit A-31**] Kukea noted that "we have yet to see any materials that are appropriate for a selective, grades 7-12 student population." [**Exhibit A-31, p.1**]

100. In December 1994, Tachino prepared a "usage analysis" and again concluded that the EMG equipment was "too expensive." [**Exhibit A-42, p.3; Tachino Trial Testimony, 12/17/98**] EMG's curriculum software was "not appropriate" for Kamehameha and was not cost effective. [**Exhibit A-42, p.3**].

101. On February 19, 1995, Lindsey met with EMG owner and founder Gail Richardson and EMG representative Amy Kawaguchi. [**Lindsey Trial Testimony, 1/7/99, Tr. p.105**] They discussed the purchase of new EduNet stations and the maintenance of the original EduNet Stations. [**Exhibit A-49**] On February 21, 1995, Richardson sent Lindsey information regarding various scenarios and pricing for the purchase of 10 new EMG work stations and the maintenance of the 12 original EduNet stations. [**Exhibit A-49**;

**Lindsey Trial Testimony, 1/7/99, Tr. p.106-107]** Lindsey told Park to "see me" regarding the EMG proposals and discussions. **[Exhibit A-49; Lindsey Trial Testimony, 1/7/99, Tr. p.104-105]**

102. By September 8, 1995, Lindsey was aware "questions are being asked about my involvement in EMG." **[Exhibit A-57]** In her memo to Park, she noted her lack of participation in the initial EMG negotiations and the staff report that Trustees ultimately approved. **[Id.]** After September 1995, she continued to be involved with discussions regarding EMG's proposals **[Lindsey Trial Testimony, 1/7/99, Tr. p.107-109]** despite any concerns about her involvement that others had.

103. In December 1995, Park sought and obtained Lindsey's approval with respect to KSBE's responses to a November EMG proposal which resolved with termination of the T-1 line connection and changes to satellite services and programs. **[Exhibit A-62; Lindsey Trial Testimony, 1/7/99, Tr. p.109]**

104. In January 1997, Trustee Lindsey asked an EMG saleswoman to arrange for a chartered jet to fly Lindsey and her husband, plus Vice-President Freitas, and co-plaintiff Bush from Los Angeles to New Orleans for the 1997 Super Bowl. **[Lindsey Trial Testimony, 1/7/99, Tr. p.117-18]** Although Lindsey told her fellow Trustees that she was going to the Super Bowl, she never told them she was using a private jet arranged by a KSBE vendor. **[Jervis Trial Testimony, 1/4/99, Tr. p.90; Stender Trial Testimony, 2/12/99, Tr. p.118-119]**

105. Soon thereafter, on April 3, 1997, EMG sent its offers to renew services directly to Lindsey. **[Exhibit A-174]** The annual cost for maintenance of the EMG system was approximately \$278,000. **[Tachino Trial Testimony, 12/17/98]** Lindsey forwarded invoices to Park for payment. **[Lindsey Trial Testimony, 1/7/99, Tr. p.113]** In April 1997, EMG also submitted to Lindsey a proposal to expand the curriculum services on campus **[Exhibit A-182]** which she did not discuss with the full Board. **[Lindsey Trial Testimony, 1/7/99, Tr. p.115-116]**

106. On May 5, 1997, Lindsey paid for half of the cost of the chartered jet, or \$7,876.94 **[Lindsey Trial Testimony, 1/7/99, Tr. p.119; Exhibit A-192]** In August 1998, she paid for the other half of the cost of the chartered jet. **[Lindsey Trial Testimony, 1/7/99, Tr. p.120; 2/2/99, p.145f-148]**

107. In all, KSBE purchased and installed twenty-two EMG workstations (including the seven workstations that were part of the demonstration program). **[Tachino Trial Testimony, 12/17/98]** Although no contract with EMG was ever signed, KSBE paid EMG between \$5 and \$6 million dollars for hardware, software, satellite time and annual maintenance costs over the five year period (1994-1998). **[Tachino Trial Testimony, 12/17/98; Park Trial Testimony, 2/25/99]** The payment of such sums on mere purchase orders prompted an internal KSBE audit in September 1995. **[Exhibit D-277; Park Trial Testimony]**

108. EMG's software was proprietary, and KSBE personnel could not load other software. **[Tachino Trial Testimony, 12/17/98; Park Trial Testimony, 2/25/99]** KSBE's information systems division could not make enhancements to the system. **[Park Trial Testimony, 2/25/99]** As of December 31, 1998, EMG's services were terminated and KSBE's investment was scrapped. **[Park Trial Testimony, 2/25/99]** Park admitted that the EMG investment was a "bad deal" and he knew that it was a "bad deal". **[Park Trial Testimony, 2/25/99]**

#### **E. Trustee Lindsey's Use of KSBE Charge Cards, Expense Accounts, and Vendors To Pay for Her Personal Travel and Expenses**

109. In 1994, Trustee Lindsey, her husband, her son, and her daughter-in-law attended the 1994 Rose Bowl Parade. Lindsey declared that the business purpose for the trip was "public relations for the estate." **[Lindsey Trial Testimony, 1/7/99, Tr. p.126-27]** KSBE paid travel expense reimbursements for certain transportation, meals, and lodging for the parade group. **[Lindsey Trial Testimony, 1/7/99, Tr. p.128-131; Exhibit A-533]**

110. In 1996, Xerox Corp. paid for Trustee Lindsey and her husband's airfare, lodging, and food to attend the Olympics in Atlanta, Georgia. **[Lindsey Trial Testimony, 1/7/99, Tr. p.124]** At the time, Xerox was a KSBE vendor. Lindsey did not offer to reimburse Xerox for any part of the trip. **[Id. at 125]** The next year she went to the Superbowl on the EMG chartered jet.

111. Lindsey has used her KSBE Visa charge card to pay for personal expenses, including car rental expenses in Las Vegas and Maui, hotel expenses in Las Vegas, and a January 21, 1998 meal at the Royal Garden Chinese restaurant. **[Exhibit A-136; Exhibit A-357; Lindsey Trial Testimony, 1/7/99, Tr. p.132-135]**

112. In December 1997 Lindsey reimbursed KSBE \$1,820.35 for personal travel-related charges incurred since December 1994 that had been charged to the trust. Those travel-related charges included a plane trip to Las Vegas, car rental expenses in Las Vegas, Nevada and Utah, and a plane trip for her husband's travel to Washington and Oregon. **[Lindsey Trial Testimony, 1/7/99, Tr. p.137-146; Exhibit A-536, bates nos. 7031-32, 7037-39, 7064-66, 7086-87]**

113. Since becoming a Trustee in 1993, Lindsey made at least 16 trips to Las Vegas at trust expense. Her KSBE business travel expense reports show that she made trips to Las Vegas in April 1993, August 1993, September 1993, October 1993, twice in April 1994, July 1994, August 1994, December 1994, January 1995, July 1995, August 1995, September 1995, March 1996, April 1996 and March 1997. **[Lindsey Trial Testimony, 1/7/99, Tr. p.147-168; Exhibit A-539, bates nos. 4016-18, Exhibit A-536, bates nos. 7039, 7046-47, 7085-86; Exhibit A-540, bates nos. P4041-42, Exhibit A-169]** Lindsey testified that some of the trips were to review KSBE properties or investment opportunities in or around Las Vegas, but she acknowledged that she never provided the

Board with any written memos or reports on the information she gathered from her trips. [Lindsey Trial Testimony, 2/5/99, Tr. p.14]

## **II. TRUSTEE LINDSEY'S UNILATERAL ACTIONS LACKING REQUISITE BOARD APPROVAL**

### **A. Trustee Lindsey's Role as Lead Trustee for Education**

114. Lindsey became the liaison or lead Trustee for the Education Group in 1993. [Lindsey Trial Testimony, 1/6/99, Tr. p.10] Prior to Lindsey, Trustee Myron Thompson had served in that capacity. [Stender Trial Testimony, 2/12/99, Tr. p.13] In his liaison role, Thompson worked with the president of Kamehameha Schools and reported back to the Board. [Id. at 14]

115. Trustee Wong agreed that Lindsey's authority as lead Trustee for education was to look at the Education Group and to report back to the Board. [Wong Trial Transcript, 3/5/99, Tr. p.9-10] She was not authorized to make decisions on her own. [Id. at 10, 11; accord, Stender Trial Testimony, 2/12/99, Tr. p.14] Wong agreed when a change was necessary, the issue had to come back to the Board for decisionmaking. [Wong Trial Transcripts, 3/5/99, Tr. p.16] Trustee Lindsey was not authorized to take any action affecting the schools without Board action [id. at 23] and the lead Trustee was to go through the chain of command [id. at 147-148].<sup>(1)</sup>

116. Trustee Wong agreed that the Board sets policy, and the principal executives are responsible for executing the policy in daily operations. Operational decisions for the Education Group are to be made by the president and his administrative staff. [Wong Trial Testimony, 3/5/99, Tr. p.83-84]

117. Trustee Jervis understood Lindsey's role was that of a "facilitator between the board and the campus, the education group," as "someone who acted to support the president of the school and the operations." [Jervis Trial Testimony, 1/4/99, Tr. p.11] Trustee Stender testified that the role of lead trustee was to accommodate the decision-making process by working with the president as had been the practice when Trustee Thompson was lead Trustee for education. [Stender Trial Testimony, 2/12/99, Tr. p.13-14] The Board did not delegate decisions involving the Education Group to Lindsey. [Jervis Trial Testimony, 1/4/99, Tr. p.12; Stender Trial Testimony, 2/12/99, Tr. p.14-15; Wong Trial Testimony, 3/5/99, Tr. p.16, 23]

#### **1. Trustee Lindsey's Understanding of Her Role as Lead Trustee For Education**

118. Trustee Lindsey testified that as lead Trustee for education, it was part of her responsibility to (1) be a liaison between Kamehameha Schools and the Board of Trustees; (2) facilitate communication between the school and the Board; (3) bring issues

and concerns at the school to the attention of other Trustees; and (4) work with and cultivate the Kamehameha Schools' community or ohana. [**Lindsey Trial Testimony, 1/6/99, Tr. p.11-12**] She also testified that she understood it was her responsibility to support the school administration and the school's president "to the extent he was doing what the Trustees asked him to do." [**Id. at 12**]

119. When she was designated lead Trustee for education, Trustee Lindsey was not given documents or guidelines indicating her duties or responsibilities. [**Lindsey Trial Testimony, 1/6/99, Tr. p.15; Stender Trial Testimony, 2/16/99, Tr. p.88; Exhibit A-314, p.5-6**] In the absence of any guidelines, she carried out her duties and responsibilities based on her "thirty years of experience in education." [**Lindsey Trial Testimony, 1/6/99, Tr. p.16**] Lindsey explained that because she had no specific responsibilities as lead Trustee for education, there was "nothing that I was supposed to be held accountable for, and I did things as I felt it was prudent to do it." [**Lindsey Trial Testimony, 2/4/99, Tr. p.132**]

120. Following her 1993 appointment, Lindsey did not attend trustee education workshops or other workshops sponsored by the Hawaii Association of Independent Schools to learn about the proper role of a trustee for an independent private school. [**Lindsey Trial Testimony, 1/6/99, Tr. p.16**]

121. Kamehameha Schools is a founding and current member of the Hawaii Association of Independent Schools, which was established in 1969 or 1970. [**Witt Trial Testimony, 2/22/99, Tr. p.7**] The National Association of Independent Schools (NAIS) is the parent organization. [**Id. at 15**]

122. The Kamehameha Schools is a member of NAIS, which includes more than a thousand member schools from across the country. [**Stender Trial Testimony, 2/16/99, Tr. p.32; Witt Trial Testimony, 2/22/99, Tr. p.25, 26, 44-45**] NAIS publishes Principles of Good Practice to guide independent school boards and individual trustees. [**Exhibit A-553; Witt Trial Testimony, 2/22/99, Tr. p.25-26**]

123. In 1996, Trustee Stender provided Trustee Lindsey with a copy of the NAIS Principles of Good Practice for Independent School Trustees. [**Stender Trial Testimony, 2/16/99, Tr. p.84-85; Exhibit A-553**] These guidelines cover the duties and responsibilities of trustees for independent, private schools [**Stender Trial Testimony, 2/17/99, Tr. p.151**] and are particularly applicable to KSBE Trustee conduct vis-a-vis the Education Group. Indeed, they are used as external referents for evaluation of KSBE governance and management issues in the June 30, 1998 Peterson report commissioned by Trustees Lindsey, Wong and Peters. [**Exhibit D-983, p.16, 18, 22**]

124. Lindsey did not consult with trustees at other private institutions, nor consult handbooks, treatises, or reports, to learn about the proper role of a trustee for an independent private school but did talk to her fellow Trustees and KSBE trust lawyers. [**Lindsey Trial Testimony, 1/6/99, Tr. p.17**] Lindsey believed her role was similar to

"the CEO [or district superintendent] of a public school." **[Lindsey Trial Testimony, 1/6/99, Tr. p.18]**

125. In her response to the Fact Finder's Report, Lindsey wrote that the scope and authority of a lead Trustee at KSBE was limited to "non-major decisions which are not specifically reserved to the Trustees as a whole by the will of Bernice Pauahi Bishop." **[Exhibit A-314, p.4; Lindsey Trial Testimony, 1/6/99, Tr. p.20]**<sup>(2)</sup> At her deposition Lindsey testified, "certainly the trustees have to make all decisions that impact on the institution in every way, shape, and form." **[Lindsey Trial Testimony, 1/6/99, Tr. p.21 (deposition)]** At trial, Lindsey agreed that all "major decisions" affecting the Kamehameha Schools should be brought to the full Board for discussion and decision-making. **[Lindsey Trial Testimony, 1/6/99, Tr. p.23]**

126. Lindsey testified that the following changes are all "major decisions": (1) changes in the school curriculum; (2) changes in the school schedule from a trimester to a quarter system; (3) decisions in the way Hawaiian language is taught at Kamehameha Schools; (4) the expenditure of funds from the school's staff development budget; and (5) the release of funds from escrow. **[Lindsey Trial Testimony, 1/6/99, Tr. p.21-23]**<sup>(3)</sup>

#### **B. Trustee Lindsey's Curriculum Mandates**

127. In July 1995, President Chun and his administrators were charged with the task of preparing curriculum guides with a due date of June 30, 1996. **[Exhibit A-314, p.10]** One purpose was to export Kamehameha Elementary School (KES) curriculum to the neighbor island campuses scheduled to open in the Fall 1996.

128. Toward that end, Claire Asam, KES curriculum and assessment coordinator, and the K-3 elementary teachers worked on revising the curriculum guide throughout the 1995-96 school year. In January 1996, Asam met with Vice-President Freitas and President Chun to discuss their progress in documenting and updating the curriculum. Asam reviewed samples of the revised curriculum and asked for feedback on the work done up to that point, which was positive. **[Asam Trial Testimony, 12/23/98]**

129. By June 1996, the K-3 curriculum guide was completed and the document was ready to be copied and distributed. **[Asam Trial Testimony, 12/23/98; Exhibit A-617]** However, Trustee Lindsey told Asam to send a copy of the K-3 curriculum guide to Rose Yamada, formerly with the DOE, for her review. **[Asam Trial Testimony, 12/23/98; Freitas Trial Testimony, 12/14/98]** At the time, Asam did not know Yamada who was not an employee of Kamehameha Schools. Asam complied with Lindsey's request. **[Asam Trial Testimony, 12/23/98]**

130. Lindsey simultaneously formed a curriculum team employing Beverly Robinson, Cheryl Saito and Patricia Holmes, who were part of the adult education division which KSBE was terminating. **[Asam Trial Testimony, 12/23/98; Holmes Trial Testimony 2/22/99; Chun Trial Testimony, 2/18/99]** Robinson soon informed Asam that the

revised K-3 curriculum was "not acceptable" and needed to be redone. **[Asam Trial Testimony, 2/23/98]**.

131. At the time Lindsey created this curriculum team Kamehameha Schools already had two specialists. Kathy Kukea was curriculum coordinator for the secondary school, and Asam served the elementary school. **[Chang Trial Testimony, 2/16/98; Asam Trial Testimony, 12/23/98]** Lindsey told Vice-President Freitas that the curriculum team would report directly to him and assist him, although he had not participated in the interviewing or hiring for these newly created positions. **[Freitas Trial Testimony, 12/14/98]**

132. In July 1996 Lindsey directed that all available K-3 elementary teachers return to school during the Summer vacation to "redo" the curriculum. This directive was not authorized by the Board. **[Wong Trial Testimony, 3/5/99, Tr. p.13; Jervis Trial Testimony, 1/4/99, Tr. p.62]** There was no board approval and no staff report for the unexpected curriculum project costs. **[Jervis Trial Testimony, 1/4/99, Tr. p.62; Stender Trial Testimony, 2/12/99, Tr. p.85]**

133. The K-3 elementary teachers were given insufficient time of one week to complete the revisions. **[Asam Trial Testimony, 12/23/98; Leong Trial Testimony, 12/24/98; Holmes Trial Testimony 2/22/99 ("At least one year would have been preferable."); Exhibit 252, p.4; Peters Trial Testimony, 2/9/99]**

134. The grades 4-6 teachers were next called in during July 1996 but given insufficient time of two weeks to redo their curriculum. **[Asam Trial Testimony, 12/23/98; Holmes Trial Testimony, 2/22/99]**

135. The revised curriculum documents were submitted to Lindsey for review. On July 18, 1996, Lindsey met with Asam and members of the curriculum team. Lindsey said the curriculum would "hurt us" and was therefore unacceptable, but she was unable to explain why and did not give any guidance on revising the curriculum. **[Asam Trial Testimony, 12/23/98]**

136. In early August 1996, the secondary school teachers were called in, two weeks prior to the start of school, to prepare a standardized curriculum guide. **[Behenna Trial Testimony, 11/18/98]** Because of the last minute notice, not all teachers could be present. Those not present had to document their curriculum during the first month of the school year, in addition to their teaching duties. **[Kukea Trial Testimony, 2/11/99]** Given their deadline, the secondary school teachers worked after the normal school day to complete the project. Directions on how to document their curriculum in the appropriate format were confusing. **[Ako Trial Testimony, 11/25/98, 11/30/98; Follmer Trial Testimony, 11/12/98; Kukea Trial Testimony, 2/11/99]**

137. During the Fall of 1996, the KES teachers began anew to revise and reformat the curriculum.<sup>(4)</sup> Second grade teacher Moana Leong testified that her reaction was "resigned disgust." **[Leong Trial Testimony, 12/24/98]** In November or early December

of 1996 Robinson of the curriculum team "rejected" this work and told the teachers to put in more "skills." [Wong-Kam Trial Testimony, 12/24/98] In December 1996 Asam revised a segment of the kindergarten reading curriculum and submitted the revision to Robinson. Asam received no response. [Asam Trial Testimony, 12/23/98]

138. In February 1997 Lindsey held talk-story sessions with K-3 and 4-6 grade teachers. She again told the group that the elementary curriculum was unacceptable and needed to be redone. [Asam Trial Testimony, 12/23/98]

139. Asam and the teachers continued to work on the revisions to the curriculum guide, receiving no feedback from the curriculum team or Lindsey. In April 1997 the curriculum team produced their own version of the curriculum guide in which they added substantial sections (the gray section) and inserted basal materials (excerpts from textbooks) that KES teachers did not use in the classroom. [Wong-Kam Trial Testimony, 12/24/98; Leong Trial Testimony, 12/24/98; Asam Trial Testimony, 12/23/98] Between April and May 1997, Asam worked with the teachers to review and revise the curriculum team's "gray/white" guides. [Exhibit A-191; Asam Trial Testimony, 12/23/98]

140. The curriculum team proposed another work session during the Summer of 1997 in which selected teachers participated. [Exhibit A-188] Lindsey set a deadline of June 30, 1997, for completion of the K-4 revised curriculum guide. [Exhibit A-241] When the curriculum team failed its deadline, Lindsey complained to Freitas in an August 12, 1997 memo as follow:

A deadline of June 30, 1997 was set for the K-4 revised curriculum guide to be completed and ready for implementation in August 1997 at the beginning of the school year.

Today, August 11, 1997, Ms. Robinson brings me a copy of the Draft Curriculum Guides. After chastising her for not meeting the deadline, I was informed that Kahele Kukea would not allow the teachers to work on it during the school year. . . .

. . . .

Please find out why only one week was allowed. Also, explain why yet again deadlines were not met. This is inexcusable.

**[Exhibit A-241 (original emphasis)]**

141. KES teachers were dismayed when the curriculum team distributed their version of the revised curriculum guides in August 1997 because those guides did not reflect the

teachers' Summer work and made major additions, deletions and alterations without teacher input. **[Exhibit A-618; Exhibit A-619; Asam Trial Testimony, 12/23/98; see Wong-Kam Trial Testimony, 12/24/98]** Joanne Wong-Kam, a teacher with 22 years experience at Kamehameha, left KES in 1997 to teach at Punahou School, partly because her way of teaching was not being "valued" at Kamehameha. **[Wong-Kam Trial Testimony, 12/24/98]**

142. In the Fall of 1997 the administration decided to use the curriculum developed by KES teachers in the Summer of 1997, not the gray sections developed by Lindsey's curriculum team. **[Asam Trial Testimony, 12/23/98]**

143. On November 17, 1997, Lindsey wrote to President Chun complaining that the August draft had never been finalized and setting a December 15, 1997 deadline for completion of the curriculum project. **[Exhibit D-569]** Her memo refers to "regression" in SAT scores for the past four years from which "one could say that the longer you stay at Kamehameha Schools K-6, the worse you get." **[Exhibit D-569, p.1]**<sup>(5)</sup> Lindsey concluded "a strong curriculum with clearly defined outcome measures" would improve instruction, learning and SAT scores. **[Id.]**

144. Asam received the assignment to blend the two curricula (gray and white) for K-3 into a single document which she completed by Lindsey's deadline. In a December 12, 1997 memo to KES Principal Kukea, Asam expressed concern about the product:

As I worked on the curriculum revision I have become increasingly concerned that the document does not represent the educational philosophy or instructional practices at KES. While I understand the need to satisfy Mrs. Lindsey's request and deadline for completion, I feel strongly that the revised document cannot be used to represent what we do at KES. . . . I feel that we need to think carefully about the implications for this document because it does not represent what the KES teachers do in their classrooms.

**[Exhibit A-319]**

145. Lindsey's dictates to revise the KES curriculum caused much frustration and confusion among the teachers and staff at Kamehameha. It negatively impacted morale. **[Exhibit A-208, p.4-5; Exhibit A-592, p.5-6]** The directive to have the secondary school curriculum suddenly reformatted in August and September of 1996 drained teachers' energy and enthusiasm for the new school year. **[Follmer Trial Testimony, 11/12/98]** Elementary school teachers were "angry" and "outraged" when the KES curriculum was repeatedly changed without their input. **[Leong Trial Testimony, 12/23/98]** The secondary school teachers saw value in their assignment to standardize format for existing curriculum **[Behenna Trial Testimony, 11/18/98]** but were frustrated because the competing requirements for their non-teaching time included matters of significant magnitude, not the least being the self-study for future WASC accreditation **[Exhibit A-208, p.5]**.

146. Trustee Lindsey was not authorized by the Board to change or alter the curriculum. **[Wong Trial Testimony, 3/5/99, Tr. p.23]** She admitted at trial that curriculum is a Board decision. **[Lindsey Trial Testimony, 1/6/99, Tr. p.21; 2/4/99, Tr. p.127; see Exhibit A-208, p.4]** She also acknowledged the Board never received the draft KES curriculum guides that she rejected as unacceptable in the Summer of 1996 **[Lindsey Trial Testimony, 2/4/99, Tr. p.127-28]** but thought she alone could reject them as lead Trustee because they were drafts and upon being finalized to her satisfaction would be submitted for Board approval **[id. at 128-29]**.<sup>(6)</sup> She could not recall whether she informed the Board of her decision to reject the curriculum draft **[id. at 129]** but Trustees Stender, Jervis and Wong credibly testified the Board did not authorize her to direct the KES curriculum revisions **[Wong Trial Testimony, 3/9/99; Jervis Trial Testimony, 1/4/99, Tr. p. 63-64; Stender Trial Testimony, 2/12/99, Tr. p. 84-85]**<sup>(7)</sup>

147. Beside the campus hostility it generated, the curriculum project cost \$233,000 including the salaries for the three members of the curriculum team, teachers, temporary clerical services, rental of a copy machine, and supplies. **[Chang Trial Testimony, 12/16/98]**

148. Lindsey's unilateral actions violated NAIS Principles of Good Practice for Independent School Trustees; specifically, Principle Number 4, which reads as follows: "The board sets policy; the administration implements policy. An individual trustee does not become involved in specific management, personnel or curricular issues." **[Exhibit A-553, p.1]**

### **C. Trustee Lindsey's Change in the 7th and 8th Grade School Schedule From Trimester to Quarter System**

149. Since the late 1970's, the 7th and 8th grades at Kamehameha Secondary School had operated under a trimester system, using three 12-week trimesters. The upper grades operated on a quarter system. Sometime after Lindsey became lead Trustee for education, she expressed concern that a 12-week grading period was too long for 7th and 8th graders. In response, the 7th and 8th grades instituted mid-term reports to parents after the first six weeks of each trimester. Thus, with the mid-term reporting, parents of 7th and 8th graders were receiving 6 reports a year, as opposed to four under a quarter system. **[Ramos Trial Testimony, 12/3/98]**

150. Lindsey was not satisfied. In the Spring of 1997, Lindsey directed Vice-President Freitas to change the 7th and 8th grades to the quarter system for the upcoming school year. **[Freitas Trial Testimony, 12/10/98]**

151. The Secondary School administration continued to believe the trimester system was the better model for 7th and 8th graders. **[Behenna Trial Testimony, 11/23/98]**

152. The abrupt change to the quarter system for the 1997-98 created a "morale problem" among 7th and 8th grade teachers. **[Ramos Trial Testimony, 12/3/98]** Laurie Seto, a 7th

Grade social studies teacher, testified the change was stressful and frustrating. The atmosphere was at times "chaotic" because teachers suddenly had to revise their teaching plans to conform to the quarter schedule. **[Seto Trial Testimony, 12/14/98]**

153. The Board never voted or decided to change from a trimester system to a quarter system. **[Jervis Trial Testimony, 1/4/99, Tr. p.69; Stender Trial Testimony, 2/12/99, Tr. p.88]** The Board never authorized Lindsey to issue a directive making the change and never received staff reports regarding the change. **[Jervis Trial Testimony, 1/4/99, Tr. p.70]**

154. In the Spring of 1998, after Lindsey had stepped down as lead Trustee for education, secondary school administrators requested that the 7th and 8th grade schedules be changed back to the trimester system. **[Behenna Trial Testimony, 11/23/98; Ramos Trial Testimony, 12/3/98]** President Chun approved reinstatement of the trimester system.

155. At trial, Lindsey admitted the shift from trimester to quarter system required a Board decision. **[Lindsey Trial Testimony, 1/6/99, Tr. p.21]** There is no evidence Lindsey consulted the Board much less obtained Trustee approval for the intermediate grades change.

156. Lindsey's unilateral directive violated NAIS Principles of Good Practice for Independent School Trustees; specifically, Principle Number 4 which reads in pertinent part as follows: "An individual trustee does not become involved in specific management . . . ." **[Exhibit A-553, p.1]**

#### **D. Trustee Lindsey's Directive That Hawaiian Language Teachers at Kamehameha Schools Must Teach Only "Traditional" Hawaiian Language**

##### **1. Teaching of Hawaiian Language at Kamehameha Schools**

157. The teaching of the Hawaiian language has grown dramatically in popularity in recent years at Kamehameha Schools. As late as 1986, the school had only one full-time Hawaiian language teacher, Sara Keahi. Today there are ten. **[Keahi Trial Testimony, 11/30/98]**

158. Over the years, Hawaiian language teachers at Kamehameha had developed their own course materials for the classroom. **[Keahi Trial Testimony, 11/30/98]** In 1992, they received administration approval to begin work on a major "curriculum project" to update and expand the high school curriculum which they completed. **[Eyre Trial Testimony, 11/30/98]**

159. The teachers' newly-developed Hawaiian language curriculum included words developed by the so-called "Lexicon Committee." **[Eyre Trial Testimony, 11/30/98]** The

Lexicon Committee, established in 1987, is a committee of Hawaiian language professors who create new Hawaiian words for modern English words such as Internet and e-mail. **[Keahi Trial Testimony, 11/30/98]** The purpose of the Lexicon Committee is to make sure that the Hawaiian language is kept up to date and can be used in modern society. **[Keahi Trial Testimony, 11/30/98]** Professors at the University of Hawaii-Manoa and the University of Hawaii-Hilo also use words from the modern lexicon in teaching Hawaiian language. **[Id.]**

160. Several of the younger teachers at Kamehameha Schools used the so-called "pepeke" system to teach Hawaiian language grammar to their students. The pepeke system attempts to define Hawaiian grammar without using western grammatical words or concepts. The pepeke system also uses modern Hawaiian terminology developed to help students learn the grammar. The pepeke system is used by professors at the University of Hawaii-Manoa and University of Hawaii-Hilo. **[Eyre Trial Testimony, 11/30/98]**

161. The Lexicon Committee and pepeke system were and remain controversial within the Hawaiian language community. **[Exhibit A-314, p.18-20 (Responses to findings 3 and 6)]**

162. Not herself a student of Hawaiian, Trustee Lindsey consulted with a group of Hawaiian speaking individuals she relied upon. **[Exhibit A-314, p.21; Pelekai Trial Transcript, 3/2/99; Hale Trial Transcript, 3/2/99]** Within the language debate they take the view that use of pepeke and Lexicon Committee vocabulary (often Hawaiianized English words) threaten the integrity of the Hawaiian language. **[Pelekai Trial Transcript, 3/2/99]** To illustrate one aspect of the debate, the Lexicon Committee chose "kiwi" for TV (television) while traditionalists would use Hawaiian words that translate roughly to "box with moving pictures" thus retaining the value of traditional Hawaiian thought process. Those who advocate usage of the lexicon and pepeke say new words are necessary for the language to grow and have meaning in modern context, and to restrict usage will kill the language. **[Beamer Trial Testimony, 11/12/98]**

163. Rather than engage the school's Hawaiian language department in this debate,<sup>(8)</sup> Trustee Lindsey simply issued a directive that faculty teach "traditional" Hawaiian language. **[Freitas Trial Testimony, 12/10-11/98 (deposition)]**

## **2. Trustee Lindsey's Directive to Teach "Traditional" Hawaiian Language**

164. In or around the first quarter of 1996, Trustee Lindsey told Vice-President Freitas that she wanted the Hawaiian language teachers at Kamehameha Schools to teach "traditional" Hawaiian language. **[Freitas Trial Testimony, 12/10/98]**

165. Freitas communicated the directive to Secondary School Principal Ramos who in turn informed the Hawaiian language department. **[Ramos Trial Testimony, 12/3/98]** Following teacher inquiries, traditional language was defined to mean words in the

Pukui-Elbert Dictionary. [**Ramos Trial Testimony, 12/3/98; accord, Exhibit A-314, p.20 (Response to Finding 5)**] The Pukui-Elbert Dictionary is the best known and most widely-used Hawaiian language dictionary. [**Keahi Trial Testimony, 11/30/98**] After talking to the Hawaiian language teachers, Principal Ramos subsequently explained to Lindsey that the Pukui-Elbert Dictionary included modern words. Lindsey did not amend her directive. [**Ramos Trial Testimony, 12/3/98**]

166. When questions were raised about the Hawaiian language policy in meetings with Kamehameha Secondary School administrators in the Spring of 1997, Lindsey told the administrators she had gone back and reviewed Board minutes. [**Behenna Trial Testimony, 11/18/98**] Lindsey represented that those documents showed that the Board previously mandated teaching of only traditional Hawaiian language and as lead trustee she was charged with implementing that Board decision. [**Behenna Trial Testimony, 11/18/98**] When Principal Ramos later suggested to Lindsey that the Board rescind its language policy, she responded that the Board's decision could not be changed. [**Ramos Trial Testimony, 12/3/98**] In December 1997, Lindsey maintained in a formal court document that her directive that faculty teach traditional language "communicated the directions of the Trustees." [**Exhibit A-314, p.18**]

167. However, at trial Lindsey admitted there are no Board minutes nor any other written documentation setting forth a mandate that Hawaiian language teachers at Kamehameha Schools teach only traditional Hawaiian language. [**Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.58**]<sup>(9)</sup>

168. The Board of which Lindsey has been a member never voted or decided that only traditional Hawaiian language could be taught at the Kamehameha Schools. [**Jervis Trial Testimony, 1/4/99, Tr. p.66-67; Stender Trial Testimony, 2/12/99, Tr. p.20, 85-87**] The Board never authorized Lindsey to issue any such directive [**Jervis Trial Testimony, 1/4/99, Tr. p.67; Wong Trial Testimony, 3/9/99**] or to confine the teaching vocabulary to words in the Pukui-Elbert dictionary. [**Jervis Trial Testimony, 1/4/99, Tr. p.69; Stender Trial Testimony, 2/12/99, Tr. p.87**]

169. The directive to teach only traditional Hawaiian language compromised curriculum materials, including videos, readers, and listening comprehension tapes because they contained modern Hawaiian words the teachers understood were forbidden. Teachers who used the pepeke system could no longer legitimately use those teaching methods. [**Eyre Trial Testimony, 11/30/98**]

170. The directive also discouraged Kamehameha School students from pursuing Hawaiian language courses at the University of Hawaii-Manoa and the University of Hawaii-Hilo where the modern lexicon was in usage. [**Keahi Trial Testimony, 11/30/98**] Total school enrollment for Hawaiian language courses declined from a high of 902 in 1995 to 684 in school year 1998-99. [**Eyre Trial Testimony, 11/30/98**]

171. Trustee Lindsey's directive regarding traditional Hawaiian language was an unauthorized change in curriculum for which she had no prior or current Board approval.

172. Lindsey's Hawaiian language directive and subsequent related actions violate NAIS Principles of Good Practice for Independent School Trustees; specifically, Principles Number 4 and Number 8 which read in part as follows:

4. . . .An individual trustee does not become involved in specific management, personnel, or curricular issues.

8. Authority is vested in the board as a whole. A trustee who learns of an issue has the obligation to bring it to the head of school, or to the board chair, and must not deal with the situation individually.

**[Exhibit A-553, p.1]**

### **E. Trustee Lindsey's Expenditure of Staff Development Funds and Release of Funds From Escrow**

173. Trustee Lindsey acknowledged that Board approval is required for the release of funds from escrow. **[Lindsey Trial Testimony, 1/6/99, Tr. p.22-23]** As set forth in previous findings, Lindsey acted unilaterally and without requisite Board approval when she changed the Baker-Van Dyke Collection contract and authorized advance payments to Van Dyke from the escrow fund. **[Section I-B supra]**

174. Lindsey also admitted that expenditures of funds from the school's staff development budget is a "major decision" which requires Board approval. **[Lindsey Trial Testimony, 1/6/99, Tr. p.22]** As set forth below, Lindsey unilaterally decided to charge the Shintani Diet programs to the school's staff development budget without Board approval or even the school president's knowledge, causing a \$140,000 cost overrun on that item in the school budget.

#### **1. Shintani Diet**

175. In January 1997 Trustee Lindsey participated in a "Hawaii Diet" program developed by Dr. Terry Shintani at Washington Place. Acting on the Governor's suggestion, she began to coordinate a similar diet program at Kamehameha Schools. **[Lindsey Trial Testimony, 2/2/99, Tr. p.150-151; Freitas Trial Testimony, 12/10-11/98]**

176. Lindsey called Vice-President Freitas about holding the Shintani Diet on campus. **[Freitas Trial Testimony, 12/10/98]** When Freitas asked Lindsey how they would pay for it, Lindsey suggested school staff development funds could be used. **[Freitas Trial Testimony, 12/10/98]** When Freitas inquired if a staff report should be prepared, she replied that it was not necessary. **[Freitas Trial Testimony, 12/10/98]** Lindsey

authorized using staff development funds to pay for the Shintani Diet. **[Freitas Trial Testimony, 12/10/98; Park Trial Testimony, 2/25/99]** At trial, Lindsey acknowledged she had no authority to unilaterally make such a decision. **[Lindsey Trial Testimony, 1/6/99, Tr. p.21-23]**

177. Two sessions of the diet program were held at the school, approximately from February 18 to March 10, 1997, and again from March 31 to April 29, 1997. **[Exhibit A-183]** Lindsey participated in both sessions. **[Chang Trial Testimony, 12/16/98]** Thirty-six persons participated in the Shintani Diet, including persons outside the Education Group. **[Chang Trial Testimony, 12/16/98; Aipopo Trial Testimony]**

178. Brian Chang is the fiscal administrator for Kamehameha Schools. His job responsibilities include developing and presenting the Education Group's budget to the Trustees, preparing variance reports and conducting cost analyses. KSBE's policy is that all expenditures must be budgeted by line item. If an expenditure is not included in the budget, a staff report is required for submission to the Trustees for approval. Chang, in his capacity as fiscal administrator, prepares and reviews almost all staff reports related to the school budget. **[Chang Trial Testimony, 12/16/98]**

179. Freitas instructed Chang to charge the cost of the Shintani Diet to staff development funds. **[Chang Trial Testimony, 12/16/98]** The president's staff development fund was charged, even though the diet was not an approved line item. **[Id.]** The president's budget for staff development funds in 1996-1997 was approximately \$140,000. This included monies for 57 mainland staff development activities, Summer study grants, and local workshops and conferences. **[Id.]**

180. A total of \$95,799 in two checks was paid from the staff development funds for the diet program. **[Id.]** Charging the Shintani Diet against the president's staff development budget did not conform to the school's policy, and no staff report analyzing the costs or benefits of the diet was prepared. **[Id.]**

181. Under KSBE policy, an Independent Contractor Form, also known as a "PERS-4" form, must be completed prior to engagement of an independent contractor. **[Chang Trial Testimony, 12/16/98]** The Independent Contractor form states that if the amount to be paid to a third party is "greater than \$3,000 and not included as an approved budget line item, trustees' approval (staff report) is required." **[Exhibit A-183]**. The purpose of the PERS-4 is to obtain approval prior to payment for services. **[Park Trial Testimony, 2/25/99]** When the school receives an invoice, it can issue a check for payment based upon the approved PERS-4. **[Chang Trial Testimony, 12/16/98]**

182. Dr. Shintani sent an invoice to Lindsey that was lost. **[Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.85]** He then left a message with Lindsey that the invoice had not been paid. **[Id. at 85, 87-88]** Lindsey testified she sent that message to Rodney Park. **[Id.]**

183. On April 4, 1997, Lindsey co-signed a check for \$48,991 payable to Dr. Shintani's foundation, the Hawaii Health Foundation. **[Exhibit A-609, p. 1]** This check was processed before any PERS-4 form was completed. No supporting documentation accompanied the check. According to KSBE policy, checks are not processed before the completion of the PERS-4 form. **[Chang Trial Testimony, 12/16/98]** Further, Lindsey testified that the Board must approve line items in the budget. **[Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.86]**

184. Lindsey admitted that when she signed the April 4, 1997 check to pay Dr. Shintani, the Board had not approved the use of staff development funds for the diet. **[Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.85]** She "assumed that was going to come out of the school and that was a school approval" **[id.]** but she did not know who authorized the April 4, 1997 payment for which she signed the check **[id. at 89]**.

185. On April 7, 1997, the invoice for the second session of the Shintani Diet was sent to Lindsey's attention. Dr. Shintani's bill for the second session was \$46,808. **[Exhibit A-609, p.4]**.

186. Approximately two weeks after the first check had been issued, and after the second session of the Shintani Diet was underway, a PERS-4 was circulated. **[Exhibit A-183]** The original, executed PERS-4 was dated April 17, 1997, and contains the handwritten note, "APPROVED BY TRUSTEE LINDSEY W/O STAFF REPORT." **[Exhibit A-183]** It was signed on different dates by various administrators and Dr. Shintani. **[Chang Trial Testimony, 12/16/98; Exhibit A-183]** Vice-President Freitas testified that the handwritten note is accurate. **[Freitas Trial Testimony, 12/10/98]**

187. Rodney Park, now the Principal Executive for the Administration Group, testified at trial that the PERS-4 was "moot" because the services had been performed. **[Park Trial Testimony, 2/25/98]** Contrary to this interpretation, Park circulated another PERS-4 for KSBE signatures after meeting with Trustee Henry Peters and talking to Sandy Wicklein and Freitas about funding for the Shintani Diet. **[Park Trial Testimony, 2/25/99]**

188. The second form was executed and backdated to the same dates as the first PERS-4. **[Exhibit A-183, Exhibit A-184; Chang Trial Testimony, 12/16/98]** The completed second form was different from the first in that 1) Park signed the second form instead of Sandy Wicklein, in order to expedite the matter; and 2) Park did not require Dr. Shintani to sign again; and 3) the second form deleted any reference to Lindsey approving the expenditure without a staff report. **[Exhibit A-184; Chang Trial Testimony, 12/16/98]** Park admitted that he made an effort to "bury" the first PERS-4 with the handwritten note but was unsuccessful. **[Park Trial Testimony, 2/25/99]**

189. President Chun testified he did not learn his budget was paying for the Shintani Diet program until after the program was completed. He then signed off for the payments because services had been provided. **[Chun Trial Testimony, 2/18/99]**

190. In all, KSBE spent \$128,800.80 in Shintani fees, food and related expenses for the two sessions of the diet held on campus. [**Chang Trial Testimony, 12/16/98; Exhibit A-610**] That cost represented 92% of the president's total staff development budget for the 1996-97 fiscal year and averaged about \$3,500 per participant. [**See Chang Trial Testimony, 12/16/98**] Lindsey participated in both diet programs even though she is not considered a member of the staff. [**Chang Trial Testimony, 12/16/98**]

191. As a result of Lindsey's approval of the Shintani Diet, the president's staff development budget was exceeded by about \$90,000. [**Chang Trial Testimony, 12/16/98**] A variance report was generated and submitted to the Trustees. [**Id.**] Trustee Lindsey credibly testified there were no complaints from Trustees about the variance report, which was part of a larger document distributed quarterly. She further explained that Trustees would become aware the diet program caused an over expenditure in the president's staff development budget if they read the quarterly variance report. [**Lindsey Trial Testimony, 2/2/99, Tr. p.156**]

192. There are no Board minutes evidencing prior approval for the expenditure. [**Wong Trial Testimony, 3/5/99, Tr. p.127**] The Board was never presented with a staff report regarding the Shintani Diet [**Jervis Trial Testimony, 1/4/99, Tr. p.89; Stender Trial Testimony, 2/12/99, p.111; Wong Trial Testimony, 3/5/99, Tr. p.126**] and had not previously authorized school staff development funds to pay for diet sessions. [**Jervis Trial Testimony, 1/4/99, Tr. p.89; Stender Trial Testimony, 2/12/99, Tr. p.111**]

193. Apart from the waste and mismanagement of trust assets that her actions manifest, Lindsey's unauthorized use of staff development funds violate NAIS Principles of Good Practice for Independent School Trustees; specifically, Principle Number 10 which reads as follows: "Each trustee . . . has fiduciary responsibility to the school for sound financial management." [**Exhibit A-553, p.1**]

#### **F. Trustee Lindsey's Termination of the Hawaiian Cultural Center Project**

194. The Hawaiian Cultural Center to be established on campus was inspired by former Trustee Myron Thompson and approved by the Board on January 20, 1994. [**Fong Trial Testimony, 11/24/98, morning session, Tr. p.5; Takemoto Trial Testimony, 2/25/99**] Between 1994 and 1996, Performing Arts Department Director Fong and his spouse were heavily involved in the planning effort. Randie Fong chaired a committee which sought input from nearly 300 community members consisting of Kamehameha staff, students, alumni and Trustees. [**Fong Trial Testimony, 11/24/98, afternoon session, Tr. p.29**] The Committee sent Trustee Lindsey more than five status reports, executive summaries, a videotape, and regular memoranda. [**Fong Trial Testimony, 11/19/98, Tr. p.38-39; 11/24/98, morning session, Tr. p.14**] The Committee labored for two years with apparent support from the Trustees. [**Hoe Trial Testimony, 11/10/98, morning session, Tr. p.54**]

195. In March 1996, Lindsey told Fong he had been working against the wishes of the Trustees because the Committee had not planned the construction of a little "hale" and had involved a lot of people unnecessarily in the project. **[Fong Trial Testimony, 11/19/98, Tr. p.38-39; 11/24/98, morning session, Tr. p. 14]**

196. KSBE Budget Director Yukio Takemoto received and reviewed the Committee memoranda and final report. He testified that "the original vision had expanded somewhat to include meeting and teaching rooms and a kitchen." **[Takemoto Trial Testimony, 2/25/99]**

197. The Committee last formally met with Lindsey in March, after which its final report was submitted at the end of 1996. **[Hoe Trial Testimony, 11/10/99, morning session, Tr. p. 54]** There has been no budget request or staff report generated to pursue the center. **[See Takemoto Trial Transcript, 2/25/99]**

198. The Board did not authorize Lindsey to delay or terminate the Hawaiian Cultural Center project. **[Jervis Trial Testimony, 1/4/99, Tr. p. 71; Stender Trial Testimony, 2/12/99, Tr. p. 88, 90]**

199. At trial Lindsey suggested the project was dependent upon the facilities master plan. Takemoto, whose department became in charge of the campus facilities master plan, testified he asked an engineering firm to look at the feasibility of establishing the cultural center at the proposed location by the campus chapel. He did not testify there was any impediment to construction **[Takemoto Trial Testimony, 2/25/99]** and the Court finds there was none.

200. Lindsey's unilateral action of disapproving the plans and ending work on the Hawaiian Cultural Center project violates NAIS Principles of Good Practice for Independent School Trustees; specifically, Principle Number 8 which reads as follows: "Authority is vested in the board as a whole. A trustee who learns of an issue has an obligation to bring it to the head of the school, or to the board chair, and must not deal with the situation individually." **[Exhibit A-553, p.1]**

### **G. Trustee Lindsey's Characterization and Definition of Her Role as a Trustee Is Inappropriate and Ineffective in a Private School Community**

201. Trustee Lindsey testified she thought that her role and duties as a trustee of an independent private school were no different from being the CEO or district superintendent of a public school district.<sup>(10)</sup> **[Lindsey Trial Testimony, 1/6/99, Tr. p.18]** That flawed perception together with the designation of lead Trustee for education coalesced with tragic proportions. Trustee Lindsey in part simply duplicated what she knew from her thirty years with the DOE, importing assumptions,<sup>(11)</sup> testing and teaching methods,<sup>(12)</sup> curricula formats,<sup>(13)</sup> management style,<sup>(14)</sup> and philosophy<sup>(15)</sup> which had brought her success as a district superintendent to a magnificently endowed "world class" private school with selective admissions policies, unique mission<sup>(16)</sup> and college preparatory standards, faculty and staff.

Her top-down approach deprived her of the opportunity to learn harmoniously about the new educational environment and promoted mutual disrespect. Because Lindsey insisted upon her educational imprimatur, her prior experience became a crippling limitation rather than an asset.

202. At trial Trustee Lindsey revealed her preference for Kamehameha Schools to become a "comprehensive" school rather than exclusively college preparatory. [**Lindsey Trial Testimony, 2/4/99, Tr. p.143**] She acknowledged her view did not accord with the other Trustees nor was there evidence she ever discussed such a major change in direction and philosophy with the Board. To the extent Lindsey's educational initiatives were not compatible with a private college-preparatory school, she perceived negative reaction as insubordination, incompetence and narcissistic resistance to change rather than genuine, good faith efforts to ensure the official goals of academic excellence and increased admissions to 4-year colleges be maintained. Viewed from this perspective the hostility resulted from Lindsey's unilateral actions and were exacerbated by her efforts to secure compliance through fiat and intimidation.

203. In the independent, private school environment, Trustees work most effectively when they use their power to build effective partnerships throughout the school community, including the partnership with the school president. Trustee Lindsey was missing such an approach to her position as trustee. [**Witt Trial Testimony, 2/22/99, Tr. p.63**]

204. Trustee Lindsey's own definition of her role as a trustee and her approach to her duties are inappropriate for a private school community and thus ineffective. They have led her to violate fundamental principles of good practice. [**Witt Trial Testimony, 2/22/99, Tr. p.63-64**]

### **III. TRUSTEE LINDSEY'S MICROMANAGEMENT**

#### **A. Trustee Lindsey's Review of All Communications**

205. In 1994 Trustee Lindsey became lead Trustee for communications. This liaison position encompassed the communications for the Education Group and KSBE in general.

206. The Board authorized Lindsey in March 1994 as follows: "All advertising, media responses, news releases and external publications are to be reviewed by Trustee Lindsey, communications liaison for the Board of Trustees. This will be standard procedure effective immediately." [**Exhibit A-28, p.1**]

#### **1. Trustee Lindsey's Review of KSBE Communications**

207. In her capacity as lead communications Trustee, Lindsey reviewed materials produced by the KSBE Communications Department. Such materials included news releases, brochures, internal publications, employee newsletters and videos. **[Yadao Trial Testimony, 2/23/99, Tr. p.9]** KSBE Communications Director Elisa Yadao explained that Lindsey reviewed and approved communications both in draft and final form. **[Id. at 10]** Lindsey's complete oversight of external communications included reviewing KSBE's invitations, fliers, and the KSBE Christmas card design. **[Id. at 26-27]** Yadao was required to get Lindsey's approval before she returned any phone calls from the news media. **[Id. at 10]** When Lindsey was not consulted, she became "displeased." **[Id. at 8, 11-12]** Yadao was a news reporter immediately before accepting the KSBE job in 1993 and in 1997 returned to news as managing editor at a local television station upon leaving KSBE. **[Id. at 4, 11]**

208. In 1994-95, Yadao's Communications Division prepared a KSBE Communications Plan and submitted it to Lindsey to present to the Board. **[Yadao Trial Testimony, 2/23/99, Tr. p.16]** Although other Trustees were inquiring about the plan, the proposed Communications Plan "just sort of sat for awhile," because Lindsey held onto it for several months. **[Id. at 16-17]**

209. In 1996, a company called Sheppard Associates conducted focus group sessions with KSBE employees. The purpose was to examine why KSBE employees were unhappy with evaluation and compensation procedures. **[Yadao Trial Testimony, 2/23/99, Tr. p.17-19]** However, the concerns expressed by the employees in the focus groups went well beyond evaluation and compensation. The Sheppard Associates final report, completed on November 4, 1996, reported five key findings.

210. The key findings include 1) staff perceive changes in KSBE culture which leave them feeling anxious and disenfranchised; 2) sporadic, inconsistent communication feeds the concern that either the change is precipitous/not well thought out or there are ulterior motives at work; 3) the respective roles of trustees, administration, and managers are unclear, fostering the perception that there is a leadership void in the organization; 4) staff feel misled over the importance of PDQs, the significance of a new performance evaluation system (AOOP), and the link between pay, PDQ and AOOP; and 5) the compensation philosophy of pay for performance, teamwork and cost management lacks credibility and is seen to conflict with KSBE's goals. The report also contained detailed ways to address each of these five key findings. **[Exhibit A-589, p.9-19]**

211. The Sheppard Associates report was supposed to be presented to the Trustees upon completion in November 1996. **[Yadao Trial Testimony, 2/23/99, Tr. p.19]** But Lindsey held the report for several months in order to present it to the Trustees at a time when they could "focus" on it. **[Id. at 20]** Trustee Stender learned of the Sheppard Associates Report when he saw it on an employee's desk in November or December of 1996. **[Stender Trial Testimony, 2/12/99, Tr. p.39-40; 2/16/99, Tr. p. 16-17]** Stender thereafter obtained his own copy directly from the consultant. **[Stender Trial Testimony, 2/12/99, Tr. p.40; 2/16/99, Tr. 16-18]**

## 2. Trustee Lindsey's Review of Campus Communications

212. As lead communications Trustee, Lindsey formed a committee which met bi-weekly from late 1994. The membership included various campus and KSBE staff. **[Walsh Trial Testimony, 11/17/98]**

213. In a memo dated May 4, 1994, to President Chun and other school administrators, Marcia Bolson (one of several campus representatives on the communications committee) reported Lindsey's parameters for review of school communications. **[Exhibit A-28]** The memo set forth inter alia "what materials Mrs. Lindsey would like to review" **[Exhibit A-28, p.1]** as follows:

External publications are any of the following materials that are distributed to all KSBE staff, parents, alumni, all students, the Hawaiian community or the general public:

Letters

Memoranda

Flyers

Brochures

Newsletters

Handbooks

Curriculum guides

Print programs

Certificates

Forms

Invitations

Ticket, magnets, other miscellaneous items

Signs

T-shirt designs

Student generated materials that are printed by KSBE and distributed internally or externally must also be reviewed. Also, materials created by independent contractors (works for hire) must also be reviewed.

**[Exhibit A-28, p.2]**

214. In her December 1997 Response to the Fact Finder's Report, Lindsey's justification for such comprehensive review reads: "In addition to matters which are inappropriate, failure to adequately oversee all communications has resulted in inter alia adverse judicial determinations, and embarrassing situations for the school." **[Exhibit A-314, p.12]** Over the years Lindsey found errors of varying magnitude ranging from wrong information contained in announcements/invitations and disputed use of Hawaiian words to typographical and grammatical mistakes. The volume of error was relatively small. **[Bohreer Trial Testimony, 2/26/99 (estimated 1%)]**

215. Prior to Trustee Lindsey's involvement, the approval of school communications such as programs, fliers, and t-shirt designs was handled by department heads and the Dean of Student Activities. After Lindsey got involved, all such items were faxed to Lindsey's Kawaiahao office for her review and approval. When asked why she was reviewing t-shirts, Lindsey told school administrators that her review originated after a lesbian alumni group tried to use the Kamehameha logo on its t-shirt. **[Ako Trial Testimony, 11/25/98; Lindsey Trial Testimony, 2/2/99, p.176]**

216. President Chun was "incredulous" when he learned after the fact that Lindsey was reviewing t-shirt designs and the like. He testified, "[T]hat is not something that a Trustee should be doing. . . . It sends the message that you don't trust your people. . . and don't value or honor their professionalism." **[Chun Trial Testimony, 2/18/99]**

**a. Delays Caused by Trustee Lindsey's Review of Campus Communications**

217. Rene Martin is a business and economics teacher at the Kamehameha Secondary School. She testified regarding a project her students undertook in the Fall of 1996. They divided into small groups; each formed a company, selected a product to sell, created a marketing plan, and executed it. Grades were to be based on the profit they earn. **[Martin Trial Testimony, 12/1/98]**

218. One of the 1996 groups decided to sell t-shirts and canvas bags with the design of a honu (turtle) or a plumeria flower on them. **[Martin Trial Testimony, 12/1/98]** The t-shirts and handbags did not contain the Kamehameha School logo or any wording. The students obtained pre-sale orders and collected deposits totalling approximately \$2,500. **[Exhibit A-606; Martin Trial Testimony, 12/1/98]**

219. Under then-existing policy, the designs on the t-shirt and bags first had to be approved by Julian Ako, the Dean of Student Activities, and then be sent by fax to

Lindsey for her approval. **[Martin Trial Testimony, 12/1/98; Ako Trial Testimony, 11/25/98]** The designs were sent to Lindsey in the "mid to third week of November," Martin testified. When Lindsey did not respond promptly Martin called daily to check on the status but received no reply. **[Id.]**

220. Lindsey still had not acted by the second week of December when the students decided to terminate their business project and refund the pre-sale deposits. Martin testified that the students were concerned about their grades because their company would make no profit. In addition, under their business plan and given their pre-sales, the five students in the group had expected to earn \$300 each. Because they had to return the pre-sale deposits, the students earned nothing. **[Martin Trial Testimony, 12/1/98]**

221. Martin received Lindsey's approval for the designs on December 18, 1996, the day before Christmas break, in a faxed note, saying: "Tell the kids to go for it." Martin's reaction was "anger, because it was too late," the students had already refunded the money. **[Martin Trial Testimony, 12/1/98]**

222. Joel Truesdel is a science teacher and cross-country coach for the Kamehameha Secondary School. On October 23, 1996, the boys' cross-country team requested Lindsey's approval of the design and wording for a "team t-shirt." These team t-shirts are important to students, Truesdel explained, because they help build pride in the team and all athletic team members are allowed to wear their team t-shirts to school on certain days. The proposed team t-shirt included a Dietrich Varez drawing of Hawaiian warriors running and two Hawaiian proverbs from a book by Mary Kawena Pukui. **[Exhibit A-122; Truesdel Trial Testimony, 12/1/98]** Team t-shirts from prior years had included designs by Dietrich Varez. **[Truesdel Trial Testimony, 12/1/98]**

223. The boys' cross country team did not receive a response from Lindsey's office on their proposed team-shirt until November 8, 1996. **[Truesdel Trial Testimony, 12/1/98]** As to the proposed Dietrich Varez design, the response was: "They need to find another picture. This artist's depiction of Hawaiians is not flattering." **[Exhibit A-122]** As to the proposed proverb, the response was: "Loke says if the proverb is placed on the t-shirt, it should state proverbs ----- Mary Kawena Pukui. Credit has to be given. If they decide to use the phrase w/o credit, Ma Koa needs to be changed to Kamehameha." **[Exhibit A-122]<sup>(17)</sup>**

224. Because of the late response from Lindsey's office, and Lindsey's rejection of the proposed design and wording, the boys' cross-country team did not have a team t-shirt that year. Team members were "very upset," Truesdel testified, because the students really liked the design they had chosen, and they did not have a team t-shirt on the day when all the other athletes wore their team t-shirts to school. **[Truesdel Trial Testimony, 12/1/98]**

225. Trustee Stender testified he received invitations and notices of school functions, plays, band concerts, and orchestra concerts so late that he was not able to calendar or attend the events. **[Stender Trial Testimony, 2/12/99, Tr. p.91]**

226. Lindsey testified she was aware of "several complaints" about delays caused by her communications review, but claimed they were "not many." [**Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.56**]

### **3. Trustee Lindsey's Detailed Involvement in Song Contest**

227. Lindsey exercised detailed control over Kamehameha Schools' annual Song Contest, which is broadcast statewide on commercial television. [**Yadao Trial Testimony, 2/23/99, Tr. p.34-37**] She had final approval over Song Contest announcers, program, seating arrangement, student introductions, and the ho'ike (a program put on after the competition while the judges tabulated the results). [**Yadao Trial Testimony, 2/23/99, Tr. p.34, 36**]

228. After the 1997 Song Contest, Lindsey held a meeting to review a tape of the entire television broadcast, expressing a "great deal of displeasure" at the way the Trustees were introduced in comparison to the way President Chun was introduced and the contrasting ways in which the Trustees and Chun were received by the audience. [**Yadao Trial Testimony, 2/23/99, Tr. p.37-38, 40**]

229. Lindsey convened numerous meetings with principal executives and Kamehameha Schools' administrators to discuss the "protocol" for Song Contest and all school events, such as commencement and baccalaureate. In these meetings, which would last up to two hours, Lindsey discussed topics ranging from the seating arrangement to who would receive leis and what types of leis they would receive. As a result of these meetings, a protocol was implemented. President Chun was "taken aback" that these issues would warrant Trustee involvement and noted that no other Trustee had ever raised such minutiae. [**Chun Trial Testimony, 2/18/99**]

### **B. Trustee Lindsey's Involvement in the Hiring Process**

230. Secondary School Principal Ramos testified it was necessary to get Trustee Lindsey's approval before filling a vacant authorized position at the school. This requirement caused delays. Lindsey told Vice-President Freitas that the review process was necessary to ensure the positions were justified. [**Ramos Trial Testimony, 12/10/98; Freitas Trial Testimony, 12/10/98**]

231. Trustee Wong testified Lindsey was asked to look into the hiring process, but did not have final authority on personnel hiring. That authority in the Education Group was vested in the president. [**Wong Trial Testimony, 3/5/99, Tr. p.148-149**]

232. Lindsey likewise was involved in hiring employees for the KSBE Communications Department and had the "final say" over whether a vacant position would be filled and by which applicant. [**Yadao Trial Testimony, 2/23/99, Tr. p.54**]

233. Lindsey also was involved in the hiring process for KSBE's Legal Group. At one point, General Counsel Aipa asked Trustee Jervis for assistance in filling certain positions in the KSBE Legal Group. The Board had authorized those particular positions and the positions had gone through the internal posting, advertising, interviewing, and selection process. [**Jervis Trial Testimony, 1/4/99, Tr. p.94**] Aipa indicated to Trustee Jervis that the Legal Group needed the positions filled but that final approval was "being held up on Mrs. Lindsey's desk." [**Id. at 94-95**] After learning Aipa's concern, Jervis informed Rodney Park, the head of KSBE's Administration Group, to take action, and the names were then released for hiring. [**Id. at 95**]

234. In January of 1997, the Department Head for Performing Arts obtained approval to hire temporary instructors to teach voice parts to approximately 1800 students for Song Contest. [**Fong Trial Testimony, 11/23/98, Tr. p.4**] These positions are needed every year for Song Contest which occurs in March. [**Id. at 14-15**] On February 20, 1997, department head Randie Fong learned from Secondary School Principal Ramos that Lindsey did not approve the temporary hires so the employees were "unhired". [**Id. at 4-5**] Fong informed the instructors they must leave and should not return to work until contacted by Fong. [**Id. at 5-6**] The temporary employees indicated they had already received the necessary forms from Personnel. [**Id. at 6**] Fong was embarrassed but very concerned since the direct impact would be on the 1800 students. He therefore contacted Vice-President Freitas and was later informed by Principal Ramos that all of the temporary hires could come back to work except for one individual. [**Id. at 7**] When Fong met with Lindsey on February 25, 1997, to discuss the matter, Trustee Lindsey said it was all a big misunderstanding. [**Id. at 9-10**]

235. In the Fall of 1995, President Chun requested Trustee Lindsey's approval to hire principals for the neighbor island elementary schools that were slated to open in August 1996 at interim sites. Lindsey said the hiring was premature, since the interim sites had not yet been identified and she was uncertain whether the schools would open as planned. Chun told Lindsey that the Trustees said the schools would open in August, and even if the opening were delayed, principals should be hired early, in part, to give them adequate time to coordinate, hire and train teachers. [**Chun Trial Testimony, 2/18/99**]

236. Chun did not receive Lindsey's approval to hire principals, staff and to purchase equipment until July 1996, seven weeks prior to the opening of the schools. [**Chun Trial Testimony, 2/18/99**] When the neighbor island schools opened one week later than the Kapalama campus, Lindsey blamed Chun. [**Exhibit D-113**]

### **C. Trustee Lindsey's Actions Undermine School President Chun**

237. Prior to 1993, when Trustee Lindsey became the lead Trustee for the Education Group, President Chun reported directly to the Board. After Lindsey assumed her duties as lead trustee, Chun reported to Lindsey and submitted items to her that needed Board approval, creating a two tiered level of review. [**Chun Trial Testimony, 2/18/99**]

238. Trustee Lindsey reviewed Education Group staff reports and all budget items. Chun credibly testified that unless Lindsey had approved a staff report or a budget, it would not get on the agenda for Board consideration. [**Chun Trial Testimony, 2/22/99, Tr. p.35-36**]

239. Chun also needed Lindsey's approval to fill authorized positions that had become vacant through resignation or retirement. These hiring decisions did not go through the full Board. Prior to 1993, Chun made these hiring decisions himself. [**Chun Trial Testimony, 2/18/99**]

240. Chun respected the new chain of command, dealing only with Lindsey and not complaining to other Trustees or trying to go around her. [**See Wong Trial Testimony, 3/5/99, Tr. p.25-28**] Trustee Lindsey, however, did not reciprocate.

241. When she was designated as lead Trustee for education the Board did not direct Lindsey to disregard the organizational chart at Kamehameha Schools [**Lindsey Trial Testimony, 1/6/99, Tr. p.14**] of which she was aware.

242. In a June 2, 1997 meeting with school administrators, recorded by General Counsel Aipa, Lindsey illustrated the chain of authority "beginning with the trustees to the teachers" as follows: Trustees, president, vice-president, principals, vice-principals, teachers. [**Exhibit A-208, p.3**]

243. In December 1997, Lindsey admitted in a formal court document that she bypassed the chain of command on a regular basis, which caused confusion and undermined the president. [**Exhibit A-314, p.7**] Her justification included "the unavailability, untimeliness and inability to respond as to certain matters", and she asserted the right of every Trustee to "inquire freely of all School employees". [**Id.; Lindsey Trial Transcript, 1/6/99, Tr. p.26 ("Trustee could talk to anybody at any time.")**]

244. At times, Lindsey gave instructions directly to Kamehameha Schools' Vice-President Rockne Freitas and bypassed the office of the president. [**Lindsey Trial Testimony, 1/6/99, Tr. p.26**] Other times, she went directly to the Secondary School Principal Ramos. Examples include Lindsey ordering Ramos in Summer 1996 to implement the Board's June 1996 decision that administrators rather than department heads evaluate teachers. [**Ramos Trial Transcript, 12/3/98; Freitas Trial Transcript, 12/10/98; see Exhibit D-432**]

245. President Chun testified that Lindsey bypassed him on numerous educational matters. For example, Chun learned after the Shintani diet program was completed at Kamehameha Schools that his budget was paying for the program; he had no participation in establishment of the three-member curriculum team Lindsey imported to Freitas' office; he learned of the "traditional" Hawaiian language mandate when Lindsey complained the teachers were noncompliant and later learned that Lindsey had direct contact with the school principal regarding her directive and also met with the Hawaiian language teachers. [**Chun Trial Testimony, 2/17-18/99**]

246. Chun testified that being "out of the loop" reduced his effectiveness in addressing faculty morale, making changes and protecting staff from "top down" management. Faculty and staff recognized his eroded effectiveness. **[Chun Trial Testimony, 2/22/99, Tr. p.23-24]**

247. Chun explained it was "very, very difficult" and "stressful" to work under Trustee Lindsey. "I have not had the opportunity to run the school while Trustee Lindsey was Lead Trustee." [Chun Trial Testimony, 2/19/99] Chun summarized Lindsey's impact on his job as president: "Prior to 1993, I had responsibility and authority. After that, I had responsibility." **[Chun Trial Testimony, 2/18/99]**

#### **D. Trustee Lindsey's Actions Violate NAIS Principles**

248. Lindsey's propensity to disregard the school's organizational chart, causing a diminution of effectiveness and authority for the president, violates NAIS Principles of Good Practice for Independent School Trustees; specifically, Principle Number 7 which reads as follows: "A trustee has responsibility to support the school and its head and to demonstrate that support within the community." **[Exhibit A-553, p.1]**

249. Principle Number 4 of the NAIS Principles of Good Practice for Independent School Trustees states: "The board sets policy; the administration implements policy. An individual trustee does not become involved in specific management, personnel, or curricular issues." **[Exhibit A-553, p.1; accord, Peters Trial Testimony, 2/9/99; see Witt Trial Testimony, 2/22/99, Tr. p.56-57]** Trustee Lindsey's actions violated this fundamental principle of governance.

250. "An independent school President typically operates as the CEO of the organization. . . . Trustees have attempted to manage the day-to-day operations of the Schools and exercise control over educational and financial matters instead of delegating the authority to the President and his staff." **[Exhibit D-983, p.18]** This conclusion from the Peterson report commissioned by Trustees Lindsey, Wong and Peters and completed June 30, 1998, supports the findings herein regarding Trustee Lindsey.

251. In her role as lead Trustee for education, Trustee Lindsey's micromanagement of Kamehameha Schools violated NAIS Principle Number Four. Conduct that violated this Principle included her direct involvement in curricular affairs; her communication with and giving of directives to administrative staff who would normally report to President Chun; her review of all external school communications; her involvement in decisions regarding the teaching of traditional Hawaiian language; and her direct involvement in student discipline issues, specifically the Kuala'au incident (Section VII-C *infra*). **[Witt Trial Testimony, 2/22/99, Tr. p.57-58; accord, Peters Trial Testimony 2/9/99 (as to curriculum)]**

#### **IV. TRUSTEE LINDSEY'S PREPARATION AND RELEASE OF HER EDUCATION REPORT**

##### **A. GoForward Initiative and Other Significant Changes Generate Campus Unrest**

252. Shortly after her appointment and designation as lead education Trustee, Lindsey reviewed various publications regarding the school covering the period 1988-1993. Discrepancies in data led her to request specific information from the administration. **[Exhibit A-282, bates no. 77001009]** "Repeated attempts to answer these questions through normal channels were . . . unproductive." **[Id.]**

253. Trustee Lindsey suggested the Board obtain an independent evaluation of Kamehameha Schools educational programs.

254. "From July 1993 until March 1994 the KSBE Trustees and Principal Executives (PEs) met in a series of strategic planning retreats and work sessions." **[Exhibit A-561, p.6]** They produced a preliminary plan and dealt with 40 education topics through issue papers. **[Id. at 7-8]**

255. "In a parallel activity, in January 1994 the Trustees awarded a contract to the Honolulu Office of E&Y [Ernst & Young, a public accounting firm] to conduct an operational review of the educational programs of KSBE." **[Exhibit A-561, p.8]** E&Y did not perform an audit but gathered data on Education Group community outreach programs which served both children and adults of Hawaiian ancestry. E&Y briefed the Trustees on their findings on March 24, 1994. **[Exhibit D-1003A; Exhibit D-1006; Ho Trial Testimony, 3/9-10/99]**

256. In September 1994 E&Y completed the first phase of its work with a draft briefing document setting forth cost-effective data based upon Trustee priorities (e.g., number of Hawaiians served, measured success of program, comparable cost of each program, for which E&Y created a unique unit known as a "CHIC"). **[Exhibit D-1004A; Ho Trial Testimony, 3/9-10/99]** School President Chun revised the E&Y draft document and presented it to Trustees at an October 1994 briefing. **[Ho Trial Testimony, 3/9-10/99]** This was the beginning of the Board's decision to create neighbor island campuses in what is known as the GoForward initiative.

257. On campus, the faculty organization (KSA) phased out entirely in 1994, leaving no formal voice for teachers. Years later when a successor organization began unionizing, President Chun apologized for his part in the demise of KSA by not having encouraged or replaced it. **[Chun Trial Testimony, 2/19/99]**

258. At President Chun's urging the Board approved the reduction in the length of new or renewed teacher contracts from five to one year tenure beginning school year 1994-95. **[Chun Trial Testimony, 2/19/99; see Exhibit A-282, bates no. 1017 (annual contracts**

provided "more responsiveness to changing student needs")] This caused teachers concern. [Hoe Trial Testimony, 11/10/98, Vol. I, Tr. p.14]

259. In April 1995, E&Y produced GoForward material which was used in working sessions with Trustees. [Exhibit D-1005A] On April 17, 1995, a unanimous Board publicly announced the GoForward initiative with anticipated opening of new schools on Maui and the Big Island scheduled for Fall 1996. The first of four new schools would begin with grade levels K-3.

260. The concomitant but not yet publicly announced Board decision to terminate nearly all of the community outreach programs was based on projected savings of \$49 million from 1995-2002 (using FY '96 budget figures for the calculation base) and a projected severance cost of \$5 million for phase out of those programs. [Ho Trial Testimony, 3/9-10/99]

261. GoForward thus preserved the center based preschools, the elementary and secondary schools on Kapalama campus, the campus Summer school, and the post-high scholarship program while adding four new elementary (K-8) schools and 18 permanent preschools statewide. [Exhibit D-561, p.21]

262. The demise of community programs greatly reduced the number of Hawaiians KSBE served from approximately 30,000 in 1992 to 3,200 in 1996. [Exhibit A-189, p.2]

263. The Board decision to eliminate the bulk of community programs (KEEP, PETOM, Traveling Preschools, Parent-Infant Education and Alternative Learning Centers) was announced in the Summer 1995, immediately impacting the constituents and staff. "[A] number of highly visible educational programs were closed and approximately 14 percent of the [KSBE] workforce was laid-off." [Exhibit A-589, bates no. E30625]

264. GoForward involved layoffs for the first time in Kamehameha School history, resulting in anger about it and anxiety from those not laid off. [Chun Trial Testimony, 2/19/99]<sup>18</sup>

265. Simultaneously, in the late Spring 1995, the Board decided to admit all KES 6th graders to the secondary school, effective in the Fall 1995. This created a need for remedial teaching and other transitional planning to accommodate a larger 7th grade entering class. The prior policy had required all KES 6th graders to meet the selective admissions criteria for the 7th grade, which had resulted in an attrition rate. [Exhibit A-282, bates no. 77001018]<sup>19</sup>

266. During 1996 KSBE began "an effort to realign its compensation package and modify its performance evaluation system. This work was prompted by a compensation study that showed KSBE was paying above market for many positions." [Exhibit A-589, bates no. E30625] While GoForward exclusively impacted the Education Group, the compensation issue was systemwide and not well received. [Exhibit A-589]

267. The confluence of these significant Board decisions generated unrest. **[See Jervis Trial Testimony, 1/4/99, Tr. p.12]** It was within this context that Trustee Lindsey's unauthorized unilateral actions and micromanagement of the school as lead Trustee since 1993 led to public controversy and ultimately hostility.

### **B. Growth of Campus Controversy and Appointment of a Fact Finder**

268. During the March 1997 Song Contest rehearsal, the students booed Trustee Lindsey. **[Jervis Trial Testimony, 1/4/99, Tr. p.16; Yadao Trial Testimony, 2/23/99, Tr. p.38; Ako Trial Testimony, 11/25/98]** She was "unhappy" about being booed, and questioned whether teachers and staff had encouraged the action. **[Yadao Trial Testimony, 2/23/99, Tr. p.38-39]** An investigation into the booing was initiated. **[Id. at 39]**

269. In March 1997, Randie Fong, an alumna and the Department Head for Performing Arts, decided that he had to bring the issues involving the management of Kamehameha Schools to the attention of the Trustees. **[Fong Trial Testimony, 11/19/98, p.13]** On March 27, 1997, Fong met with Trustee Peters to inform him of issues involving Trustee Lindsey, the negative impact of Trustee Lindsey's behavior on the Kamehameha Schools, and that Fong had decided to resign. **[Id. at 14, 16-17; Exhibit A-595]** Fong gave Peters examples of Trustee Lindsey's actions. **[Id. at 19-20]** Fong feared retaliation from Lindsey against himself and his family and asked Peters for protection. **[Id. at 21]** (Fong's spouse worked on special projects at the school and their son was a student.) Peters asked Fong to hold off on his resignation and suggested that he meet with Trustee Lindsey. **[Id. at 14-15, 21]**

270. On April 11, 1997, Fong met with Trustee Lindsey. **[Fong Trial Testimony, 11/19/98, Tr. p.21; Exhibit A-179]** During that meeting, he discussed in detail the management issues, her lack of credibility and negative impact on campus, and told Lindsey he planned to resign. Fong took his written agenda for the meeting with him and addressed the points directly. **[Fong Trial Testimony, 11/19/98, Tr. p.23-25; Exhibit A-179]**

271. Fong had lunch with Trustee Stender on Wednesday, April 16, 1997. **[Fong Trial Testimony, 11/23/98, Tr. p.18]** Trustee Jervis also met with Fong and concluded that Fong's concerns were certainly tied to the other issues Jervis was hearing about. **[Jervis Trial Testimony, 1/4/99, Tr. p.16]**

272. Fong's proffered resignation caused great concern to the Trustees and the Kamehameha faculty. **[Jervis Trial Testimony, 1/4/99, Tr. p.16; Stender Trial Testimony, 2/12/99, Tr. p.35-36; Hoe Trial Testimony, 11/10/98, Tr. p.11-12]** Fong was admired and liked by the students, the faculty and the Hawaiian community and his leaving would have been a tremendous loss to Kamehameha. **[Stender Trial Testimony, 2/12/99, Tr. p.35-36]**

273. Two days after Stender had lunch with Fong, the Trustee wrote a memo to his colleagues regarding the morale problem and the issues involving micromanagement on

campus. [Stender Trial Testimony, 2/12/99, Tr. p.36-38; Exhibit A-185] Stender stated that "today the problem has reached a level that I cannot ignore and I believe that it is so serious that we must address the problem and now." [Exhibit A-185, p.1 (original emphasis); Stender Trial Testimony, 2/12/99, Tr. p.37] Stender suggested that "[t]he first step that we must take to correct the problem is not to micro-manage the organization." [Exhibit A-185, p.2] He suggested returning the management of the Kamehameha Schools to President Michael Chun and his staff. [Stender Trial Testimony, 2/12/99, Tr. p.38-41]

274. The controversy was discussed among the Trustees at the April 29, 1997 Board meeting. [Jervis Trial Testimony, 1/4/99, Tr. p.16; Stender Trial Testimony, 2/12/99, Tr. p.41] The meeting was long and cathartic. [Jervis Trial Testimony, 1/4/99, Tr. p.16] Trustees discussed campus issues including micromanagement, the morale problem, and President Chun. [Jervis Trial Testimony, 1/4/99, Tr. p.16, 17; Stender Trial Testimony, 2/12/99, Tr. p.42] Stender contended morale was low because of the micromanagement issues. [Jervis Trial Testimony, 1/4/99, Tr. p.17]

275. As to President Chun, the Board discussed whether Chun was carrying out his duties and whether he was being prevented from carrying out his duties and functions because of micromanagement. [Jervis Trial Testimony, 1/4/99, Tr. p.17] Stender told the other Trustees that although Chun was being blamed for all the things that were going wrong on campus, the president had no control over the school. He said Lindsey had control of the school. [Stender Trial Testimony, 2/12/99, Tr. p.49] Stender asserted that Lindsey, as lead Trustee for education, had assumed President Chun's position without authority from the Board. [Stender Trial Testimony, 2/12/99, Tr. p.47-48] Lindsey had a strong reaction and denied any basis for these concerns. Lindsey said the micromanagement allegations were "overblown and not founded in truth." [Jervis Trial Testimony, 1/4/99, Tr. p.16, 18] The Trustees told Stender he was overreacting and it was President Chun's problem. [Stender Trial Testimony, 2/12/99, Tr. p.43]

276. The Trustees also discussed the competency of the teachers and staff. [Stender Trial Testimony, 2/12/99, Tr. p.49] Trustee Lindsey said President Chun and his entire staff, except for Vice-President Freitas, were incompetent. [Stender Trial Testimony, 2/12/99, Tr. p.49] The following day, on April 30, Stender further articulated his concerns, making references to the meeting, in his memo to all Trustees. [Exhibit A-189] The Board took no action.

277. In 1997 approximately 230 faculty formed Na Kumu O Kamehameha ("Na Kumu"). The organization served the need for a formal faculty voice following the demise of a precursor organization (KSA) in 1994 and was sparked by the threat of Fong's resignation, the reduction in teacher contract duration from 5 to 1 year together with more stringent revisions to the employee handbook, all resulting in a perceived need for protection and group representation. [Hoe Trial Testimony, 11/10/98, Tr., Vol I, p.6, 8-11, 14] One teacher testified he joined Na Kumu "mostly because I was becoming a little bit scared," specifically fearing Trustee Lindsey. [Truesdel Trial Testimony, 12/1-2/98]

278. By April or May 1997 Na Kumu representatives had met with President Chun approximately 20 times since its inception, with concerns they asked Chun to take to the Trustees. Sometimes Chun would communicate a response; other times Board Chair Wong sent a letter. **[Hoe Trial Testimony, 11/10/98, Tr., Vol II, p. 30-31]**

279. Approximately a year before Lindsey became a Trustee, the alumni office began coordinating "Talk Story" sessions, an informal discourse among attending Trustees and alumni often held on campus. Over time alumni interest increased, coinciding with various issues of Trustee compensation and other policy matters gaining high public profile. By 1997 the sessions had expanded to neighbor islands and even the mainland. **[Sai Trial Testimony, 3/4/99]** On Oahu, the Spring Talk Story session routinely was held within months of the annual song contest in March.

280. Marlene Sai, as Director of the Alumni and Parents Advancement Center (APAC), located on campus, timely sent invitations to alumni to attend a May 1997 Talk Story session. In May 1997, Chairman Wong's office informed her the session was being postponed, that Trustee Wong would send letters to the invited alumni and Sai would be advised if it were reset. **[Sai Trial Testimony, 3/4/99]** APAC was never instructed to resume the sessions.

281. On May 3, 1997, former Kamehameha teacher and alumna Nona Beamer sent the Honolulu Advertiser editor a highly critical letter of Trustee Lindsey. Beamer described the Trustee's micro-management methodology as "an utterly diabolical plan of a self-serving egoist" who has demoralized the campus and Kamehameha `ohana. **[Exhibit A-190]** The letter was printed by the newspaper. Beamer testified she had heard from her family members and Sarah Keahi Quick, Hawaiian language teacher on campus, of Fong's resignation and a directive to teach only traditional Hawaiian language, prohibiting teachers from using or teaching any new Hawaiian words. Both actions Beamer attributed to Trustee Lindsey based upon her information. **[Beamer Trial Testimony, 11/12/98]**

282. On May 5, 1997, alumnus Roy Benham met at a home with about twenty other alumni, including Trustee Stender, to prepare questions for the anticipated Talk Story session. They intended to ask Trustees about the Fong resignation, the Hawaiian language dilemma and who was running the school. **[Benham Trial Testimony, 11/12/98]** Trustee Stender gave Benham a copy of his April 30, 1997 memo to Trustees which inter alia framed the micromanagement, morale, Chun competency issues and directly attributed them to Trustee Lindsey. **[Exhibit A-189]**

283. The Talk Story session was unilaterally canceled by Trustee Wong after consultation with Trustee Lindsey. **[Jervis Trial Testimony, 1/4/99 p.14-15; Stender Trial Testimony 2/12/99, Tr. p.33]** Trustees Jervis and Stender were upset at the cancellation since it was a critical moment for Trustees to be before the community and ohana members to hear and address some of the issues. **[Jervis Trial Testimony, 1/4/99, Tr. p.15; Stender Trial Testimony, 2/12/99, Tr. p.33]** The Kamehameha ohana reacted

strongly to the cancellation of Talk Story sessions. [**Jervis Trial Testimony, 1/4/99, Tr. p.15-16**]

284. Triggered by cancellation of access to the Trustees and concerned about Trustee Lindsey's actions, President Chun's status and campus demoralization, alumni met among themselves and, led by Roy Benham and Tomi Chong, organized a demonstration walk for May 15, 1997 ("the March"). [**Chong Trial Testimony 11/9-10/98; Benham Trial Testimony 11/12/98**]

285. The alumni representatives asked to meet with all five Trustees. On May 14, 1997, Trustees Lindsey and Wong met with Benham and Chong in the basement of the campus administration building. Chairman Wong asked them to cancel the March. Benham refused but said he would relay the concerns to the alumni group. [**Benham Trial Testimony 11/12/98**] Chong testified the alumni were angry because they anticipated meeting with all the Trustees. Trustee Wong blamed the absence of the other three Trustees on scheduling conflicts. [**Chong Trial Testimony 11/9-10/98**] In fact, General Counsel Aipa had advised against a majority being present.

286. During early May 1997, Trustee Jervis unsuccessfully urged the Board to consider mediation to get to the bottom of the campus controversy. [**Jervis Trial Testimony, 1/4/99, Tr. p.17-19**] Working with General Counsel Aipa, Trustee Jervis next suggested petitioning the probate court for appointment of a fact finder/mediator, to which all Trustees ultimately agreed. [**Jervis Trial Testimony, 1/4/99, Tr. p.24-25**]

287. The Petition for Instructions Appointing Fact Finder/Mediator was filed on May 14, 1997. [**Exhibit A-629**] Signed by all the Trustees, the Petition asked the probate court to appoint Judge Patrick Yim (retired) as a fact finder/mediator and to give Judge Yim certain powers to make an inquiry into the controversy on behalf of the Trustees. All of the Trustees, including Lindsey, agreed to the appointment of Yim as the fact finder and agreed that Yim was qualified, not only from a competency standpoint but from a cultural sensitivity perspective as well. [**Jervis Trial Testimony, 1/4/99, Tr. p.24-25**]

### **C. The March**

288. On May 15, 1997, supporters of the Kamehameha Schools conducted the March from Mauna Ala, the burial grounds of Princess Bernice Pauahi Bishop, to Kawaihaho Plaza, the offices of KSBE. Over 700 people participated in the March. [**Chong Trial Testimony, 11/9/98; Exhibit A-197**] The purpose of the March was to express three concerns to the Trustees: (1) return the management of the Kamehameha Schools to the president; (2) reinstate the Trustee Talk Story sessions; (3) seek the input from teachers, staff, and others with no retaliation or punitive action against those willing to speak. [**Benham Trial Testimony, 11/12/98**]

289. Trustee Wong met the marchers at Kawaihaho Plaza. Benham, on behalf of Na Pua, presented Wong with a copy of a petition outlining the concerns, signed by the Na Pua

members, and given to the Supreme Court. **[Benham Trial Testimony, 11/12/98]** Na Kumu's Statement of Concern, identifying micromanagement, lack of faculty input, and a climate of fear as concerns, also was presented to Trustee Wong. **[Exhibit A-200]**

290. KSBE employee Dennis Walsh took approximately 200 pictures of the Kamehameha Schools' alumni and other participants in the May 15, 1997 March. **[Walsh Trial Testimony, 11/17/98]** KSBE Communications Director Yadao testified regarding efforts made to identify people who took part in the March. Trustees Lindsey and Peters watched the marchers as they came into Kawaiahao Plaza and wrote down the names of people they recognized. **[Yadao Trial Testimony, 2/23/99, Tr. p.46]** Lindsey also asked members of the Communications Group to identify people in the March and write down their names. **[Id.]** Trustee Lindsey was "very angry" about the March because she believed these people were "marching against the Trustees." **[Id. at 47]** After the March, Yadao saw a yellow notepad on Lindsey's desk with the names of people from the March. **[Id. at 70-71]**

291. The success of the March and intensity of the issues coalesced in a formal non-profit association of 3,500 alumni, parents and supporters of Kamehameha Schools which was incorporated on June 3, 1997, as Na Pua Na Ke Ali`i Pauahi, Inc. (Na Pua). **[Chong Trial Testimony, 11/9/98]**

292. On June 2, 1997, Trustees Lindsey and Wong with General Counsel Aipa attended an Education Group administration meeting on the Kamehameha campus. According to Aipa's notes the school administrators at the June 2, 1997 meeting expressed the following "high priority" concerns:

1. Hawaiian values do not apply to everyone within the organization.
  - a. Preferential treatment given to certain divisions or departments.
2. Lack of empowerment (Voice).
  - a. Staff is not listened to and therefore decisions are made without staff input and in a vacuum.
  - b. Time demands were unrealistic, particularly without staff input into the decision making process.
  - c. Decisions were often made without facts or made on inaccurate or incomplete facts.
  - d. Staff felt the perception of not having credibility without justification.
  - e. Staff at Kamehameha Schools felt unappreciated at Kawaiahao Plaza.
  - f. Staff felt the fear of retaliation for actions taken or statements made at Kamehameha Schools.

3. There was a need for rapid response from upper management and the trustees . . .
  - a. The processing of paperwork was extremely slow. Purchase requisitions for matters already approved in the budgets were restrained. The hiring of staff for positions already approved and budgeted was restrained.
  - b. The review of newsletters, correspondence and memoranda was slow. Query why the approvals were needed.

**[Exhibit A-208]** Aipa testified that once the concerns of the school administrators were identified, documented, and prioritized, the matter was handed back to the school administration to resolve. **[Aipa Trial Testimony, 12/21/98]**

293. Similarly, efforts by Na Kumu to communicate with Trustees were ignored and on June 5, 1997, the faculty representatives took their grievances to the media. **[Exhibit A-214]** By then members were considering unionizing and had concerns about the "hand-picked" fact finder issuing a secret report to Trustees. **[Exhibit A-214, p.2]**

#### **D. Fact Finding Process Commences**

294. Responding to issues of confidentiality and retaliation, the Board of Trustees agreed that identities of the participants in the fact finding process would remain confidential and that there would be no retribution or reprisal against anyone who provided information to the Fact Finder. **[Jervis Trial Testimony, 1/4/99, Tr. p.26; Stender Trial Testimony, 2/12/99, Tr. p.63]** The July 10, 1997 court order granting their Petition and empowering Judge Yim incorporated the confidentiality guarantee. **[Exhibit A-226; Jervis Trial Testimony, 1/4/99, Tr. p.27]**

295. On July 10, 1997, Trustee Wong sent a letter to the Kamehameha ohana encouraging them to participate in the fact finding process. **[Exhibit A-227; Jervis Trial Testimony, 1/4/99, Tr. p.28]** Trustee Jervis went to campus as well as the community including neighbor islands encouraging all employees and alumni to speak with Judge Yim without fear of retribution. **[Jervis Trial Testimony, 1/4/99, Tr. p. 32]**

296. Judge Yim met with the Trustees individually and twice en banc. At the first group meeting with Trustees, Yim discussed his fact finding process and the future possibility of mediation. **[Jervis Trial Testimony, 1/4/99, Tr. p.29, 32-33]** The last meeting with the Trustees en banc was in the KSBE boardroom on November 10, 1997. **[Yim Trial Testimony 2/23-24/99]**

#### **E. The Fact Finder Makes His Preliminary Report to the Board**

297. Judge Yim's final report had to be filed in court by December 5, 1997. [**Exhibit A-273**] When Yim met with the Trustees on November 10, 1997, he announced certain recommendations he would make; specifically a) that Trustee Lindsey must relinquish her role as lead Trustee for the Education Group [**Lindsey Trial Testimony, 1/6/99, Tr. p.112**] and b) the need to engage a reputable institution to conduct an educational and management audit of the Education Group. [**Yim Trial Testimony 2/23-24/99**]

298. Trustee Lindsey was "very upset" about Judge Yim's recommendation that she step down. [**Jervis Trial Testimony, 1/4/99, Tr. p.34; Stender Trial Testimony, 2/12/99, Tr. p.70-71; Wong Trial Testimony, 3/5/99, Tr. p.136-37; see Lindsey Trial Testimony, 1/6/99, Tr. p.112**] Trustee Wong described Lindsey's reaction as one of "shock." [**Wong Trial Testimony, 3/5/99, Tr. p.135**] Trustee Peters also reacted strongly to Yim's preliminary findings and recommendation. [**Jervis Trial Testimony, 1/4/99, Tr. p.34; Stender Trial Testimony, 2/12/99, Tr. p.71**]

299. At trial, Trustee Lindsey maintained she stepped down as lead Trustee of education on August 12, 1997, coinciding with Board approval of the education strategic plan. [**Lindsey Trial Testimony, 1/6/99, Tr. 34, 112**]<sup>(20)</sup> She acknowledged there are no Board minutes to reflect that date of relinquishing the liaison position. [**Id. at 34**] Lindsey further asserted she told Judge Yim in her fact-finder interview that she was no longer lead for education, but Yim's report recommended she step down anyway. [**Id. at 112**]

300. The credible evidence is that Lindsey did not relinquish her role as lead Trustee for education until after Yim filed his report with the court on December 4, 1997. It was Yim's announcement to the Trustees that he intended to make such a recommendation which caused the November 10, 1997 meeting to erupt. When she interviewed with Honolulu Advertiser reporter Greg Barrett for the November 27, 1997 news story [**Exhibit A-285**] Lindsey gave no indication she had relinquished her role as lead Trustee when asked about Yim's anticipated recommendation to do so. [**Id. at 2**] The handwritten notes of Lindsey's public relations consultant Carlson, taken during the Barrett interview on November 26, 1997 [**Exhibit 541, bates no. 33001015**] read in pertinent part as follows:

[Barrett] Q. Yim to recommend relinquish?

[Lindsey] A. Not a problem. I don't have governance of KS [Kamehameha Schools]. They asked me to have oversight. I don't make any decision alone.

[**Id. at bates no. 33001029**] On December 9, 1997, Lindsey issued a news release publicly announcing the Board's decision of that date to discontinue the practice of having a lead Trustee for education. [**Exhibit A-630; Lindsey Trial Testimony, 1/6/99, Tr. p.36**] On December 10, 1997, Lindsey signed her court-filed response to Yim's report. [**Exhibit A-314, p.36**] Her response to the recommendation she step down as lead Trustee was as follows: "Trustee Lindsey has relinquished her role as lead Trustee of the

Education Group." **[Id. at 15]** Likewise, no specific date for relinquishment is contained in the Response to Fact Finder report filed by counsel on behalf of the Trustees. **[Exhibit D-999, p.8]**

301. The November 10, 1997 meeting rapidly deteriorated amidst loud voices and rejections by Trustees Lindsey, Wong and Peters to Judge Yim's recommendation to mediate the matters and resolve them internally rather than through court filings. **[Jervis Trial Testimony, 1/4/99, Tr. p. 35-36; Stender Trial Testimony, 2/12/99, Tr. p.69-70, 72]** Trustees Stender and Jervis met with Trustee Wong and urged him to have the other Trustees reconsider Yim's mediation request. **[Jervis Trial Testimony, 1/4/99, Tr. p.36; Stender Trial Testimony, 2/12/99, Tr. p.72]** Trustees Wong, Peters, and Lindsey declined to mediate prior to issuance of the Fact Finder's Report. **[Jervis Trial Testimony, 1/4/99, Tr. p.36]**

302. At the meeting with Yim on November 10, 1997, Lindsey asked the other four Trustees and Yim for permission to "tell her story." **[Jervis Trial Testimony, 1/4/99, Tr. p.36-37; Stender Trial Testimony, 2/12/99, Tr. p.72-73]** None of them asked Lindsey to define what she meant by her "story," and she did not offer clarification. Judge Yim responded she did not need his permission. The other four Trustees gave her permission. **[Lindsey Trial Testimony, 2/1/99 (afternoon session) Tr. p.1-2]**

303. As of November 10, 1997, low academic performance of students at Kamehameha Schools was not one of the issues in the public controversy. **[Jervis Trial Testimony, 1/4/99, Tr. p.37-38; Stender Trial Testimony, 2/12/99, Tr. p.73; see Benham Trial Testimony 11/12/98; Chong Trial Testimony, 11/9-10/98; Exhibits A-44, D-283, D-285]**

304. Prior to November 10, 1997, Trustee Lindsey had not brought any written reports to the full Board indicating that academic performance was inadequate. **[Jervis Trial Testimony, 1/4/99, Tr. p.38; Stender Trial Testimony, 2/12/99, Tr. p.73-74, Wong Trial Testimony, 3/5/99, Tr. p.21-23]** Lindsey testified that on or soon after June 8, 1996, she brought issues of low academic performance to the Board through a written memorandum, the draft of which is in evidence. **[Exhibit D-990]** No Trustees testified they received the document, and the Court finds the draft was not finalized and sent. This is further corroborated by her lack of reference to the memo in the written report she did submit on November 25, 1997. **[Exhibit A-282, bates no. 1007, para.2, bates no. 1011]** Trustee Lindsey's memo to her colleagues, sent on April 21, 1997, only mentions "student progress" as one of several topics she wanted to add to the April 29, 1997 discussion prompted by Stender's memorandum about the Fong resignation. **[Exhibit D-584; see Exhibit A-185]**

305. On November 12, 1997, Judge Yim received two bankers boxes of materials from Trustee Lindsey who indicated to Yim they were supportive of her position that President Chun lacked competence. **[Yim Trial Testimony, 2/23-24/99]** Much earlier in the fact finding process Trustee Jervis had unsuccessfully urged Lindsey to provide those documents to Yim. **[Jervis Trial Testimony, 1/4/99, Tr. p.31-32]**

## **F. Trustee Lindsey Prepares Her Education Report**

306. Dennis Walsh, special projects officer to the Trustees, testified that on November 11, 1997 (the day after Yim announced his anticipated recommendations to Trustees) he began assisting Trustee Lindsey with the drafting and preparation of her Education Report. Prior to joining KSBE in 1993, Walsh worked for Lindsey at the DOE and later helped Trustee Lindsey prepare her application to become a Trustee. **[Walsh Trial Testimony, 11/17/98]**

307. On November 17, 1997, Lindsey completed a draft of a memorandum to the four other Trustees entitled "Improprieties and Irregularities," which she did not send. **[Exhibit A-281; Lindsey Trial Testimony, 1/6/99, Tr. p.117, 118]** It focused primarily on President Chun's shortcomings. **[Lindsey Trial Testimony, 1/6/99, Tr. p.113]** Specifically, the November 17, 1997 draft detailed allegations that Chun had engaged in "Unacceptable Financial Management Practices;" "Unacceptable Educational Leadership Performance;" "Unacceptable Personnel Management and Facilities Management Practices;" "Unacceptable Performance of Major Tasks Assigned by Trustees;" and "Unacceptable Performance as a Community Representative of KSBE." **[Exhibit A-281]** The draft memo noted only four low academic performance findings, listed in the context of Chun's failure to update the curriculum, as an example of his unacceptable educational leadership. **[Exhibit A-281, bates no. 3043023]**

308. Within two weeks of the meeting with Judge Yim, Trustee Lindsey completed her education report, which emphasized allegations regarding low academic performance of students at Kamehameha Schools and incorporated many of the improprieties contained in the draft memo about Chun. **[Lindsey Trial Testimony, 1/6/99, Tr. p.113-14; Exhibit A-282]**

309. Walsh worked on and helped rewrite several sections of Trustee Lindsey's education report, including the cover letter to the Trustees **[Exhibit A-484]**, her confidentiality warning to the Trustees **[Exhibit A-488]**, and the text of the report regarding student academic performance and President Chun's performance. **[Exhibit A-485 (initial draft); Exhibit A-486 (last draft); Exhibit A-487 (penultimate draft); Walsh Trial Testimony, 11/17/98]** Walsh did not work on changes to the body of the report after his last draft. He continued to work on the cautionary introductory language, including a last minute addendum. **[Walsh Trial Testimony, 11/17/98]**

310. Walsh prepared his drafts of Lindsey's education report based on her initial handwritten draft plus materials provided by Lindsey, and he did not confirm the accuracy or reliability of the information she provided. **[Walsh Trial Testimony, 11/17/98]** Lindsey did not provide him with copies of the exhibits that were attached to the final version of the report **[Exhibit A-282]**. Walsh had never done a report similar to this education report and admitted he had no experience or background in testing, education evaluation, or test scores. **[Walsh Trial Testimony, 11/17/98]**

311. As Walsh neared completion of his work, Lindsey's attorneys hired self-employed public relations specialist Doug Carlson to help her communicate with the media. Carlson was retained either November 23 or 24, 1997. Carlson credibly testified that from late November 1997 through January 1998 he acted as Lindsey's spokesperson, issued approximately 24-30 news releases on her behalf, and arranged approximately 10 interviews for her, receiving approximately \$48,000 from the Trustee for his work, which occupied him nearly full-time. **[Carlson Trial Testimony, 11/18/98]**

312. Carlson's handwritten notes, dated November 24, 1997, state: "LL [Trustee Lindsey] eager to respond to Qs [questions] & set the record straight. When report is leaked." **[Exhibit A-541, bates no. 1010-1011]** Carlson credibly testified these notes are based on information from her attorneys. He also testified he did some "editorial organizing" of Lindsey's education report. **[Carlson Trial Testimony, 11/18/98]** Any such work must have been completed by November 25th, when Lindsey distributed her report in the KSBE boardroom.

313. Working in concert with Trustee Lindsey, Walsh spent substantial time on her education report on November 23 and 24, 1997. He credibly testified that Lindsey deleted the following cautionary language: "Certain references in this report . . . could reflect poorly on the reputation of the Kamehameha Schools." **[Compare Exhibits A-485, p.1, para.1, A-487, p.1, para.1 (earlier drafts) with Exhibit A-486, p.1, para.1 (last draft)]** That cautionary language was not included in the final version of Trustee Lindsey's education report. **[Exhibit A-282, bates no. 1009]**

314. The first Walsh draft **[Exhibit A-485]** warned: "It is essential that the information contained in this report remain confidential." The next draft **[Exhibit A-487]** read: "It is essential that information contained in this report remain confidential until the Board decides on appropriate action." The last amendment made just before release to the Board **[Exhibit A-488]** was initiated by Trustee Lindsey to convey even greater caution than the term "confidential" implied. **[Lindsey Trial Testimony, 1/7/99, Tr. p.38; see Walsh Trial Testimony, 11/17/98]** Thus, the final version carried in bold face type a two paragraph caution ending with the following: **"It is therefore essential that this report in its entirety remain internal to the Board until such time as the Trustees act on the contents of this report."** **[Exhibit A-282, bates no. 1009]** Trustee Lindsey credibly testified she chose this language because she was concerned with "leaks" to the media of boardroom material and wanted to emphasize that this document must not be made public. **[Lindsey Trial Testimony, 1/7/99, Tr. p.38]**

### **G. Trustee Lindsey Distributes Her Report to Co-Trustees**

315. On November 25, 1997, Trustee Lindsey completed her education report, formally entitled "An Imperative for Educational Change - A Report to the Board of Trustees of Kamehameha Schools Bishop Estate Regarding Problems at the Kamehameha Schools." **[Exhibit A-282]** Although it was not on the agenda, she "walked in" her report, hand

delivering one copy to each Trustee present at the November 25, 1997 meeting. [**Lindsey Trial Testimony, 1/7/99, Tr. p.41**]

316. At the meeting Lindsey read aloud the following bold-faced warning to her colleagues [**Lindsey Trial Testimony, 1/7/99, Tr. p.42**]:

**The sole purpose of this report is to provide the members of the Board of Trustees with information which will enable us to determine how well we are fulfilling our Mission. This report is submitted in the interest of reaching consensus on a definition of educational excellence, establishing policies and plans to attain that standard, evaluating our educational performance and improving our service to our students.**

**Information contained herein, if improperly disseminated, could lead to embarrassment for some of our students, which is not intended and which must be avoided. Other information contained herein could be interpreted as criticism of certain staff persons. It is therefore essential that this report in its entirety remain internal to the Board until such time as the Trustees act on the contents of this report.**

[**Exhibit A-282, bates no. 1009**]

317. While looking directly at Trustee Stender, Lindsey told the Trustees present that her report was confidential and if released publicly it would be harmful and damaging to the Kamehameha Schools, students and staff. [**Stender Trial Testimony, 2/12/99, Tr. p.75-76**] Stender took Lindsey's comments so personally that he gave his copy of her report to General Counsel Aipa to hold until he could go to Aipa's office to read it there. [**Stender Trial Testimony, 2/12/99, Tr. p.76; Aipa Trial Testimony, 12/21/99**]

318. Lindsey's handwritten notes of the November 25, 1997 Trustees meeting state: "I passed out the 'An Imperative for Educational Change' in binders. I also asked the Trustees NOT to take this public." [**Exhibit A-283 (original emphasis)**]

319. Lindsey's education report originally consisted of an eleven page narrative and various appendices and attachments. [**Exhibit A-282**] It included a two page memo dated November 25, 1997, to her fellow Trustees in which Lindsey "urge[d] the Board to recognize that we are facing serious problems in the quality of the education we are providing to our students." [**Exhibit A-282, bates no. 1007**] The report emphasized inter alia:

1) A summary of SAT achievement test results, K-12, as reported in the Spring, 1997 PEP study, indicated that KS student performance deteriorates from Grades 1-12. The

longer students stay at Kamehameha Schools, the more poorly they perform, as measured by standardized test scores. **[Exhibit A-282, bates no. 1011]**

2) These findings are corroborated by a PEP technical study conducted by Charles Giuli, Ph.D. His findings, based on 5 cohorts for the period 1991-1995, indicate that:

- Reading scores on standardized student achievement tests declined 26% for Grades 1-5

- Math scores on standardized student achievement tests declined 25% for Grades 1-5  
**[Exhibit A-282, bates no. 1013]**

4) According to the results of the 1997 SAT-9, the Kamehameha Schools Class of 1997 includes more than thirty graduates *who can barely read*. **[Exhibit A-282, bates no. 1013 (original emphasis)]**

5) Our teachers deliver the service KSBE exists to provide. Yet our first grade teachers use a curriculum that has no formal link to the second grade curriculum, or the third to the fourth or fifth to sixth and so on all through our school. An articulated curriculum is one of the most powerful tools available for improving the education we provide our students. Yet Kamehameha Schools does not have an articulated curriculum. **[Exhibit A-282, bates no. 1013]**

320. Lindsey's narrative also stated it was "imperative that the Board of Trustees initiate an investigation of ... [eight specified] irregularities" involving school President Chun and his wife, primarily relating to alleged unauthorized expenditures of funds. **[Exhibit A-282, bates no. 1019-1020]**

321. At the November 25, 1997 meeting, Trustee Wong asked General Counsel Aipa to conduct a legal review of Lindsey's education report. Aipa briefly reviewed the education report, and then stamped it "confidential" and "work product." **[Aipa Trial Testimony, 12/21/98]**

322. Trustee Jervis was out of town on KSBE business and was unable to attend the November 25, 1997 Board meeting. Lindsey went to Jervis' office the next day, November 26, and gave him a copy of her education report. **[Jervis Trial Testimony, 1/4/99, Tr. p.40-41]** Jervis credibly testified Lindsey "pointed out the paragraph there that said it was confidential and the release of it could be detrimental to students or teachers or administrators. She said this was a highly confidential report." **[Jervis Trial Testimony, 1/4/99, Tr. p.41]**

## H. Trustee Lindsey Tells Her Story

323. Shortly after he was retained, Public Relations Consultant Carlson arranged for Trustee Lindsey to do an interview on November 26, 1997, with newspaper reporter Greg Barrett of the Honolulu Advertiser. **[Carlson Trial Testimony, 11/18/98]** Lindsey told Barrett she was willing to be interviewed because the other Trustees and Judge Yim had given her permission to speak out. **[Exhibit A-541, bates no. 33001016; Carlson Trial Testimony, 11/18/98]** Carlson's handwritten notes of the interview indicate that Lindsey and Barrett discussed a wide range of issues relating to the controversy at Kamehameha Schools, none of which raised concerns regarding academic performance. **[Exhibit A-541, bates no. 1015-1031]** Lindsey's comments were reported in a November 27, 1997 front-page story in the Honolulu Advertiser with the banner headline: "Lindsey breaks silence on estate." **[Exhibit A-285]**

324. That same day, November 27, 1997, the Honolulu Star-Bulletin published an essay by five educators which alleged "gross mismanagement" of Kamehameha Schools by Trustee Lindsey. **[Exhibit A-286, admitted for limited purpose of providing context for Trustee Lindsey's response]** With Carlson's assistance, Trustee Lindsey immediately issued a response to the critical essay. **[Exhibit A-471, bates no. 1006-08]** The response was printed in full in the Honolulu Advertiser's November 28, 1997 "Letters and Commentary" **[Exhibit A-288]** and excerpts of the response were contained in a front-page story headlined: "Lindsey condemns critical essay." **[Exhibit A-287]** In her response, Lindsey stated: "I am committed to telling the truth and will do so relentlessly in my own way in the days to come." **[Exhibit A-288]** Student academic performance was not discussed.

325. On November 28, 1997, Trustee Lindsey gave separate interviews to each of the four network-affiliate Honolulu television stations. **[Carlson Trial Testimony, 11/18/98]** Carlson's handwritten notes indicate that Lindsey and the news reporters discussed a wide variety of issues relating to the management and controversy at Kamehameha Schools, but not student academic performance. **[Exhibit A-541, bates no. 0034-44]**

326. Trustee Lindsey also appeared on the morning news shows for the four Honolulu network TV affiliates, discussing the micromanagement allegations and the controversy. **[Jervis Trial Testimony, 1/4/99, Tr. p.39]** She made no statements regarding the academic performance of the students at Kamehameha Schools **[Stender Trial Testimony, 2/12/99, Tr. p.74]**

327. Carlson's handwritten notes, dated December 2, 1997, state the following under the heading "Objectives" : "--to ensure Os' [Trustee Stender's] cred. [credibility] is damaged . . . --to ensure LL's [Trustee Lindsey's] standing is elevated." **[Exhibit A-541, bates no. 0047; Carlson Trial Testimony 11/18/98]** To elevate Trustee Lindsey's standing, Carlson testified, he made her accessible to the media in prearranged interviews and disseminated news releases regarding the controversy on her behalf and arranged the December 5, 1997 Advertiser interview he attended with Lindsey. To damage Stender's

credibility he generated two news releases (one involving a business transaction; the other about Stender and a Trustee/income-beneficiary of Campbell Estate where Stender was previously CEO). It was Carlson's practice to have his clients review all news releases. [Carlson Trial Testimony 11/18/98]

#### **I. Trustee Lindsey's Education Report Sent to Judge Yim and President Chun**

328. Trustee Lindsey through KSBE private counsel McCorriston's law firm sent a copy of her education report to Judge Yim, which he received on December 2, 1997, three days before his final report was due to be filed in court and two days before it was actually filed. [Yim Trial Testimony, 2/23-24/99] Yim was not expecting the report and found it rather tardy in relation to his deadline. He did not incorporate Trustee Lindsey's findings in his report. [Id.]

329. At the December 2, 1997 Board meeting, the Trustees decided to give a copy of Lindsey's education report to President Chun so that he could respond to it. [Jervis Trial Testimony, 1/4/99, Tr. p.43; Stender Trial Testimony, 2/12/99, Tr. p.76; Lindsey Trial Testimony, 1/7/99, Tr. p.52-53] President Chun was initially asked to respond within two days, by December 4, 1997, but he requested additional time and was given until December 9, 1997. [Jervis Trial Testimony, 1/4/99, Tr. p.43-44; Chun Trial Testimony, 12/18/99]

330. Lindsey's handwritten notes of the December 2, 1997 Board meeting state: "--Permission to give a copy to Michael--Allow him to respond--Only 5 copies--What should we do Michael to review it Michael to respond to it Impress upon Mike the confidentiality Trustees trying to bring resolution." [Exhibit A-293]

331. On December 2, 1997, Trustee Wong gave President Chun his copy of Lindsey's report and told him that the Board wanted him to respond to it. Trustee Lindsey told Chun that this was a "confidential" report bound by the "attorney-client privilege" and that it contained information and findings "damaging" to the school and to Chun. Lindsey said that Chun needed to handle the Report "with extreme care." [Chun Trial Testimony, 2/18/99; accord Jervis Trial Testimony, 1/4/99, Tr. p.44-45; Stender Trial Testimony, 2/12/99, Tr. p. 78-79]

#### **J. The Fact Finder Files His Report Under Seal and Each Trustee Receives a Copy**

332. On December 4, 1997, General Counsel Aipa sent a memo to all Trustees stating: "Enclosed is a copy of Judge Yim's Final Report of Fact Finder which was filed **UNDER SEAL** with the court today. Please keep this document confidential pursuant to the court's order." [Exhibit A-625 (original emphasis)] Trustee Jervis testified that the Trustees received their copies of the Fact Finder's Final Report on December 4, 1997. [Jervis Trial Testimony, 1/4/99, Tr. p.48]

333. At trial, Trustee Lindsey denied receipt of the Yim report on December 4, 1997 [**Lindsey Trial Testimony, 1/7/99, Tr. p.55**] and did not recall discussing the report on that date with her public relations adviser, Doug Carlson [**id. at 56**]. The credible evidence shows she received and read the Fact Finder's Final Report and then called her public relations consultant.

334. Carlson's handwritten notes for December 4, 1997, confirm Lindsey made the following statements to him that day: "I've seen the fact-finder report and I'm scared to death . . . F.F.--completely missed the point. . . Kill the Messenger." [**Exhibit A-541, bates no. 0048; Carlson Deposition 10/19/98, p.146, line 20**]; "ignored the primary issue--President Michael Chun." [**Exhibit A-541, bates no. 0049**]. In that same conversation Lindsey said: "I've seen the FF [Fact Finder] report & I'm devastated. I am the target for everything that's perceived to be wrong at K.S.[Kamehameha Schools]" [**Exhibit A-541, bates no. 0049; Carlson Trial Testimony, 11/18/98**] Following his conversation with Trustee Lindsey, Carlson began drafting a news release for all media and arranged for her interview with Greg Barrett of the Honolulu Advertiser. The news release was distributed the next day which is when she met with Barrett.

#### **K. Trustee Lindsey Releases Her Education Report to the News Media**

335. On December 5, 1997, Trustee Lindsey gave the narrative portion of her education report to Honolulu Advertiser reporter Greg Barrett. [**Lindsey Trial Testimony, 1/7/99, Tr. p.57**] It consisted of the first 12 pages of the report, excluding her cover memo to fellow Trustees and all the exhibits. [**Lindsey Trial Testimony, 1/7/99, Tr. p.57**] Lindsey redacted the entire bold-faced caution she had read aloud and emphasized to the Trustees. [**Lindsey Trial Testimony, 1/7/99, Tr. p.41-42, 58; Exhibit A-282, bates no. 1009**] Lindsey testified she eliminated those paragraphs from Barrett's copy because that warning was for the Board. [**Lindsey Trial Testimony, 1/7/99, Tr. p.58-59**]

336. Trustee Lindsey interviewed with Barrett in her KSBE office with Carlson present. At one point Lindsey stepped out; Trustee Wong passed by and reporter Barrett briefly engaged Wong in conversation, gaining quotes as to Wong's reaction to the report. [**Wong Trial Testimony, 3/4/99, Tr. p.5-6**] Neither Chairman Wong nor any other Trustees had foreknowledge Lindsey was releasing her report. [**Id. at 5; Lindsey Trial Testimony, 1/7/99, Tr. p.70; Stender Trial Testimony, 2/12/99, Tr. p.80**]

337. On December 6, 1997, the Honolulu Advertiser published a front-page story under the banner headline: "Trustees say school failing to teach, money misspent." [**Exhibit A-299 in evidence for quotes attributed to Trustees and notice as to all else**] The story described Lindsey as "'lead trustee' for schools" [**Exhibit A-299, p.1, col.5**] and gave notice of Trustee concerns about "poor student performance, a faulty curriculum and unauthorized spending of school money." [**Exhibit A-299, p.1, col.2**]. The article summarized eighteen criticisms from the education report including *inter alia*: "The longer students stay, the more poorly they do on standardized tests"; and "More than 30 members of the Class of 1997 could barely read at Grade 12 levels." [**Exhibit A-299,**

**p.3]** The article further recited various fiscal concerns regarding the Chuns also taken from the Lindsey education report. **[Exhibit A-299, p.2-3]**

338. Seeking broad coverage of his client's education report, Carlson disseminated a news release on December 5, 1997, to several news agencies. **[Carlson Trial Testimony, 11/18/98; Exhibit A-296]** It recites seven low academic performance examples from the education report, including "the longer students stay at Kamehameha Schools the more poorly they perform as measured by standardized test scores." **[Exhibit A-296, p.1]** The news release omits reference to specific criticisms of Dr. Chun and his spouse.

339. The December 5 news release describes Trustee Lindsey's education report and her motive for releasing it to the public as follows: "Trustee Lokelani Lindsey today released data that she said reveals `serious problems' about the Kamehameha Schools' ability to adequately educate its students. Lindsey said she made the information public in part as a response to criticism directed at her for her involvement in the Kamehameha Schools as `lead Trustee' for the Estate in education matters." **[Exhibit A-296, p.1]** It led to further newspaper and other media coverage of the report. **[Exhibit A-300, Carlson Trial Testimony, 11/18/98]**

#### **L. Trustee Lindsey's Motive for Publicizing Her Education Report**

340. At trial Trustee Lindsey offered several reasons for the public release of her report. She claimed the other Trustees by inference on November 10, 1997, authorized her actions by giving her permission to tell her story. **[Lindsey Trial Testimony, 2/4/99, Tr. p.176]** The Court finds this explanation incredible. Her fellow Trustees did not know the contents of her report until two weeks later. While Lindsey had drafted one 1996 memorandum about academic performance issues **[Exhibit D-990]** it was not sent to her colleagues. Work on her educational report did not begin until the day after the Yim meeting, when Walsh became involved. The contents of her unsent draft memorandum of November 17, 1997, had been provided in bankers boxes to Judge Yim but not to other Trustees. **[Lindsey Trial Testimony, 1/6/99, Tr. p.118; see Lindsey Trial Testimony 2/1/99, Tr. p.185-86 ("I had submitted a report to Pat Yim that the Trustees did not have . . ."); see Exhibit A-281; Yim Trial Testimony, 2/23-24/99]** Finally, nothing that happened at the November 10, 1997 Board meeting could or did supersede the later events of the November 25, 1997 Board meeting when Lindsey herself dramatically emphasized the essential need to keep the document completely confidential.

341. There is no evidence to support the assertion that the other Trustees authorized Trustee Lindsey to release her highly confidential report to the media.

342. At trial Lindsey admitted the report was to remain "internal to the Board" until the Board addressed it, and she agreed the Board had not discussed her report as of December 2, 1997, when Trustees gave it to President Chun for response. **[Lindsey Trial Testimony, 1/7/99, Tr. p.73-74]** She also agreed it had not been discussed by the Board as of December 5, when she released it and interviewed with Barrett. **[Id. at 59]**

343. At one point testifying, Lindsey denied the report was confidential, attempting to create a distinction based on internal to the Board. **[Id. at 67-69]** She asserted that the December 2, 1997 Board action of giving the report to President Chun for response made the report external to the Board. **[Id. at 54]** But she did not tell the Board then (or ever) that she no longer regarded the document as confidential. **[Id. at 53]**

344. Lindsey next testified she released her report to the media because she received a telephone call from someone who said President Chun had reproduced the report and given copies to other people who were helping him respond. **[Id. at 59]** In contrast, Trustee Stender testified he assumed Chun would use staff to generate a meaningful response to Lindsey's report. Lindsey testified she received one call with specific information naming school staff and an outside attorney, Douglas Ing,<sup>(21)</sup> who had gathered at the campus administration building to help Chun. **[Id. at 59-60]** She did not verify the information believing it credible because highly detailed. **[Id. at 63]**

345. In fact, President Chun had assembled several staffers to get technical data and other information necessary to respond to Lindsey's use of statistics and alleged financial mismanagement. Chun credibly testified that the Lindsey report was not reproduced and distributed to them until the December 6, 1997 Barrett news article appeared, at which time Chun called his friend and attorney Ing to join them. **[Chun Trial Testimony, 2/18/98; see Freitas Trial Testimony, 12/10-11/98 (Chun refused Freitas' request for a copy, explaining the report was confidential)]**

346. When confronted with a different motive for releasing the report, Trustee Lindsey responded as follows:

Q. Mrs. Lindsey, you thought that releasing your report to the news media would, quote, balance the scales a little bit by bringing, letting the public know your concerns; isn't that correct?

A. That's true.

Q. And you would be able to balance the scales before Judge Yim's fact finding report was released; am I correct?

A. It wasn't balancing the scales for Lokelani Lindsey. It was balancing the scales for the students at Kamehameha Schools. I didn't take this out into the public. It was taken out into the public by Oz Stender. And there were repeated articles with allegations, rumors, innuendos. I thought if the public needed, since it was out there anyway, some factual data, and I thought by bringing this factual data to the public we would see a change in the school. Indeed, we did.

Q. Mrs. Lindsey, my question was you thought you were able to balance the scales before Judge Yim's fact finding report was released; am I correct?

A. That was not what I had in mind.

**[Lindsey Trial Testimony, 1/7/99, Tr. p.65-66]**

Q. Mrs. Lindsey, in releasing your education report to the media, when you knew that Judge Yim's fact finding report would be released on December 12, 1997, did you put your personal interests before that of the Kamehameha Schools and its students?

A. I don't believe I did. I believe that Judge Yim's report -- in fact I know Judge Yim's report did not have anything to do with my releasing that report. What had triggered the release of that report is the mere fact that the report did not stay internal to the board, that the report was taken out of the board room, that the report was shared with other people. And I got a phone call to that effect. And that indeed people did not do what they said they were going to do.

**[Id. at 73-74]** These responses contrast with the motive ascribed to her in the news release generated on her behalf when the report was released on December 5, 1997. **[Exhibit A-296, p.1 ("[S]he made the information public in part as a response to criticism directed at her . . . as 'lead Trustee' for the Estate . . .")]**

347. Lindsey also testified to her sense of urgency in getting Board action on her education report in order to effect changes before the ensuing semester. How this might explain a need to release the report is not clear. Because her report does not contain any specific proposals that were capable of immediate implementation short of replacing Chun as president **[Exhibit 252, bates no. 1017-1018]** her sense of urgency for Board action is even less clear. She did express disappointment when the Board refused to discuss the details of her 12-page summary and instead gave the entire report to Chun for response.<sup>(22)</sup> In any event, her sense of urgency was not shared by the other Trustees who by the end of trial had not formally considered the contents of her report or Chun's responses. **[Wong Trial Testimony, 3/9/99]**

348. In a series of illogical and contradictory trial responses, Trustee Lindsey has failed to explain the breach of her own clear mandate for secrecy of the Lindsey education report.

349. Trustee Lindsey's deliberate release of the highly critical education report one day after her panicked response to the Yim report and without logical explanation was an

imprudent, self-interested decision which she knew risked harm to Kamehameha Schools personnel, students and reputation.

350. As set forth in detail infra Lindsey's action was all the more egregious because she did not intend for the report to be balanced, she did not use all the academic performance information she had that would have provided balance, she cited as problems matters that already had been resolved by the Board, she disseminated in part inaccurate, damaging statistics on student performance, she made public accusations about personnel alleging fiscal improprieties, and she broke the most fundamental rules of fairness by releasing the document before receiving or considering the school president's response, which was forthcoming in four days.

351. In addition, by publishing the report rather than confining the issues it raised to the boardroom, Trustee Lindsey violated NAIS Principles of Good Practice for Independent School Trustees as follows:

Principle 5: A trustee accepts and supports board decisions and respects board confidentiality.

Principle 7: A trustee has the responsibility to support the school and its head and to demonstrate the support within the community.

Principle 8: . . . A trustee who learns of an issue has the obligation to bring it to the head of school, or to the board chair, and must not deal with the situation individually.

[**Exhibit A-553, p.1; accord, Peters Trial Testimony 2/9/99; Witt Trial Testimony, 2/22/99, Tr. p.47, 52; Exhibit D-983, p.16 (Peterson Report)**]

### **M. Response to Release of Lindsey's Education Report**

352. The December 6, 1997, Advertiser article [**Exhibit A-299**] and related news accounts negatively affected students at every grade level at Kamehameha campus. The elementary level students manifested low self-esteem. [**Hoe Trial Testimony, 11/12/98, Tr. p.47-48**] Upper level students additionally expressed anger and concern about the impact of Lindsey's report on their college admissions. [**Galdeira-Decosta (then junior class president) Trial Testimony, 11/20/98 ("hurt, shocked and angry"); Ciara Lacy (then senior class president, now at Yale) Trial Testimony, 11/27/98 ("embarrassed, hurt and slightly disappointed"); Lance Tamashiro (then senior, now at M.I.T.) Trial Testimony, 11/27/98 (students sarcastically joked they were "stupid Hawaiians"; Tamashiro never met anyone from Kamehameha who couldn't read); Hannahs Trial Testimony, 12/2/98 ("embarrassment" in daughter's essay on the**

**subject)]** President Chun who was personally exposed with his wife to financial mismanagement allegations admitted to "anger" and feeling "devastated." [**Chun Trial Testimony, 2/18/99**]

353. The teachers were immediately occupied with classroom-wide counseling on the first day after the weekend news article appeared. [**Follmer (9th and 10th grade math teacher) Trial Testimony, 11/12/98 (reaction of students "Mr. F, we're not very good, are we?"; Truesdel (science teacher) Trial Testimony, 12/2/98 (had trouble teaching that Monday: "Are we really that bad?"); Ramos Trial Testimony 12/3/98 (had discussions with students); Behenna Trial Testimony, 11/19/98**]

354. On December 8, 1997, Na Kumu wrote to the Attorney General in response to, among other things, Lindsey's education report and its release. [**Exhibit A-566**] "Today we saw in our classrooms the most important reason for the Board to be immediately removed. Our students have been deeply and personally affected by recent statements Trustee Lindsey offered the media. While they know they are achieving at high levels, they were outraged and bewildered to see themselves and Kamehameha degraded in the manner Trustee Lindsey employed." [**Exhibit A-566, p.5**]

355. On December 9, 1997, as required, President Chun provided his response to the Trustees. [**Exhibit D-433**]<sup>(23)</sup>

356. On December 9, 1997, Board Chair Wong had KSBE staffer Walsh draft a letter [**Exhibit A-482**] to be sent to parents of school students addressing the media coverage of Lindsey's report. [**Walsh Trial Testimony, 11/17/98**] Trustee Jervis stopped the final version [**Exhibit A-304**] from going out because Jervis wanted the letter to be sent by all Trustees, not simply with the Chair's signature. [**Wong Trial Testimony, 3/4/99**]

357. On December 11, 1997, Trustee Jervis sent Lindsey a memorandum, stating that the release of her education report was "grossly irresponsible". [**Exhibit A-671, p.2**]

358. On December 12, 1997, Trustees Stender and Jervis sent Lindsey a letter demanding that she resign as a Trustee. [**Exhibit A-320**]

359. On December 16, 1997, Trustee Stender sent Lindsey a memorandum requesting that she "immediately apologize to the Kamehameha Schools' students, teachers, parents, administrators, and ohana for the damage you have caused." [**Exhibit A-328**]

360. On December 29, 1997, not having received a response to their earlier demand for resignation, Trustees Stender and Jervis filed this Petition for Removal of Lindsey as a KSBE Trustee. [**Stender Trial Testimony, 2/12/99, Tr. p.83**]

361. Despite being told by Secondary School Principal Ramos that release of her report had a negative impact on everyone and that the report itself did not accurately reflect the secondary school performance [**Ramos Trial Testimony, 12/2-3/98**], at trial Trustee Lindsey maintained it was helpful to go public with the document: "Depends how you

define harmful. I think that it caused anxiety. And I think they were emotionally upset about it. But I also think that people started paying attention to the data. And so therefore it was helpful." [Lindsey Trial Testimony, 1/7/99, Tr. p.71] <sup>(24)</sup>

362. Board Chair Wong agreed that the information, if improperly disseminated, could lead to embarrassment of Kamehameha's students. He further agreed that other information could be interpreted as criticism of certain staff persons, and that it was therefore "essential that this report remain internal to the Board." [Wong Trial Testimony, 3/9/99] In speaking of the campus unrest and teacher frustration with administration, Trustee Lindsey and himself, Wong testified: "I want the judge to know that the controversy itself created tremendous problems for this Estate. People were taking sides, they were splitting--friends were against friends. I mean, it's crazy. It's absolutely crazy." [Wong Trial Testimony, 3/5/99, Tr. p.29]

## **V. TRUSTEE LINDSEY'S EDUCATION REPORT LACKED COMPLETENESS, ACCURACY AND BALANCE**

### **A. Trustee Lindsey Not Intend Balanced Report**

363. Trustee Lindsey admitted that her education report was not a "complete report as to the quality of education of the Kamehameha Schools," and "it was not intended to be." [Lindsey Trial Testimony, 1/7/99, Tr. p.20]

364. Lindsey also confirmed her education report was not intended to be a "balanced and reasonable evaluation" of the quality of the education of the Kamehameha Schools. [Lindsey Trial Testimony, 1/7/99, Tr. p.20] Lindsey said her report had a different "focus." She testified: "If I were writing a report that had to talk about the overall quality of the school, I would have written it differently." [Id. at 16]

365. Trustee Lindsey agreed that part of her education report is "biased against Dr. Chun." [Lindsey Trial Testimony, 1/7/99, Tr. p.32]

### **B. Trustee Lindsey's Failure To Use Academic Information Available to Her That Would Provide Balance**

366. Trustee Lindsey acknowledged she did not include all the information available to her in her education report. [Lindsey Trial Testimony, 1/7/99, Tr. p.21]

367. In the Fall of 1997, prior to the release of Lindsey's education report, Secondary School Principal Ramos told Lindsey that many juniors and seniors who took the SAT-9

test in the Spring of 1997 had not taken the test seriously. **[Ramos Trial Testimony, 12/2/98]** Ramos explained to Lindsey that, particularly for the seniors, the test results were not going to go on their school transcripts, and many seniors were "just fooling around" during the test. **[Ramos Trial Testimony, 12/3/98]** Nonetheless, Lindsey used the Spring 1997 SAT-9 test data as the basis for the conclusion in her education report that "the Class of 1997 includes more than thirty graduates who can barely read." **[Exhibit A-282, bates no. 1013 (original emphasis)]**

368. On Friday, November 21, 1997, Lindsey went to the Kamehameha Program Evaluation and Planning Division (PEP) office on campus and spoke to Charles Giuli, a Ph.D. analyst. **[Exhibit D-500]** Lindsey asked for information regarding testing and achievement at the school and said she wanted to receive it by Monday, November 24, 1997. **[Exhibit D-500]** The PEP staff was not clear about Lindsey's purpose but immediately began assembling the requested information. **[Exhibit D-500]** On November 21, 1997, information was informally given to Lindsey, including PEP analyst Giuli's draft technical report of longitudinal assessment. **[Tibbetts Trial Testimony, 2/8/99]** This is confirmed by Lindsey's handwritten note "11-21-97" on Giuli's Draft PEP study, which is included in the appendices to Lindsey's education report **[Exhibit A-282, bates no. 1021]**

369. On November 25, 1997, Lindsey received from President Chun certain materials she had requested on November 21, 1997 from Giuli in the PEP Office. **[Lindsey Trial Testimony, 1/6/99, Tr. p.124-126; Exhibit D-476]** The materials received by Lindsey included information showing an increase in verbal and math SAT College Board scores between 1981-1997 **[Exhibit D-497]** and an increase in PSAT/National Merit qualifying scores between 1982-1998. **[Exhibit D-498]** Lindsey did not include any of this information in the final version of her education report.

370. Upon receiving Giuli's memo, Lindsey did not consult with Giuli or any outside educational experts in preparing her report:

Q. Now when you were putting together this Imperative for Educational Change, did you go outside of Kamehameha Schools to talk to any outside educational experts?

A. About?

Q. About your findings, about the data that Dr. Giuli presented?

A. No.

Q. And why didn't you do that?

A. Because I interpreted the data myself based on my experience of interpreting test data for years.

**[Lindsey Trial Testimony, 2/1/99, Tr. p.208]**

371. In her memorandum to the other Trustees on November 26, 1997, amending pages 11 and 12 of her education report, Lindsey did not include any of the additional information she had received from the PEP office. **[Lindsey Trial Testimony, 1/7/99, Tr. p.13]** At the Board meeting on December 2, 1997, Lindsey did not provide the Trustees with any amendments or addendum to her education report. **[Id. at 14]** When Lindsey released her education report to the news media on December 5, 1997, she did not amend or modify her report to include any of the information she received from the PEP office on November 25, 1997. **[Id. at 11, 14]** Lindsey did not tell the news media that her education report excluded information she had available to her. **[Id. at 31]**

372. At trial Lindsey testified: "I want to make sure the Court understands even though the information was given to me, I didn't read it." **[Lindsey Trial Testimony, 1/7/99, Tr. p.31]**

## **1. Secondary School Data Ignored**

373. The assessment program at Kamehameha Secondary School was designed to assess post-high preparation and fundamental skills. Post-high preparation was assessed, in part, by examining the percentage of students attending two and four year colleges and scores on the College Board exam. Fundamental skills were measured in part by scores on the CTP exam and the College Outcome Measures Program (COMP) exam, and grade level subject matter (i.e. biology, history) tests, developed internally or nationally. **[Kukea Trial Testimony, 2/10/99; e.g. Exhibit A-645]**

374. Every year, the Kamehameha Secondary School publishes a "Secondary School Portfolio" and submits copies to faculty, the school president, Trustees, and other interested people. **[Kukea Trial Testimony, 2/10/99]** The portfolios contain comprehensive data on student performance in a number of areas, including information on the College Board scores, number of students attending college and student writing performance. **[Id.; Exhibits A-643 (1993), A-644 (1994), A-645 (1995), A-646 (1996), A-647 (1997)]**<sup>(25)</sup>

375. Lindsey agreed that the portfolios were provided to the Trustees annually. **[Lindsey Trial Testimony, 2/5/99, afternoon session, Tr. p.3-4]** She denied reviewing them before publication as part of her responsibilities as lead Trustee for communications because a portfolio "was an internal document." **[Id. at 6]** This contrasts with KSS

curriculum coordinator Kathy Kukea's specific recall that Lindsey reviewed the draft 1995 portfolio as part of the communications review because Lindsey asked to include a picture of the Trustees in the front and change the layout of one page but did not have any additional comments on the information contained in the portfolio. Kukea stated she was never contacted by Lindsey about portfolios with that one exception. **[Kukea Trial Testimony, 2/10/99]** The Court finds Kukea's specific recall credible. The Court further finds portfolios were "external publications" as defined in the May 1994 campus memo announcing Lindsey's parameters for communication review, a copy of which Lindsey received. **[Exhibit A-28]** That memo defines external publications to include "any materials that are distributed to all KSBE staff . . . ." **[Id. at 2]** Handbooks and curriculum guides are among the materials expressly included. **[Id.]** Thus, the Court finds Lindsey was sent annual portfolios in draft form for her review.

376. Lindsey acknowledged that the Education Group's annual reports which include performance data are provided to the Trustees, and she did not include any of this information in her education report. **[Lindsey Trial Testimony, 1/7/99, Tr. p.7-8]**

377. The data Lindsey ignored shows the secondary school achieved progress in many areas. **[Exhibit D-433, p.1-2]** For example:

KSS graduating class Scholastic Assessment Test (SAT) verbal scores, on average, have improved from 481 in 1981 to 515 in 1997. The average SAT math score improved from 502 in 1981 to 557 in 1997.

Kamehameha's SAT verbal and math subtest scores have improved at a faster rate than the national average and are both currently above the national average.

The number of KSS graduates enrolling in four year colleges steadily increased from 54% in 1981 to 74% in 1996.

The writing skills of Kamehameha's students, as measured by COMP, are well above the levels achieved by incoming college freshmen as measured on a national average.

**[Exhibit D-433, p.2]**

378. In November 1997, KSS curriculum coordinator Kukea prepared a Staff Report for the Trustees regarding the Preliminary Scholastic Assessment Test Preparation Program ("PSAT Program"). **[Exhibit A-651; Kukea Trial Testimony, 2/10/99]** The Staff Report showed since the inception of the PSAT Program in 1991, Kamehameha Schools had 27 National Merit Semifinalists and 127 Commended Scholars. **[Exhibit A-651, p.3]** Lindsey's education report excluded reference to merit scholars.

379. Lindsey correctly reported that only 48% of the 1997 graduating class achieved the minimum College Board scores for entrance to UH. **[Tibbetts Trial Testimony, 2/8/99; Exhibit D-433, Response to Statement 3]** At the same time, Lindsey ignored available historical data showing an increase over time in College Board scores.<sup>(26)</sup> This information was routinely included in the secondary school portfolios. **[Kukea Trial Testimony, 2/10/99; Exhibit A-643; Exhibit A-644; Exhibit A-645]** PEP also provided this information to Lindsey, upon her request, on November 21, 1997. **[Tibbetts Trial Testimony, 2/8/99; Exhibit D-497]**

380. On January 8, 1998, President Chun submitted a supplemental response to Lindsey's education report. **[Exhibit A-337]** It sets forth in narrative and graph figures comprehensive data on secondary school student performance. At trial, PEP analyst Tibbetts credibly testified that she sent Lindsey, before her education report was completed, all of the data which is the basis for figures 1 through 5, 6 through 9, 11 through 17 in the supplemental response. **[Tibbetts Trial Testimony, 2/10/99]** In addition, Tibbetts found the data for figures 1 through 4, 6 through 9, 11 and 12 of the supplemental response in the 1996 Secondary School Portfolio. **[Id.; compare Exhibit A-646 p.12, 38, 47, 57, 61, 62, 68 with Exhibit A-337 figures noted in text]**

## **2. Elementary School Data Ignored**

381. As noted in a summary of 1998 standardized achievement test results: "Kamehameha Elementary School ranked at the 99th percentile among schools nationwide for reading and mathematics for all grade levels." **[Exhibit A-634, p.ii, 45]**

382. On June 24, 1997, PEP analysts Kathy Tibbetts and Charles Giuli met with Trustee Lindsey **[Lindsey Trial Transcript, 1/7/99, Tr. p.8-9]** to discuss the 1997 SAT-9 achievement test results and KES test scores, including the dip in the middle grades which PEP was monitoring. The conversation noted that analysis of the KES dip in scores was further complicated by the change from the CTP-III standardized test to the SAT-9 and a shift of the 1996 testing to Winter to coincide with grade 7 admissions testing. **[Tibbetts Trial Testimony, 2/8/99]** At trial Lindsey testified she couldn't remember if she included any of the information given to her in June 1997 in her education report. **[Lindsey Trial Testimony, 1/7/99, p.9-10]**

383. During the Summer of 1996, Lindsey requested that KSS curriculum coordinator Kukea and PEP program evaluation specialist Tibbetts complete a report containing a longitudinal study of test scores of Kamehameha students. **[Tibbetts Trial Testimony, 2/8/99; Kukea Trial Testimony, 2/10-11/99; Exhibit D-433, Attachment 1-3]** This report in draft was completed in July 1996. **[Exhibit D-433, Attachment 1-3]** The longitudinal data in that report, which was available to Lindsey, demonstrates a dip after grade 1, then rising again approaching grade 6. **[Tibbetts Trial Testimony, 2/8-9/99]**. It also analyzed SAT data for KES lottery classes grades 1 through 6 (the only classes for which complete data was then available): The SAT reading scores showed KES students entered and remained at comparable levels to the national norm group. **[Exhibit D-433,**

**Attachment 1-3, Chart 1]** The math SAT data showed KES students entered and remained above the national norm. [**Id. Chart 2]**

384. None of this data found a place in Lindsey's educational report.

### **C. Trustee Lindsey Cites Problems Already Resolved**

385. Trustee Lindsey's education report included six "notable findings" [**Exhibit A-252, bates no. 1011]** which she admitted at trial had already been addressed by the Board. [**Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.26-29]**

386. Specifically, the Board already took action on educational technology and, through the GoForward decision, eliminated programs Lindsey's education report cited for not being cost-effective or successful. Those programs included the Parent-Infant Education Program, the Traveling Preschool Program, the Alternative Education Program, the Adult Continuing Education Program (for GEDs) and the Kamehameha Early Education Program (KEEP) to train DOE teachers. [**Exhibit A-252, bates no. 1013-1014]**

### **D. Trustee Lindsey's Report Contains Inaccurate, Damaging Statistics On Student Performance**

#### **1. Longer Stay Worse Do**

387. Trustee Lindsey's education report used the K-12 SAT achievement test results from the Spring 1997 test to justify her statement that the longer students stay at Kamehameha Schools, the more poorly they perform on standardized tests. [**Exhibit A-282, bates no. 1011, 1018]** Numerous witnesses credibly testified that Lindsey distorted the data analysis by incorrectly using "cross sectional" data (data of different students for one point in time) to suggest a decline in performance over time. [**Kukea Trial Testimony, 2/10-11/99; Tibbetts Trial Testimony, 2/10/99; Ako Trial Testimony, 11/25/98; Popham Trial Testimony, 2/3/99, Tr. p.35-36; accord, Exhibit D-433, Response to Statement 1]**

388. The education report included two misleading graphs of reading and math scores to illustrate her point. [**Exhibit A-282, bates nos. 1011, 1012]** Those graphs, showing cross-sectional data of SAT-9 scores for kindergarten through grade 12, only depict the percentile ranks of thirteen different groups of students in April 1997. The graphs also mixed results from randomly admitted and competitively admitted students, without noting the difference in admissions criteria for each respective population. [**Tibbetts Trial Testimony, 2/8/99; Exhibit D-433, Response to Statement 1]**

389. Longitudinal studies (i.e. studies of the same students as they progress through Kamehameha's programs) of KES students indicate test scores are maintained or improve

at Grade 6, when compared to entrance scores. **[Tibbetts Trial Testimony, 2/8/99; Kukea Trial Testimony, 2/10-11/99; Exhibit D-433; Response to Statement 1 and Attachment 1-1; Exhibit A-632 (K-6 reading scores); Exhibit A-633 (1-6 math scores)]**

390. At KES, students in the class of 2003, admitted under the lottery system, increased their average reading scores from the 58th percentile at 1st grade to the 60th percentile at 6th grade although there were "dips" in between. Similarly, the average math scores increased from the 74th percentile at 1st grade to the 77th percentile in 6th grade. **[Tibbetts Trial Testimony, 2/8/99; Exhibit D-433, Attachment 1-1 (comparison based on SAT-8 and SAT-9 scores but not using CTP-III for comparison)]** For competitively admitted students, test scores dropped from grade one to grade two but increased in the fifth and sixth grades. **[Tibbetts Trial Testimony, 2/8/99]**

391. Exhibits A-632 (Multi-Cohort Trends in Reading Related Tests) and A-633 (Multi-Cohort Trends in Math Tests) graph the reading and math test scores for four different cohort groups of students at KES, the classes completing grade 6 in 1998, 1999, 2000, and 2001. In both reading and math, the scores of the competitively admitted students maintained or exceeded the private school norm group. **[Exhibit A-632; Exhibit A-633]** For competitively admitted students, average cohort scores increase in fifth and sixth grades by at least 5 points. The grade 6 class of 1998, left KES (at grade 6) with a higher performance on standardized tests than when they entered at Kindergarten. In math, KES students at grade 6 are performing at the 90th percentile. Successive cohort group scores are also higher than the previous class and are "layered" above the earlier class. **[Tibbetts Trial Testimony, 2/8/99; Exhibit A-632; Exhibit A-633]**

392. At the secondary level, the classes of 1996, 1997, 1998 and 1999 improved their average percentile scores in math, as measured by the CTP III exam, and either maintained or improved their average percentile scores in reading as measured by the same exam. **[Exhibit D-433, Attachment 1-3, Charts 15, 16, 17 and 18 (1996 draft longitudinal study)]** Kathy Kukea, a co-author of the July 1997 draft study annotated the relevant charts as follows: "KES and Secondary school students enter and remain above the national norm from Kindergarten to Grade 12." **[Id. Chart 4]** Similarly, in mathematics, "KES and Secondary Schools [students] enter above the national norm" and "grow at a faster rate than their high ability peers around the country." **[Id. Chart 5]**

393. Trustee Lindsey's report incorrectly concluded that Kamehameha students perform more poorly on standardized tests the longer they stay at Kamehameha.

## **2. Giuli Report**

394. Trustee Lindsey's education report cited a draft PEP technical study completed by Charles Giuli to justify her claim that the longer children stay at Kamehameha, the worse they perform as measured by standardized tests. **[Exhibit A-282, bates no. 1013]** Lindsey relied on her own expertise in evaluating Giuli's report and adopting its contents.

**[Lindsey Trial Testimony, 2/1/99, Tr. p.208]** Her review failed to discover significant flaws in Giuli's report.

395. Giuli's colleague at PEP, Kathy Tibbetts, testified that Giuli (1) did not adequately consider regression to the mean in his analysis; (2) failed to note the "dip" in other private school norm groups; and (3) omitted information from the June 1997 meeting he had with Trustee Lindsey and PEP analyst Tibbetts. **[Exhibit D-433, Attachment 1-3; Tibbetts Trial Testimony, 2/8/99]** In addition, Giuli's results are contradicted by the pattern of increasing test scores found in the draft July 1996 longitudinal study by Tibbetts and Kukea, which they produced at Lindsey's request.

396. Another flaw in Giuli's report was use of incomplete and selective data for grades 1 through 6. He did not follow the same group of students as they progressed through Kamehameha. **[Kukea Trial Testimony, 2/11/99; Tibbetts Trial Testimony, 2/8/99]** Rather, Giuli took the average of the test score results for five groups of students at grade 1 and compared them to the average test score of the classes that were in grades 4 and 5 in 1997. The comparison is misleading because each successive new class at KES scored higher than the previous class for the first three competitively admitted classes. **[Exhibit D-433, Response to Statement 2]** Kukea described the report as having such gross errors in methodology that there was no point in talking about the data. **[Kukea Trial Testimony, 2/11/99]**

397. Ph.D. expert in educational testing, assessment and evaluation James Popham is an Emeritus Professor in Education from UCLA with nearly thirty years of experience in educational testing, measurement and evaluation, who has received numerous professional awards in education, authored over 20 books, 27 chapters in books, and 175 articles. **[Popham Trial Testimony, 2/3/99, Tr. p.4-12; Exhibit A-548]**

398. Popham opined that Lindsey's education report fails to address the impact of regression to the mean. **[Popham Trial Testimony, 2/3/99, Tr. p.36-38]** Regression to the mean is a well known phenomenon, discovered over 110 years ago, which establishes that high or low test scores, upon retesting, will move or regress to the mean or average. **[Popham Trial Testimony, 2/3/99, Tr. p.36-37]**<sup>(27)</sup> Popham testified Guili's draft technical report, attachment A to Lindsey's education report **[Exhibit A-282, bates no. 1021-1055]**, does not adequately address regression to the mean. **[Popham Trial Testimony, 2/3/99, Tr. p.38]** When regression to the mean is considered, the scores of Kamehameha students are better than expected and the Kamehameha teachers and students "ought to feel rather proud." **[Id. at 50]** Failure to recognize regression is a common way to distort data. **[Id. at 51]**

399. PEP analyst Tibbetts credibly testified that statistical theories of regression to the mean and the ceiling effect are factors in the declining KES test scores in the middle grades. **[Tibbetts Trial Testimony, 2/8/99]** The ceiling effect occurs when students cannot score higher because they are already scoring at high levels on a test. **[Tibbetts Trial Testimony, 2/8/99; Exhibit A-652]**

400. Exhibit A-652 shows the distribution of the SAT-9 Total Reading Stanine scores for KES kindergartners in the Spring of 1997, compared with the normal curve. As indicated by Exhibit A-652, 85% of the kindergartners taking the SAT-9 test in 1997 scored at the highest possible level in reading (stanine 9).<sup>(28)</sup> For KES first graders taking the SAT-9 exam during the Spring of 1997, over sixty percent scored in the highest stanine 9. PEP staff determined that the ceiling effect was causing high scores in the kindergarten and first grade because the SAT-9 test was not sufficiently spreading the children out. **[Tibbetts Trial Testimony, 2/8/99; Exhibit A-652]**

401. In addition, the dip in test scores was found in both the national and private school norm groups on the SAT-9 reading and math exams. It was not isolated to Kamehameha. **[Tibbetts Trial Testimony, 2/9-10/99; Exhibit D-433, Attachment 2-3a, 2-3b; Exhibit A-632; Exhibit A-633]** This supported the conclusion that regression to the mean was in effect, as well as other factors.

402. Giuli's report underwent peer review in the PEP group in January 1999, and the decision was made to keep his report in draft form in the files because of its flaws. **[Tibbetts Trial Testimony, 2/8/99]**

### **3. Graduates Who Can Barely Read**

403. Lindsey's education report asserted that the senior class of 1997 included more than thirty graduates "who can barely read". **[Exhibit A-282, bates no. 1013 (original emphasis)]** The statement is not accurate.<sup>(29)</sup>

404. Lindsey's statement was based on the results of one SAT-9 test administered to secondary students in April 1997 in which "31 students in the Class of 1997 received Stanford reading comprehension scores that placed them in the 'below average' stanines (23rd percentile or lower) on national norms." **[Exhibit D-433, Response to Statement 4]**

405. Upon learning the results, administrators requested a comparison of the relationships between the SAT-9 scores, College Board scores, and the accumulative GPA for class of 1997. The September 8, 1997 PEP comparison revealed a strong correlation between the SAT-9 total reading and math, the College Board verbal and mathematical reasoning, and cumulative GPA when results for all 442 seniors were compared. However, when the comparison was done only for seniors scoring below stanine 4, the correlations were not significant. This suggested that the seniors' performance on the SAT-9 test given in the Spring 1997 was not a reliable indicator of student achievement. **[Exhibit D-433, Response to Statement 4, Attachment 4-1; Kukea Trial Testimony, 2/10-11/99]**

406. As a precaution, and to confirm suspicions of the school administration that students were fooling around during the Spring testing, those students who had scored below the 40<sup>th</sup> percentile were retested in early November 1997, the start of their senior and junior

years, respectively. This time they were advised if they scored below the 40<sup>th</sup> percentile they would be given remedial help. A total of 61, now juniors and seniors, were retested. The results were tabulated on November 5, 1997, and showed a remarkable rebound in scores,<sup>(30)</sup> the average for reading comprehension having increased from the 23<sup>rd</sup> to the 56<sup>th</sup> percentile for the retested group. **[Exhibit D-433, Attachment 4-2]** Only 3 students earned reading scores in the below-average stanines (23<sup>rd</sup> percentile or lower). **[Tibbetts Trial Testimony, 2/8/99; Exhibit D-433, Response to Statement 4]**

407. Information explaining the results anecdotally, statistically, and qualitatively (based on retest) indicate that the Spring 1997 SAT-9 test results regarding the more than 30 seniors' inability to read were not an accurate assessment of their abilities. **[Exhibit D-433, Response to Statement 4; Ramos Trial Testimony, 12/3/98; Freitas Trial Testimony, 12/11/98; Kukea Trial Testimony, 2/10-11/99]**

408. Kukea received the retest results on November 7, 1997. The next day she gave Principal Ramos the summary, and he indicated he would provide the summary to Lindsey immediately. **[Kukea Trial Testimony, 2/10-11/99]** At trial Principal Ramos indicated he did not give Lindsey the retest results. **[Ramos Trial Testimony, 12/10/98]**

409. Assuming Lindsey had no knowledge of the retest results, she was reckless and unjustified in concluding on the basis of a single standardized test, particularly one she did know was not taken seriously, that the students scoring below average can barely read.

#### **4. No Articulated Curriculum**

410. Lindsey's education report asserted that "Kamehameha Schools still is without an articulated K-12 curriculum." **[Exhibit A-252, bates no. 1019]** The report explains "first grade teachers use a curriculum that has no formal link to the second grade curriculum" and from each grade onward. **[Id. at 1013]**<sup>(31)</sup>

411. The Kamehameha Schools had a comprehensive curriculum and assessment program in place long before Lindsey's tenure as a Trustee. **[Kukea Trial Testimony, 2/10-11/99]** In school year 1989-90, the curriculum and assessment staff, elementary teachers and consultants developed a new curriculum document for all curricular areas. All elementary teachers received training to provide articulation from grade level to grade level. The secondary school used a similar process over the years to renew and revise its curriculum. **[Exhibit D-433, Response to Statement 5]**

412. Claire Asam, KES Curriculum and Assessment Coordinator with over 25 years of experience in developing elementary school curriculum, testified that in the 1980's KES had a curriculum guide that was articulated, including scope and sequence of skills to be taught at each grade level. **[Asam Trial Testimony, 12/23/98]**

413. Robert Peters, Ph.D. expert in education curriculum instruction and school governance and a teacher of graduate level courses in elementary education curriculum at the University of Hawaii, reviewed the KES 1998-90 and 1995-96 curriculum guides and found they contained an articulated curriculum. **[Peters Trial Testimony, 2/9/99]**

414. In 1995 KES began revising its curriculum guide in anticipation of the opening of the neighbor island schools and the progression of the competitively admitted students through KES. Teachers collaborated over the course of the school year and by June 1996, a revised curriculum guide was completed. **[Exhibit A-617]** Expert witness Peters reviewed the revised guide and stated that the document was articulated both horizontally and vertically. **[Peters Trial Testimony, 2/9/99]**

415. Vice-President Freitas, whose doctoral education degree and experience do not encompass elementary school curriculum, testified that KES did not have a curriculum in the Summer of 1996 and acknowledged he prefers a higher level of specificity than did the faculty and Asam in terms of curriculum guide content. **[Freitas Trial Testimony, 12/14-15/99]** Freitas' office was in charge of the Summer 1996 effort to document curriculum, and Freitas acquiesced to Lindsey's proposal to have retired DOE curriculum specialist Rose Yamada review the K-3 guides that Asam produced. He also acquiesced to Lindsey's establishment of the curriculum project employees who were transferred from KSBE adult community education programs. **[Id.]**

416. One of the three curriculum project members, Patricia Holmes, was a trial witness. In revising the K-3 curriculum guides, the project team looked at DOE materials, national standards and state standards material for language and math. Holmes said the 1996 KES document was "not an articulated curriculum"; hence, the team created one. **[Holmes Trial Testimony, 2/24/99]** Ultimately, the K4-6 and secondary curriculum also were put into the curriculum project format. At trial Holmes testified she had never seen a secondary school portfolio, the documentation of institutional outcome measures for KSS nor the PEP exit skills reports **[Exhibits A-649, A-650]**. She also admitted, "I know of no specific school that has an articulated curriculum that I've described." **[Holmes Trial Testimony, 2/24/99]**

417. At trial Peters explained a curriculum document should guide teacher decision making. In contrast, portions of the KES curriculum guide that Lindsey's curriculum team created resembled a teacher's manual **[Peters Trial Testimony, 2/9/99; Exhibit A-618, Language Arts 2, Grade 2 Writing, p.11]** and in some sections inserted specific materials from textbooks that the teachers did not use. **[Leong Trial Testimony, 12/24/98; Asam Trial Testimony, 12/23/98; Wong-Kam Trial Testimony, 12/24/98]**

418. The statement that the Kamehameha Schools did not have an articulated curriculum is misleading. What happened is KES did not have curriculum guides in the format Lindsey recognized as articulated from her DOE experience. As further explained in the June 30, 1998 Peterson report, commissioned by the majority Trustees,<sup>(32)</sup> alignment of curriculum between KES and KSS "gains tremendous importance" once the 1996 automatic admissions began. **[Exhibit D-933, p.109]** As of June 30, 1998, the Peterson

report found "no formal interface or curriculum alignment between Elementary and Secondary Schools." **[Id.; accord, Peters Trial Testimony, 2/9/99]** The report "noted that informal meetings between staff about formal articulation have taken place and that both staffs have declared a strong willingness to formalize this articulation process." **[Exhibit D-933, p.109]** Thus, the Court concludes that the Lindsey education report was at best incomplete regarding articulated curriculum, finding that each school in 1997 did have its own articulated curriculum and as of 1998 both were formalizing the grade 6-7 link between them.

## **5. Other Inaccuracies or Incomplete Aspects of Trustee Lindsey's Education Report**

419. Lindsey's education report noted that in 1995, thirty-eight KES "6th graders could not pass the test for continuation on to 7th grade." **[Exhibit A-282, bates no. 1018]** While correct, this statement implies that all of the 6th grade students should have been able to score well enough to gain entry into the 7th grade. Lindsey's report failed to note that the randomly selected KES class was facing a selective admissions test for the first time.

420. In 1979, the Trustees instituted a "lottery system" in which children were randomly chosen for admission into KES. Those Trustees and the school administration recognized the policy change would result in some KES graduates being denied acceptance at the secondary school when exposed to competitive admissions. **[Exhibit D-433, Response to Statement at bates no. 1018]** However, on average, the KES students did fare better than the non KES-applicants for 7th grade. The acceptance rate for KES students was one in three and later one in two compared to one in seven for non-KES applicants. **[Exhibit D-433, Response to Statement, at bates no. 1018; Exhibit A-642]**

421. In addition, average test scores of KES 6th graders were very similar to the non-KES students applying to Kamehameha Secondary School, and one study for the year 1998 found KES students scoring ten percent higher than non-KES students admitted by competitive exam. **[Exhibit A-648; Tibbetts Trial Testimony, 2/8/99; Kukea Trial Testimony, 2/12/99]**

422. Trustee Lindsey's report criticized President Chun for failure to timely develop an education strategic plan. **[Exhibit A-282, bates no. 77001016]**

423. Kamehameha Schools had developed an education strategic plan in the early 1990's. Completed in 1992, it was called "Educational Excellence for the Next Century, A Strategic Plan for the 1990's" ("1992 ESP"). **[Exhibit A-557; Ramos Trial Testimony, 12/9/98]** An executive summary of 1992 ESP was prepared and dated July 1992. **[Exhibit A-4]**

424. The 1992 ESP was a bottom up plan, having been developed over a two-year period, beginning with meetings and workshops with teachers, staff and administrators. **[Ramos Trial Testimony, 12/9/98; Chun Trial Testimony, 2/18-19/99]** It contained specific

qualitative and quantitative student outcome measures and identified resources needed to achieve these outcomes. **[Exhibit A-557; Freitas Trial Transcript, 12/14-15/98]** The plan was submitted to the Board for approval but was not acted upon. The prior Board members deferred action knowing three new Trustees would be coming on in the next few years, and that explanation was given school administrators. **[Stender Trial Testimony, 2/12/99, Tr. p.134; Tibbetts Trial Testimony, 2/8/99; Kukea Trial Testimony, 2/10/99]**

425. The 1992 ESP was updated in 1993. **[Tibbetts Trial Testimony, 2/8/99; Exhibit A-558]** Despite Board inaction, the plan was implemented in 1992 with the support of President Chun. **[Ramos Trial Testimony, 12/9/98; Stender Trial Testimony, 2/12/99, Tr. p.134; Follmer Trial Testimony, 11/12/98]**

426. Trustees Wong and Lindsey joined the Board in early 1993.<sup>(33)</sup> In December 1994 Trustee Jervis was added. Beginning in 1994, the Board held a series of strategic planning retreats covering a wide variety of topics. The first was held on September 8-10, 1994; the second on October 30-November 1, 1994; and the third on February 5-6, 1995. **[Exhibit A-561, p.11-20]** On February 21, 1995, Trustees Jervis and Lindsey previewed five preliminary scenarios prepared by Ernst & Young, consultants, for expansion of Kamehameha's programs: from Model I, a program re-engineering initiative to Model V with permanent preschools and satellite schools on the neighbor islands. Eventually the Board endorsed Model V and made public announcements in April 1995. **[Exhibit A-561, p.20-22]** This was followed in June 1995 with the Trustee decision closing several long standing outreach programs resulting in termination of about 170 positions.<sup>(34)</sup> In late June 1995 an implementation team for GoForward was established to oversee the rollout of GoForward. **[Exhibit A-561, p.22-24]** The preschools and the neighbor island elementary schools were scheduled to open for school year 1996-1997. **[Chun Trial Testimony, 2/18/99]**

427. On June 4-5, 1996, the Board held a fourth retreat and generated a list of new and follow-up actions/reports covering several issues. **[Exhibit A-561, p.26]** These issues were called "major decisions." After the retreat, President Chun was directed to develop and present by October 30, 1996, an education strategic plan consistent with the principles of GoForward and incorporating many of the identified issues or major decisions. **[Exhibit A-561, p.26-28]** In a memo dated July 11, 1996, Chun wrote to Trustee Wong to clarify his understanding of the content and level of detail expected in the education strategic plan and to clarify his understanding of the decisions made at the June 1996 retreat at Turtle Bay. A proposed table of contents for the education plan was enclosed with the memo. No major changes were suggested by the Trustees. **[Chun Trial Testimony, 2/18/99; Exhibit D-432]**

428. Stakeholder input is critical to developing a strategic plan, and school administrators perceived teachers as important stakeholders. **[Freitas Trial Testimony, 12/14-15/98; see Exhibit D-983, p.45, 49-50]** Since teachers were away for the Summer, there was limited opportunity for them to have input given the Board's deadline.

429. The Board's deadline was not sufficient time to develop a strategic plan,<sup>(35)</sup> particularly when the school was responding simultaneously to other demands. Specifically the curriculum project had begun in Summer 1996, the administration was effectuating plans to open the new Maui and East Hawaii Elementary Schools, hiring personnel and procuring equipment for the new schools and for additional preschools, KSS staff was involved in organizing WASC self-study efforts, and all faculty and staff were involved with commencing the new 1996-1997 school year. **[Freitas Trial Testimony, 12/14/98]**

430. The strategic plan was not formally presented at a Board meeting by the October 30, 1996 deadline because President Chun was hospitalized with hepatitis. **[Id.]** Later that year, the plan prepared by Chun and his staff was presented to the Board and rejected. **[Chun Trial Testimony, 2/18/99]** Chun was told to hire a consultant to assist the administration with the preparation of the strategic plan and given six weeks to complete. **[Freitas Trial Testimony, 12/14/98; Chun Trial Testimony, 2/18/99; Kukea Trial Testimony, 2/10/99]** Trustee Stender suggested using NAIS consultants. **[Exhibit A-314, p.17]**

431. Instead, President Chun engaged Mildred and Richard Kosaki, experienced educators since retired from UH, to assist in revising the strategic plan. **[Freitas Trial Testimony, 12/15/98]** The Kosaki-reworked plan, called the "Kamehameha Schools Education Plan 1996-2005" ("Kosaki plan") **[Exhibit A-679]** also was rejected by the Board. **[Chun Trial Testimony, 2/18/99; Exhibit A-314, p.17]**

432. Trustee Wong then asked Lindsey to assist in completing a strategic plan, which she did. Acting as a facilitator, Lindsey selected a team of administrators including principal executives Nathan Aipa, Rodney Park, and Yukio Takemoto to participate. **[Park Trial Testimony, 2/25/99; Exhibit A-672]** Lindsey believed the strategic plan was a management tool; teachers and staff should participate in the follow-up operational plan. **[Lindsey Trial Testimony, 2/5/99, afternoon session, Tr. p.20-21]** A strategic plan was completed in July 1997, called the "Kamehameha Schools Bishop Estate Education Strategic Plan 1997" ("1997 ESP") **[Exhibit A-672]** and adopted by the Board in August 1997.

433. In terms of content, the 1997 ESP **[Exhibit A-672]** is similar to the Kosaki Plan **[Exhibit A-679]** and the 1992 ESP **[Exhibit A-557]**. The similarities occur primarily in the mission, vision, and goals. The objectives and evaluations of the 1997 ESP and Kosaki Plan are very similar. The 1997 ESP objectives and benchmarks also bear similarities to the 1992 ESP. Only the format of the plans are very different.

434. The lack of a formally adopted strategic plan by the Board from 1992 to July 1997 does not appear to have had any significant impact to the operation of the Kamehameha Schools for several reasons. First, the secondary school operated de facto with the 1992 ESP as a planning guide. As of 1997, the secondary school had met all of the objectives and outcomes included in the 1992 ESP. **[Kukea Trial Testimony, 2/10/99]** Second, as it relates to the outreach programs, the Board terminated most of those in 1995. **[Exhibit A-**

**561, p.20-25]** GoForward thus made moot the need for an approved strategic plan as to the outreach programs. Third, the elementary school was in transition from 1991 to 1997, as the randomly selected student population was phased out and the competitively admitted students were phased in. **[Tibbetts Trial Testimony, 2/8/99]** The KES strategic direction and goals were thus determined by the decision to transition to a competitively admitted student population.

435. The 1997 ESP was adopted slightly more than three months before Lindsey issued her education report. It identified the school mission, vision, organizational goals and strategic intent for the school, setting forth a series of tables "to provide a mechanism for measurement of our pursuit of these educational Mission, Vision, and Goals." **[Exhibit A-672]**

436. While the stated objective of Lindsey's education report was to determine how well the school is fulfilling its mission **[Exhibit A-282, bates no. 1009]** Trustee Lindsey failed to relate her findings and conclusions in any way to the 1997 ESP which throughout she has described as an essential document for the school. Indeed, the 1998 Peterson report, commissioned by Trustees Lindsey, Wong and Peters, concluded the school president and Board "failed to promote three . . . [1997 ESP] organizational goals" with the result that "the Education Strategic Plan will be resisted because the Trustees demonstrate no ownership or commitment to the goals." **[Exhibit D-983, p.50]**<sup>(36)</sup>

437. No one from the KSBE Education Group was given an opportunity to review and comment on the final draft of Lindsey's education report before it was given to the Trustees on November 25, 1997. **[Lindsey Trial Testimony, 1/7/99, Tr. p.40]** Lindsey testified she did not think it was "necessary" to get comments from the Education Group. **[Id. at 40]**

438. Trustee Lindsey claimed that her education report was prepared and released in fulfillment of her fiduciary obligations as a trustee **[Exhibit A-282, bates no. 1007]**, because the Kamehameha Schools are facing serious problems in the quality of the education being provided to the students. To the contrary, her report is seriously flawed, inaccurate, and incomplete.<sup>(37)</sup>

## **E. Personnel Improprieties/Chun Accusations**

439. Lindsey's education report found it "imperative that the Board complete a review of the school's president's performance regarding student academic achievement." **[Exhibit A-282, bates no. 1018]** The "urgency" of this imperative was the inaccurate or incomplete academic performance findings discussed supra. The report further found it "imperative that the Board initiate an investigation of . . . [fiscal] irregularities from the period 1993-1997" allegedly involving President Chun and his spouse. **[Id. at 1019]**

440. The specific financial accusations were that President Chun (1) directed an unauthorized commitment of KSBE monies to the Nature Conservancy and the UH Study Abroad Tour; (2) directed expenditures of more than \$45,000 a year for Christmas decorations and entertaining at the president's home; (3) overspent financial aid monies and manipulated the school's budget; and (4) allowed his wife to use school resources for non-KSBE functions, spend funds for dormitory furniture and commit KSBE funds for changes to the school's dormitory renovation project. **[Exhibit A-282, bates no. 1019]**

441. Prior to publicly releasing her report, Lindsey did not give Chun or his wife an opportunity to respond to the accusations. President Chun did not know that Lindsey would be making personal allegations about himself and his wife in the media. **[Chun Trial Testimony, 2/22/99, Tr. p. 38-41]** He did respond to each allegation, either denying, clarifying or attempting to justify admitted actions on December 9, 1997. **[Exhibit D-433, Response to Statement 17]**

442. Expenditures to the Nature Conservancy and UH Study Abroad Tour consisted of financial aid to students. Each student who was supported met all conditions for financial aid, and the amounts awarded were less than the amounts cited by Lindsey in her report. **[Exhibit D-433, Response to Statement 15; Chang Trial Testimony, 12/16/98]**

443. Lindsey's assertion that President Chun directed expenditures of more than \$45,000 per year for Christmas decorations and entertaining contains error. **[Chang Trial Testimony, 12/16/98; Exhibit D-433, Response to Statement 17; Chun Trial Testimony, 2/18/99]** The figures cited by Lindsey actually represent expenses from October through January for those years and reflect more than Christmas functions. These expenses included boarder dinners and other student activities. The majority of the guests were students. For the Christmas activities, the cost was approximately \$3 to \$4 per person. The expenditures were authorized as Christmas entertainment and were part of the president's approved entertainment budget. **[Exhibit D-433, Response to Statement 17; Chun Trial Testimony, 2/18/99; Chang Trial Testimony, 12/16/98]**

444. President Chun already had explained to the Trustees in the boardroom that the financial aid budget for post-high scholarships was exceeded in 1995 and 1996 because the financial aid department had over committed its budget, with the expectation that attrition would reduce the actual awards to budget levels. **[Exhibit D-433, Response to Statement 15]** This was done because past attrition rates left unexpended funds and student needs were not met. The decision to over-commit was made to assure that scholarship funds were being fully utilized. Although financial aid monies were overspent, the total Education Group budget was not exceeded for those years. **[Chun Trial Testimony, 2/18/99; Exhibit D-433, Response to Statement 15]**

445. Beginning in 1988 Bina Chun, as the president's spouse, became involved in certain projects on campus, including organizing and co-hosting activities at the president's residence. She requested some functions, which her husband approved, believing it appropriate to host community, business and government organizations. **[Chun Trial Testimony, 2/18/99; Exhibit D-433, Response to Statement 17]**

446. Bina Chun participated in the dorm renovations project and sat on the design committee. The Chuns deny she authorized changes to the dormitory renovations [Exhibit D-433, Response to Statement 17; Chun Trial Testimony, 2/18/99; Chang Trial Testimony, 12/16/98] but various invoices and evidence of KSBE reimbursements to Bina Chun prove her involvement exceeded advisory status.

## **VI. REDUCED ACCREDITATION PERIOD AND INVESTIGATION INTO RELEASE OF THE WASC REPORT**

### **A. The Visiting Committee's 1998 Accreditation Report on the Kamehameha Secondary School**

447. Since 1965, the Kamehameha Secondary School grades 9-12 have been accredited by the Western Association of Schools and Colleges ("WASC"). Such accreditation is particularly important to college-bound students, because it shows that the graduate's school meets certain high standards of excellence. In 1992, the Kamehameha Secondary School grades 9-12 was accredited by WASC for six-years, the longest allowed. The school's most recent accreditation review by WASC therefore occurred in 1998. [Whiting Trial Testimony, 12/14/98]

448. The accreditation process began with a year-long school "self study." The theme for the 1998 WASC accreditation was "Focus on Learning." For the self-study, the teachers and staff at the Kamehameha Secondary School worked in committees and focus groups. [Whiting Trial Testimony, 12/14/98] Their work included a major project of "schoolwide learning expectations" that did not get beyond draft stage because Trustee Lindsey mandated the faculty reformat the existing curriculum which interrupted the WASC effort. [Exhibit A-521, p. 15] Despite that omission and consistent with WASC protocol, a completed self-study was then given to members of the WASC Visiting Committee for them to review prior to their accreditation visit to the campus.

449. The nine members of the WASC Visiting Committee were on campus from March 9 through 12, 1998. [Exhibit A-521] At the end of their visit, the WASC Visiting Committee read their completed report to the Kamehameha faculty. [Whiting Trial Testimony, 12/14/98]

450. The WASC Accreditation Report generally praised the quality of the school's programs and the professionalism and commitment of the school's teachers to their students. [Exhibit A-521, p. 45-46, 50] Thomas Read was a member of the WASC Visiting Committee and was responsible for initially drafting the sections of the accreditation report entitled "Organization for Student Learning," Sections A1, A2, A3, and A4. [Read Trial Testimony, 12/21/98, Tr. p.38; Exhibit A-521] That included the sections on "School Purpose," "Governance," "Leadership," and "Staff." Read at trial confirmed that the Kamehameha Secondary School had "very rich comprehensive

curriculum, very high quality staff, a very professional staff, a dedicated committed staff." **[Read Trial Testimony, 12/21/98, Tr. p.29; see Exhibit A-521, p. 46]**

451. The report sharply criticized the Trustees' governance of the school: "[A] perverse application of top-down decision-making which has openly undervalued, if not scorned, the professional expertise, talent, and commitment of the non-administrative staff has produced an oppressive, intimidating, and fearful professional climate at the school."<sup>(38)</sup> **[Exhibit A-521, p.16]** The WASC Accreditation Report also cited seven trustee decisions which "negatively affected the school" as follows:

[A] The mandate to use only those Hawaiian words in the Pukui-Elbert Dictionary.

[B] The Board's non-recognition of administration and staff planning efforts in the early 1990's.

[C] A suddenly-mandated curriculum project while the faculty was in the middle of the self-study work.

[D] A suddenly-mandated change in the school's standardized testing program without consultation with faculty.

[E] Appointment of an extra administrator as an additional management layer between the president and school administrators.

[F] Purchase of an expensive collection of Hawaiiana for the library without consulting the staff or other financial priorities after another trustee had judged the collection to be duplicative and not worth the investment.

[G] Trustee involvement in such minutia as T-shirt designs and communications between the school and constituents.

**[Exhibit A-521, p.17]** The credible evidence establishes that Trustee Lindsey was unilaterally responsible for [A], [C] and [G]. **[See Section II-B, D supra; Section III-A supra]** In addition, she was the moving force behind majority trustee decisions [D] and [F]. **[See Exhibit A-144 and Section I-B supra]**

452. While the WASC report did not identify Trustee Lindsey by name because it is against protocol to evaluate individuals **[Read Trial Testimony, 12/21/98, Tr. 31-33]** Lindsey correctly perceived that most of the WASC report criticism and concerns of governance fell upon her. **[Lindsey Trial Testimony, 1/8/99, Tr. p. 5]**

453. At trial, Read concluded the principal cause for the dysfunctional governance of the secondary school was micro-management by Trustee Lindsey in her role as lead Trustee for education. **[Read Trial Testimony, 12/21/98, Tr. p.33]**

454. The 1998 WASC Accreditation Report for the Kamehameha Secondary School was stamped "Confidential Internal Document." **[Exhibit A-521]** At trial, Trustee Lindsey did not know who stamped the report confidential nor by what authority it was so designated. **[Lindsey Trial Testimony, 1/6/99, Tr. 50-51]** The 1992 WASC Accreditation Report was not marked "confidential." **[Whiting Trial Testimony, 12/14/98; Stender Trial Testimony, 2/16/99, p. 36, 196]** The 1998 WASC Accreditation Report is available to the school community to read. **[Whiting Trial Testimony, 12/14/98]** Approximately 250 copies of the 1998 WASC Accreditation Report were made on March 18, 1998, for intended distribution. **[Exhibit A-385]**

455. Trustee Stender, as a Board Member for Assets School, Academy of Pacific, St. Andrew's Priory and Iolani School, had participated in other WASC accreditation reviews. **[Stender Trial Testimony, 2/12/99, Tr. p.94; 2/16/99, Tr. p.36-37]** None of those reports had been considered or marked "confidential" and several had been promoted through the news because they were favorable. **[Stender Trial Testimony, 2/12/99, Tr. p. 94]** In contrast, Trustee Lindsey testified in 30 years with the DOE, no WASC report had been released to the media. **[Lindsey Trial Testimony, 1/6/99, Tr. p. 41]** But she could not say whether DOE WASC reports are available in school or public libraries. **[Id. at 50]**

456. When the WASC Visiting Committee left the Kamehameha Schools campus on March 12, 1998, the committee considered its report to be "final." **[Read Trial Testimony, 12/21/98, Tr. p.42; Witt Trial Testimony, 2/22/99, p. 23]** A WASC accreditation report is considered "owned" by the school, and there are no WASC restrictions on its use. **[Witt Trial Testimony, 2/22/99, p.23]**

## **B. Trustee Lindsey Demands an Investigation**

457. On March 19, 1998, Trustee Lindsey saw an article in the Honolulu Advertiser regarding the WASC Accreditation Report. **[Lindsey Trial Testimony, 1/6/99, Tr. p.36]** That same day, aware that the media sought her reaction to the WASC report, Lindsey wrote a memo to General Counsel Aipa, asking for an investigation into who at the school had provided it to the news. **[Exhibit A-392, bates no. 03098226; Lindsey Trial Testimony, 1/6/99, Tr. p.37]** In her memo, she stated it was improper and unprofessional to release the report to the news media before WASC had submitted its "final report." **[Exhibit A-392, bates no. 03098226]** Lindsey also told her colleagues she was upset because the WASC report was confidential and shouldn't have been released to the media. **[Stender Trial Testimony, 2/12/99, Tr. p.93-94]** Lindsey credibly testified she thought the WASC Accreditation Report was "released for someone else's agenda." **[Lindsey Trial Testimony, 1/6/99, Tr. p. 41]**

458. In her initial memo to General Counsel Aipa, Lindsey on March 19, 1998, asked him to assign someone from employee relations to investigate the perceived breach arising from the confidential status she accorded visiting committee reports before they accompanied the formal WASC accreditation decision. [Exhibit A-392, bates no. 03098226, see Lindsey Trial Testimony 1/6/99, p. 54] At the next board meeting, the Trustees asked President Chun to look into the campus leak. [Jervis Trial Testimony, 1/4/99, Tr. p. 75; Stender Trial Testimony, 2/12/99 Tr. p. 95; Exhibit A-392, bates no. 03098225] General Counsel Aipa understood the majority also wanted private counsel William McCorriston to investigate. [Exhibit A-392, bates no. 03098225] McCorriston and his firm were already defending KSBE on other matters including the State Attorney General's investigation of KSBE. Trustees Jervis and Stender felt the investigation was inappropriate because the release of the WASC report caused no discernible harm to the school and glowingly praised school performance. [Stender Trial Testimony, 2/12/99, Tr. p. 95] Neither Stender nor Jervis understood the Board to have authorized McCorriston to investigate the WASC matter prior to March 27, 1998 [Jervis Trial Testimony, 1/4/99, Tr. p. 76; Stender Trial Testimony, 2/12/99, Tr. p. 96] and Trustee Lindsey could not recall when the Board discussed it. [Lindsey Trial Testimony, 1/6/99, p. 38]

459. On March 27, 1998, Aipa wrote Lindsey to acknowledge acting on her specific instructions to inform McCorriston to "hold off on his investigation pending the outcome of the President's review of the matter." [Exhibit A-392, bates no. 03098225] Lindsey then sent Aipa her handwritten comment on Aipa's memo: "Something must have gotten lost in the transmission. I would like McCorriston to investigate." [Exhibit A-392, bates no. 03098225] As a result, the McCorriston firm established a presence on campus.

### **C. Trustee Jervis Halts the Questioning of KSBE Staff by Counsel From the McCorriston Firm**

460. On June 1, 1998, Trustee Jervis was on the Kamehameha Schools campus for a meeting when he learned that employees were being questioned, in the presence of a court reporter, regarding the release of the WASC Accreditation Report. [Jervis Trial Testimony, 1/4/99, Tr. p.76, 77] The questioning was being conducted by attorneys from the McCorriston law firm, and the staff members being questioned were not represented by counsel. [Jervis Trial Testimony, 1/4/99, Tr. p. 77; Stender Trial Testimony, 2/12/99, Tr. p.96] One question being asked of interviewees was whether the person would submit to a polygraph test. [Jervis Trial Testimony, 1/4/99, Tr. p.80]

461. Trustee Jervis went into the interview room and ordered the questioning be stopped. [Jervis Trial Testimony, 1/4/99, Tr. p. 77] He testified that the employee being questioned, Pet Tiffany, "came out in tears" and was "scared to death." [Jervis Trial Testimony, 1/4/99, Tr. p.79]

462. As of June 1, 1998, the Board had not received or discussed President Chun's report regarding his internal inquiry into the release of the WASC Accreditation Report. [Jervis

**Trial Testimony, 1/4/99, Tr. p.77; Stender Trial Testimony, 2/12/99, Tr. p.96]** As of June 1, 1998, the Board had not authorized the McCorrison law firm to question KSBE staff members in the presence of a court reporter regarding the release of the WASC Report. **[Jervis Trial Testimony, 1/4/99, Tr. p.78; Stender Trial Testimony, 2/12/99, Tr. p.96]**

463. When Trustees Lindsey and Wong learned of Jervis' action, they spoke with General Counsel Aipa to confirm the events. Lindsey asserted that staff had no right to counsel during the internal investigation. **[Exhibit A-415]**

464. On June 2, 1998, Trustee Lindsey drafted a memo to the file reflecting her displeasure with Trustee Jervis' unilateral halt of the campus investigation:

I told Nathan that Gerry Jervis has no right to stop the investigation. He is but one Trustee. He has done this repeatedly. He stopped a memo from the Chairman from going out without the approval of the Board. He also stopped the Administration from disciplining four teachers who violated our internal policies and procedures.

**[Exhibit A-415; Lindsey Trial Testimony, 1/6/99, p. 43-45]**

#### **D. Trustees Lindsey, Wong and Peters Vote To Continue the WASC Investigation**

465. At a Board meeting on June 2, 1998, Trustees Lindsey, Wong and Peters voted to "continue forthwith the investigation (into the release of the WASC Accreditation Report) with the assistance of William McCorrison, Esq." **[Exhibit A-414]** Trustees Stender and Jervis dissented to the investigation "because employees will not be represented by counsel thereby risking legal exposure to KSBE and President Michael Chun had not yet reported his findings regarding the matter." **[Exhibit A-414]**

466. On June 3, 1998, Trustee Lindsey asked General Counsel to expand the investigation basis to include violations of the KSBE employee handbook policies prohibiting release of confidential documents. **[Exhibit A-416; Lindsey Trial Testimony 1/6/99, Tr. p. 50; see id. at 40]**

#### **E. Trustees Stender and Jervis Object and Obtain a Temporary Restraining Order**

467. On June 5, 1998, Trustees Stender and Jervis by memorandum to the other Trustees reiterated their "strong objection" to pursuit of the WASC investigation by the McCorriston firm and notified them of written objections being filed in Probate Court. **[Exhibit A-423]** At 3:30 that same day the formal court document was filed in the First Circuit. **[Exhibit A-424]**

The internal memorandum read in pertinent part as follows:

This is the very kind of gross intimidation and heavy-handedness [sic] that the Board was resoundingly [sic] criticized for by the Factfinder, and that amply contributed to the poor marks in the very same WASC report that is in question. It is not only a waste of Estate funds, but a misuse of our resources, our time, and our authority.

In Conclusion, to proceed with this interrogation is unwise, improper and imprudent.

**[Exhibit A-423, bates no. 01016003]** At trial, Trustee Lindsey denied the McCorriston tactics were heavy-handed, adding she "thought we were looking for an objective party to come in and do it . . . ." **[Lindsey Trial Testimony, 1/6/99, Tr. p. 52]** She found precedent for using outside counsel through reliance on DOE investigations of staff regarding theft, cocaine distribution and sexual assault where internal investigations had met resistance. **[Id. at 52-54]**

468. On June 11, 1998, Trustees Jervis and Stender sent the following memorandum to majority Trustees:

We understand that the interrogation of employees by the McCorriston firm will proceed, notwithstanding our prior objections.

We believe the interrogations will expose the trust to irreparable harm. If the interrogation proceeds we will file for a temporary restraining order.

We ask that you stop the interrogations immediately.

**[Exhibit A-434]**

469. On June 12, 1998, at 3:51 p.m. the First Circuit Court issued a Temporary Restraining Order ending the campus investigation for ten days. **[Exhibit A-436]**

470. After the Probate Court issued its Temporary Restraining Order, the Trustees reached compromise on how the investigation into the release of the WASC Accreditation Report would proceed. The compromise was to use KSBE's in-house staff

to conduct an inquiry and discontinue the use of the McCorriston law firm, the court reporter, and the request for polygraph tests. [**Jervis Trial Testimony, 1/4/99, Tr. p.83-84; Stender Trial Testimony, 2/12/99, Tr. p.97**]

471. The initial method of conducting the investigation fueled the controversy on the Kamehameha School campus and caused morale problems. [**Stender Trial Testimony, 2/12/99, Tr. p.98**]

472. Robert Whiting, one of the faculty co-coordinators for the 1998 accreditation review, was questioned twice by KSBE staff investigators regarding the release of the WASC Accreditation Report. The first questioning session lasted two and a half hours; the second, about 25 minutes. Whiting testified he felt he wasn't being believed and was intimidated. In his estimation the WASC investigation lowered morale at the school and created a them-versus-us climate. [**Whiting Trial Testimony, 12/14/98**]

473. Kawika Eyre, a Hawaiian language teacher and one of the leaders of Na Kumu, was questioned twice and was called several times during class time by the KSBE staff investigators. [**Eyre Trial Testimony, 11/30/98**]

#### **F. Scope of WASC Investigation Expands**

474. In September 1998 the Attorney General filed a petition in Probate Court to remove all five Trustees. More than 800 Kamehameha Schools students signed a petition in support of the action. [**Lindsey Trial Testimony, 1/6/99, Tr. p. 70**]

475. At the October 6, 1998 Board meeting, Trustees Lindsey, Peters and Wong expanded the scope of the WASC in-house investigation to include the student petition. Specifically, they mandated the in-house investigators determine whether faculty and campus staff had manipulated students to support their removal. [**Exhibit A-631**] Trustee Lindsey explained the majority and her own vote at trial as follows: "We voted to conduct an investigation to see if indeed the staff was using the student for another agenda." [**Lindsey Trial Transcript, 1/6/99, p. 69**] "I voted in favor of investigating to see if the staff did indeed encourage and use the students in this manner; yes, I did." [**Lindsey Trial Transcript, 1/6/99, p. 70**]

476. As of February 5, 1999, Trustee Lindsey did not know the status, accumulated cost to KSBE, nor whether there was a deadline to conclude the investigation of Education Group staff regarding the student petition. [**Lindsey Trial Testimony, 2/5/99, afternoon session, Tr. p. 63-64**]

477. The original investigation did end by February 5, 1999, but Trustee Lindsey did not know how much the 12-month inquiry into the campus leak of the WASC report had cost the trust. [**Lindsey Trial Testimony, 2/5/99, afternoon session, Tr. p.60**] By the end of trial, the Trustees had received a preliminary report, but not a final report, on the WASC investigation [**Stender Trial Testimony, 2/12/99, Tr. p.97-98**] and no report regarding the student petition from in-house investigators.

478. The WASC investigation, initiated by Trustee Lindsey, was a waste of KSBE assets of yet unknown proportions which produced predicted negative results of reducing campus morale. Trustee Lindsey, fully aware of the potential results, together with two of her colleagues precipitated a temporary restraining order and thereafter, having modified the methods of interrogation, continued the investigation and then expanded it. There is no credible evidence that investigation of the student petition promoted any legitimate KSBE interest. The circumstantial evidence leads this court to conclude the investigations were mandated to suppress critics of the Trustees, Lindsey in particular, and were wholly Trustee-self-interested. This conclusion is further supported by the timing and duration of the investigations. The alacrity with which the majority Trustees acted to investigate the student petition situation and the diligence they showed in pursuing the WASC leak contrast sharply with their failure to actively address in any Board meeting or any other meaningful way the many substantive issues regarding education and presidential leadership at the school that were raised by Trustee Lindsey's education report and President Chun's responses to it. The Board had not met nor taken any action on these education matters by trial's end.<sup>(39)</sup>

#### **G. WASC Approves Reduced Accreditation Period**

479. Trustee Lindsey's micromanagement and the related school governance problems contributed to the Kamehameha Secondary School receiving a reduced period of accreditation. Since approximately 1975, the Kamehameha Secondary School always received a six-year period of accreditation from WASC. **[Whiting Trial Testimony, 12/13/98]** Following the 1998 review, the WASC Visiting Committee recommended only a three-year period of accreditation with a prescribed follow-up self-study in the areas of governance and decision-making. **[Read Trial Testimony, 12/21/98, Tr. P.43]** WASC granted the three-year term, and made clear to the school that it was the "governance issues" that "precipitated" the reduced period of accreditation. **[Exhibit A-677]**

480. Before the end of the three-year term, a small team representing WASC will visit the Kamehameha Secondary School to determine if "satisfactory progress" has been made in addressing the governance issues. **[Exhibit A-677]** "If no progress has been made or if insufficient progress has been made in the judgment of the visiting committee and [WASC] Commission, the school may be given an additional year or two to correct the problem or could be denied accreditation." **[Exhibit A-677]**

#### **VII. TRUSTEE LINDSEY'S ACTIONS CREATED CLIMATE OF FEAR AND INTIMIDATION ON CAMPUS**

481. Even before the Trustees launched the WASC investigation, fear and intimidation marked the campus. Thomas Read, an expert in the area of evaluation, accreditation, and governance of schools, was one of the WASC Visiting Committee team members. Read

and others were on campus from March 9 through 12, 1998. **[Exhibit A-521]** During that time Read met with President Chun, all of the school's administrators except Vice-President Freitas, approximately 150 teachers (both in classrooms and faculty focus groups) including four department heads, groups of parent and student representatives, and about 40 to 50 individual students. **[Read Trial Testimony, 12/21/98, Tr. p.23-27]** Read also visited 31 classes over the four-day period. **[Id. at 26]** Read concluded there was "a pervasive climate of fear among the teaching and counseling staff" and a "pervasive lack of trust." **[Id. at 31]**

482. In focus group meetings with faculty, counseling staff and administrators present, no one would speak up in a group; they would only express their opinions privately. In Read's meetings with faculty members, they would ask: "Is this confidential?" "Will my name be used?" **[Read Trial Testimony, 12/21/98, Tr. p.37-38]**

483. Students he visited with were pleased with the school's program, facilities, opportunities, and their treatment by the teaching and counseling staff but expressed concerns about President Chun's authority having been usurped and what "was perceived to be a climate of fear among the teachers." **[Read Trial Testimony, 12/21/98, Tr. p.27]** Two days after the WASC team left campus, the teachers formally unionized.

484. On March 14, 1998, the Kamehameha faculty voted 186-36 to form a union. 222 out of 237 eligible voted. **[Exhibit A-570]** William Follmer is a 9th and 10th grade mathematics teacher at Kamehameha School and a former card-carrying member of the National Right To Work Legal Defense Foundation. He became and remains active in the successful union effort. Follmer testified that Trustee Lindsey was "the igniting spark" of unionization. **[Follmer Trial Testimony, 11/12, 17/98]** "By disenfranchising and not empowering or even listening to faculty and staff, the actions of both the Board and the President contributed to the formation of the union." **[Exhibit D-983, p.20]**<sup>(40)</sup>

485. At trial President Chun described the present climate of "fear", "intimidation" and "controversy" on campus. "There is a feeling you don't want to attract attention to yourself even if there is something wonderful to share because you don't know the consequences. If you attract attention to yourself, you're a nail and it's viewed that Trustees carry a hammer." **[Chun Trial Testimony, 2/18/99; accord, Truesdel Trial Testimony, 12/1/98]** Chun further described Trustee Lindsey's management style as "controlling", "intimidating" and "micromanaging." **[Chun Trial Testimony, 2/19/99]**

#### **A. Lindsey's Management Style**

486. Lindsey testified that as lead Trustee for education, she exercised "management by walking around," which included occasionally making unscheduled, unannounced visits to classrooms during class time. **[Lindsey Trial Testimony, 1/6/99, Tr. p.27]**

487. Eldon Chun is a 9th and 10th grade Hawaiian Culture teacher at the Kamehameha Secondary School. In October or November 1993, Trustee Lindsey and Alumni Affairs

Director Marlene Sai visited Chun's classroom unannounced. **[Sai Trial Transcript, 3/4/99]** It was the first time a Trustee had been to his class. **[E. Chun Trial Testimony, 12/2/98]** Upon their arrival, Trustee Lindsey took Chun outside the classroom to talk with him. **[Sai Trial Testimony, 3/4/99]** Lindsey told the teacher she had received "several calls" from parents saying that he told students the Trustees sit around all day and collect money. Chun responded that his question might have been misconstrued. Chun testified the question was, "What do you think, the Trustees sit around and collect all that money?" Chun testified that Lindsey glared at him during his explanation and said everyone has to be a "team player." **[E. Chun Trial Testimony, 12/2/98]** Upon his return to class and after the visitors left, the students asked: "Kumu Chun, what happened? What did you do wrong?" **[Id.]** He did not know how to answer them and testified he had been a bit intimidated and embarrassed by the incident. **[Id.]**

488. On many occasions Trustee Lindsey reprimanded KSBE staff members in the presence of other KSBE employees. **[Yadao Trial Testimony, 2/23/99, Tr. p.55-56]** Those publicly reprimanded include KSBE Communications Director Elisa Yadao, General Counsel Aipa, President Chun, communications staff member Kekoa Paulsen, and Personnel Director Sandra Wicklein. **[Id.]** Lindsey expressed her displeasure in a "very vocal" and intimidating manner. **[Id. at 41]** <sup>(41)</sup>

489. At Lindsey's April 11, 1997 meeting in her Kawaiahao office with Performing Arts Department Director Randie Fong to discuss his intended resignation and her alleged shortcomings, Lindsey stood up from her chair and started screaming and swearing. **[Fong Trial Testimony, 11/19/98, Tr. p.19-22]** Trustee Lindsey said "who the 'f' does Doctor Chun think he is? And: Ever since I've been here as trustee, no one has appreciated what I have -- what I've done for the schools. And who the 'f', you know, does he think he is?" **[Id. at 22]** <sup>(42)</sup>

490. Fong met again with Trustee Lindsey on August 11 or 12, 1997, at which time Lindsey told Fong she had a ruling from the legal department that his memorandum of April 11, 1997 **[Exhibit A-179]** constituted his letter of resignation. **[Fong Trial Testimony, 11/23/98, Tr. p.44-45]** By letter dated July 29, 1997 **[Exhibit A-597]** Fong already had informed the Board, including Lindsey, of his intention to remain employed at KSBE. **[Fong Trial Testimony, 11/23/98, Tr. p.41]** During the August 1997 meeting, Lindsey discussed Fong's alleged involvement in the May 15<sup>th</sup> march and the formation of Na Kumu. **[Fong Trial Testimony, 11/23/98, Tr. p.46]** Fong perceived Lindsey's remarks as harassment against him and his wife. **[Id. at 46]** Fong was not issued a new contract for the school year until sometime in September 1997. **[Id. at 51]**

491. In Spring 1995, when random selected KES students were still subjected to 7th grade selective admissions, Principal Tony Ramos was called to a meeting on campus with Trustee Lindsey and Director of Admissions Wayne Chang. Lindsey had reviewed the admissions and testing records of KES students who applied to the 7th grade at KSS. Based on her review, she determined that some teachers at the elementary school were "more effective in getting kids ready for grade 7." **[Ramos Trial Testimony, 12/3/98]** Lindsey subsequently discussed her research at a meeting of 7th and 8th grade teachers,

claiming she could track which students got in based on who their teachers had been. **[Seto Trial Testimony, 12/14/98]** Principal Ramos testified it is not educationally appropriate to make a judgment as to whether a teacher is effective based on whether that teacher's students gained selective admission to 7th grade. **[Ramos Trial Testimony, 12/3/98]**

492. In 1996, Trustee Lindsey suggested that KSS teachers be evaluated in part on their students' standardized tests. She questioned why the existing teacher appraisal form had no evaluation based on student achievement scores. Principal Ramos credibly testified that teacher contracts for the 1996-97 school year were delayed until Lindsey was satisfied with the answers to her questions. **[Ramos Trial Testimony, 12/3/98]**

### **B. Trustee Lindsey Intervenes on Behalf of Her Grandson**

493. Pat Ayat is the head coach of the boys' junior varsity basketball team at Kamehameha Schools. He began coaching at Kamehameha in 1992 as an assistant volunteer coach for the intermediate boys' basketball team and later became the head coach of the team. He held that position until the Spring of 1996, when he began coaching the boys' junior varsity basketball team. **[Ayat Trial Testimony, 12/15/98]**

494. Under the Kamehameha Athletic Department's policy, the intermediate boys' basketball team consists of a maximum of 15 players. Ayat testified that this had been the policy for as long as he had been coaching; however, on one occasion, in 1995, he had more than 15 players on his team. **[Ayat Trial Testimony, 12/15/98]**

495. In November 1995, when Ayat was the head coach of the intermediate boys' basketball team, he held tryouts for the team, which consisted of seventh and eighth graders. After the tryouts, Ayat made the cuts and selected the 15 players who made the team. Trustee Lindsey's grandson had not participated in the tryouts. After the 15-member team was selected, head basketball coach Winchester approached Ayat. He inquired about Lindsey's grandson and learned he was not on the team. After the conversation, Ayat added Lindsey's grandson to the roster. The student did not attend practice regularly but played in games until he had academic problems. **[Ayat Trial Testimony, 12/15/98]** Vice-President Freitas admitted he intervened on behalf of the student as well. **[Freitas Trial Testimony, 12/14/98]**

496. Collette Akana is a 7th grade social studies teacher at the Kamehameha Secondary School. On the afternoon that the school's Christmas vacation began in December 1995, she got a message to return to campus because Trustee Lindsey wanted to see Akana in her classroom with Lindsey's grandson as soon as possible. The school secretary alerted Akana that Lindsey was concerned her grandson was getting a low grade and she wanted him to be eligible to play in school basketball games during the holiday recess. Under school policy, a student who receives two D's or F's on his progress report cannot participate on the athletic teams. Akana had intended to give the grandson a failing grade. Akana testified she first showed Lindsey several research papers from students who had

received "A" grades, so the Trustee could compare those papers to the work done by her grandson. The teacher felt "pressure" and was "intimidated" by Lindsey, who was "glaring at me, not saying a word." [Akana Trial Testimony, 12/14/98] It was the first time a Trustee had ever gone to her classroom with concerns about a grade. Akana offered to make the grade a C-minus, if the grandson rewrote his paper. Without consulting her grandson Lindsey promised that the rewritten paper would be better. Akana did record a passing grade on December 19, 1997. [Exhibit D-991] After Christmas break she received the paper amended only by the addition of two or three sentences in pencil. Akana was "devastated". [Akana Trial Testimony, 12/14/98] At trial Lindsey recalled that she and Akana were both uncomfortable; that Lindsey later told her daughter she would never do a parent-teacher conference for her grandson again; and upon review of the grading exhibits clarified she did not ask for a grade change. [Lindsey Trial Testimony, 2/2/99, Tr. p.73-75; 2/4/99, Tr. p.110-14] Akana had not testified that Lindsey specifically requested a grade change, but rather Akana knew Lindsey's purpose from the school secretary's message. [Akana Trial Testimony, 12/14/98]

497. The assistant principal of the Kamehameha Secondary School, Sandra Behenna, personally reviewed the school schedules of Trustee Lindsey's grandchildren for three years because she felt there was a potential for conflict between Lindsey and certain secondary school teachers. If there were a potential conflict, Lindsey's grandchild would be moved to another teacher. Behenna did not recall this sort of review was done for the relatives of any other Trustee. [Behenna Trial Testimony, 11/19/98]

498. Trustee Lindsey's intervention on behalf of her grandson violates NAIS Principles of Good Practice for Independent School Trustees; specifically Principle Number 6: "A trustee guards against conflict of interest, whether business-related or personal. The trustee takes care to separate the interests of the school from the specific needs of a particular child or constituency." [Exhibit A-553]

### **C. Trustee Lindsey Summons Student Kuala'au to Her Office During Class Time**

499. Kamani Kuala'au was student body president at Kamehameha Schools during the 1996-1997 school year. [Kuala'au Trial Testimony, 12/28/98, Tr. p.9] He testified that in April 1997, a lot of things going on at Kamehameha Schools were not "pono" or "right". [Id. at 19] Students "were unable to effect change" through student government and it appeared to Kuala'au that "the administration could not even effect change." [Id.] He also was concerned about Dr. Chun's position as president of Kamehameha Schools, and there were concerns about the academic freedom of teachers, particularly regarding how Hawaiian language was taught. [Id.] Kuala'au was from Maui, had attended Kamehameha since the seventh grade, and lived on campus. [Id. at 4-5, 8-10]

500. In part because they both resided on Maui, Trustee Lindsey had known Kuala'au during his years as a boarding student. [Exhibit A-314, p.29-30] Kuala'au was socially

adept, having engendered relationships with Trustees Lindsey and Stender and Hawaii Senator Daniel Akaka for whom he worked in the Nation's capitol during his junior year.

501. On April 27, 1997, a few weeks before the alumni March, the senior class held a social on campus where Kuala'au spoke with friends who were also class officers. **[Kuala'au Trial Testimony, 12/28/98, Tr. p.20-21]** The class officers were upset at the way things were being run at the school. **[Moniz Deposition p.128, lines 3-8]** Kuala'au suggested that they write a letter to the Trustees about their concerns and print it in the newspapers. **[Kuala'au Trial Testimony, 12/28/98, Tr. p.21]** The students decided that James Moniz, the senior class president, and Kuala'au would prepare the letter. **[Id.]**

### **1. Trustee Stender Triggers Immediate Student Action**

502. On the evening of April 30, 1997, Kuala'au received a telephone call from Trustee Stender **[Kuala'au Trial Testimony, 12/28/98, Tr. p.23-24]** who was returning Kuala'au's prior telephone call. **[Stender Trial Testimony, 2/12/99, Tr. p.127]** During the course of the conversation, Kuala'au explained to Stender that the students were concerned about Dr. Chun's tenure and wanted to publish an open letter to Dr. Chun and the Trustees expressing their love and admiration for the president. **[Id. at 127-128]** Stender cautioned Kuala'au that it would be expensive to place a full page ad in the paper and offered to help raise money to pay for it. **[Id.]** Trustee Stender suggested that the students address the letter to the Hawaii Supreme Court justices instead of the Trustees **[Kuala'au Trial Testimony, 12/28/98, Tr. p.25]** and told Kuala'au: "It looks like they're getting ready to get rid of him," meaning Dr. Chun. **[Id. at 24]**

503. After the telephone call, Kuala'au located Moniz on campus and told him they needed to write the letter now. **[Kuala'au Trial Testimony, 12/28/98, Tr. p.26-27]** Kuala'au completed the letter later that night. **[Id. at 27-28; Exhibit D-254]**

504. The next morning, on May 1, 1997, Kuala'au asked his English teacher to proofread the letter, and Kuala'au read it aloud in three classes in order to gauge whether student feelings were consistent with the statement he and Moniz planned to publish. **[Kuala'au Trial Testimony, 12/28/98, Tr. p.28-30]**

505. The letter noted that "Kamehameha is in a state of turmoil," that several of the "best teachers will be resigning or retiring," and that "[m]any more are dissatisfied with the current Board of Trustees' new leadership and management styles." The letter also stated that this adversely affected their classmates and predicted the best teachers "will go elsewhere." **[Exhibit D-254, p.1]**

### **2. Trustee Lindsey Summons Kuala'au From Campus**

506. On May 1, 1997, Trustee Lindsey contacted Vice-President Rockne Freitas who informed Principal Ramos that Lindsey wanted to talk to Kuala'au. Ramos, through his

secretary, ordered Kuala'au to the principal's office [**Ramos Trial Testimony, 12/10/98**] and told him the Trustee wanted to see him. [**Kuala'au Trial Testimony, Tr. p.32-33**]

507. Prior to speaking with Ramos at 1:00 p.m., Kuala'au was not aware he was going to a meeting with Lindsey. [**Kuala'au Trial Testimony, 12/28/98, Tr. p.35**] Neither his parents nor the school president were contacted. [**Id.**; **Lindsey Trial Testimony, 2/4/99, Tr. p.187**] Kuala'au did not have the option of taking anyone with him to the 1:30 p.m. Trustee meeting. [**Kuala'au Trial Testimony, 12/28/98, Tr. p.35-36**]

508. Principal Ramos drove Kuala'au to Kawaiahao Plaza where they met with Lindsey for 2-1/2 hours in her office. [**Kuala'au Trial Testimony, 12/28/98, Tr. p.32-34, 37-39**] Lindsey told Kuala'au she had received telephone calls from unnamed persons informing her of his activities. [**Id. at 39**]

509. Trustee Lindsey read the following messages from her steno notepad: (1) a mother of an intermediate student told her that the student body president was doing a petition on campus and that intermediate students were being pressured; (2) Kuala'au initiated a letter writing campaign against the Trustees and for Dr. Chun; and (3) Trustee Stender called Kuala'au and told him that the Trustees were going to fire Dr. Michael Chun, so Kuala'au needed to do something about it and Stender would pay to put it in the newspapers. The last caller reportedly expressed indignation that Stender "would stoop so low to use a student like this." [**Kuala'au Trial Testimony, 12/28/98, Tr. p.39-40**]

510. Kuala'au told Lindsey that the first two messages were false. [**Kuala'au Trial Testimony, 12/28/98, Tr. p.41**] He was "shocked" that people were checking in with the Trustee and that his name was mentioned. [**Id. at 42-43**]

511. Kuala'au admitted Trustee Stender had called him and denied inaccuracies about their conversation. [**Kuala'au Trial Testimony, 12/28/98, Tr. p.43-45**] Trustee Lindsey and Principal Ramos tried several times to convince the student he was being "used" by Stender. [**Id. at 49-50**]

512. Kuala'au asked whether school President Chun was going to be fired. [**Kuala'au Trial Testimony, 12/29/98, Tr. p.18, 30**] She told him there have "never been any discussions in the boardroom to fire Dr. Chun. There have never been discussions in the boardroom during her tenure." [**Kuala'au Trial Testimony, 12/28/98, Tr. p.45; accord, 12/29/98, Tr. p.18; Ramos Trial Testimony, 12/10/98**]

513. During the meeting, Trustee Lindsey accused the senior "of being behind the applause for Dr. Chun at the Song Contest". [**Kuala'au Trial Testimony, 12/28/98, Tr. p.46**] At that point, Kuala'au cried, raised his voice and told Lindsey he "could not believe that people would disrespect Dr. Chun so much as to believe that the people who applauded him that day weren't doing it because they loved him." [**Id.**; **see Ramos Trial Testimony, 12/10/98; Lindsey Trial Testimony, 2/4/99, Tr. p.192**]

514. Lindsey also told Kuala'au, "I'm not going to do this, but how would you feel if I wrote a letter to Princeton and told them you were a rebel [rabble] rouser?" [**Kuala'au Trial Testimony, 12/28/98, Tr. p.48; accord, Exhibit A-314, p.31**] Kuala'au had been accepted at Princeton University for the Fall of 1997 and had applied for KSBE scholarship assistance without which he probably could not attend Princeton. [**Kuala'au Trial Testimony, 12/28/98, Tr. p.48-49**] He returned from Princeton to testify at trial. While his KSBE scholarship was never in jeopardy, Kuala'au said Lindsey's remark had made him tense in April 1997. [**Id. at 48**]

515. Lindsey also told Kuala'au during the course of their meeting that publication of his letter could add to Kamehameha's problems and he "could destroy the entire Kamehameha institution." [**Kuala'au Trial Testimony, 12/28/98, Tr. p.50**] Kuala'au testified, "I was scared . . . and I really believed that it was a scare tactic to get me not to print the letter and it worked." [**Id. at 51**]

516. Lindsey invoked promises of confidentiality about the meeting [**Kuala'au Trial Testimony, 12/28/98, Tr. p.52**] and the two embraced with cordial salutations as the meeting ended. Principal Ramos drove the student back to his campus dorm. [**Id. at 54**]

517. Lindsey's summary of the events, set forth in a formal court document filed in December 1997, differ in her assessment that Kuala'au was not "intimidated or threatened" by her actions. [**Exhibit A-314, p.31**]

518. Kuala'au saw Dean of Student Activities Ako later that evening at the Cazimero May Day concert and told Ako that "my stomach had been wrenching" and that "I had never cried so much in my life." [**Ako Trial Testimony, 11/25/98; see Kuala'au Trial Testimony, 12/28/98, Tr. p.56-57**] When he returned to campus that night, Kuala'au told classmate Moniz "things were looking bad" and he was "scared." He had been taken down to Kawaiahao Plaza to talk with Trustee Lindsey, but couldn't talk about it. [**Moniz Deposition p.96, p.113-114**] The next morning, Kuala'au told Moniz to burn the letter. We should not send it. [**Id. at 97, lines 18-20**] Moniz also said that Kuala'au "seemed real pressured out, just like he didn't know what to do." When Moniz saw Kuala'au the next day, he observed him to be "kind of jumpy," "all over the place" and still a little scared. [**Id. at 133**]

519. Trustee Lindsey testified there was "no particular reason" she did not go to the campus to meet with Kuala'au [**Lindsey Trial Testimony, 2/4/99, Tr. p.188**] and that her reason for meeting with him was to determine whether Stender actually had contacted the student and discussed Chun's status. Later, when Trustee Stender denied his contact with Kuala'au in a Board meeting, Principal Ramos was called into the boardroom to confirm what Kuala'au had said and that Stender lied to the Board. [**Lindsey Trial Testimony, 2/2/99, Tr. p.204-06; Wong Trial Testimony, 3/3-4/99**]

520. During the Summer of 1997, Na Kumu issued a public statement regarding the Kuala'au incident. [**Hoe Trial Testimony, 11/12/98, Tr. p.12-13**] Na Kumu representative Hoe was subsequently informed by her principal that her termination was

being considered. [**Hoe Trial Testimony, 11/10/98, Vol I, Tr. p.85; 11/12/98, Tr. p.13-14**] In a June 2, 1998 memo, Lindsey accused Trustee Jervis of stopping the administration from disciplining four Na Kumu leaders "who violated our internal policies and procedures." [**Exhibit A-415**] According to Hoe, a reprimand was placed in her record. [**Hoe Trial Testimony, 11/12/98, Tr. p.14**]

521. On January 12, 1998, after obtaining legal counsel to explore the possibility of a lawsuit, Kuala'au wrote to Chairman Wong, requesting an apology from the Board for Lindsey's actions. [**Exhibit A-341**] He received no response and did not initiate litigation.

522. At trial Lindsey testified that she still thinks it was "proper" to call Kuala'au down to her office, but if she "knew that it would cause this kind of a flak, it would never have happened." [**Lindsey Trial Testimony, 2/4/99, Tr. p.195**]

### **3. Trustee Lindsey's Actions Violate NAIS Principles**

523. NAIS Principles of Good Practice for Independent School Trustees Principle Number 8 states: "Authority is vested in the Board as a whole. A trustee who learns of an issue has the obligation to bring it to the head of school, or the board chair, and must not deal with the situation individually." [**Exhibit A-553**]

524. Trustee Lindsey's actions regarding Kamani Kuala'au violated this principle. An independent school trustee should not be involved directly in student discipline issues. [**Witt Trial Testimony, 2/22/99, Tr. p.58-59**] Under the principles of good practice, Lindsey's concern about Kuala'au's actions on campus should have led her to ask the school president to investigate the matter and get back to the Board with an explanation. [**Id. at 59-60**] It also would have been reasonable for Lindsey to suggest a course of action to the school president, although the administrator would not have been obligated to follow the suggestion. [**Id. at 60**] Instead, Lindsey bypassed President Chun and gave a directive to the vice-president and the school principal to transport the student to her office. While Lindsey did take the matter up in the boardroom, it was after she had subjected Kuala'au to her inappropriate and unprofessional conduct [**Ramos Trial Testimony, 12/10/98**] for which there is no justification.

### **D. Trustee Lindsey Blames "the Conspiracy" for Hostile Campus Atmosphere**

525. At trial Trustee Lindsey testified that "the conspiracy," rather than her own actions, created an oppressive and hostile atmosphere on the Kamehameha campus. [**Lindsey Trial Testimony, 1/6/99, Tr. p.33**]

526. Lindsey identified Trustee Stender as part of the conspiracy, asserting Trustee Jervis later joined the conspiracy. [**Lindsey Trial Testimony, 1/8/99, Tr. p.25-26**] She had heard some rumors that Dr. Chun and his wife were part of the conspiracy, and she

believed that the Fact Finder, Judge Yim, was a "victim" of the conspiracy. **[Id. at 26]** Trustee Lindsey testified that she thought some of the members of Na Pua and Na Kumu also were part of the conspiracy. **[Id. at 29]**

527. Strands of a conspiracy theory earlier manifested in August 28, 1995 minutes of Trustee Lindsey's public relations committee. **[Exhibit A-575, p.2]**: "Note that there is a subversive internal group positioning themselves to hurt KSBE in the larger community." Those minutes dealt with GoForward implementation and were not distributed to other Trustees. Twenty months later and a few days before the May 15, 1997 march, the public relations committee received an analysis of recent news articles in a format separating fact from opinion which Trustee Lindsey had requested. Those minutes quote committee member Wayne Chang blaming alumni involvement for "stirring up these issues". **[Exhibit A-585, p.3]** Lindsey then said she would take the issues to the other Trustees. **[Id.]**

528. The issues were indeed presented to the Trustees through the March of May 15, 1997, which attracted hundreds of kupuna, teachers, families and friends of the school. **[Stender Trial Testimony, 2/12/99, Tr. p.61]** The issues were next presented to the Board by Fact Finder Yim in November and December 1997. The issues were thereafter presented to the Board by the WASC accreditation report in March 1998. **[Exhibit A-521]** "[C]ertain key issues of concern" raised by WASC were later echoed in the Peterson report, commissioned by Trustees Lindsey, Wong and Peters and presented to the Board upon completion, June 30, 1998. **[Exhibit D-983, p.76]** The issues were earlier presented to Board chair Wong and Lindsey by campus administration on June 2, 1997 **[Exhibit A-208]** and well before that, in November 1996, the Sheppards Associates report raised similar, significant issues. **[Exhibit A-589]**

529. The credible evidence has shown no conspiracy creating campus hostility. The credible evidence instead shows the Kamehameha Schools suffer great harm under Lindsey's trusteeship, not the least being loss of half its customary WASC accreditation period.

530. In reaching these Findings of Facts the Court did not consider or rely upon Exhibit A-295, the Fact Finder's Report of Judge Yim. The Court did consider and cite Exhibit A-314, Trustee Lindsey's formal response to Yim's report. Thus, the Court took cognizance of findings quoted in Exhibit A-314 but only to the extent they gave meaning to Lindsey's responses contained therein.

## CONCLUSIONS OF LAW

### **I. STANDING AND JURISDICTION**

1. A trustee "may bring an action against his co-trustee to compel the latter to perform his duties under the trust or to enjoin him from committing a breach of trust or to compel him to redress a breach of trust." Richards v. Midkiff, 48 Haw. 32, 42 (1964). The rule is the same for charitable trusts. Id. at 42-43.

2. KSBE Trustees Stender and Jervis had standing to institute this action for the removal of their co-trustee, Lokelani Lindsey.

3. The Attorney General of Hawaii as parens patriae for the beneficiaries had standing to join in this removal action. Midkiff v. Kobayashi, 54 Haw. 299, 335 (1973).

4. This Court has jurisdiction over the parties and subject matter.

## II. STANDARD OF CONDUCT FOR A TRUSTEE

### A. Duty of Loyalty

5. A trustee is obligated "to administer the trust solely in the interest of the beneficiary." Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 340 (1982). Accord, H.R.S. Section 560:7-301 (1966); H.R.S. Section 554C-5, -11 (Supp. 1998) (effective April 14, 1997). This duty of loyalty is fundamental and inflexible. "[T]here is nothing in the law of fiduciary trusts that is more firmly settled than that a fiduciary shall not be allowed to thus serve himself while ostensibly serving the beneficiaries." Mid-Pacific Dress Manufacturing Co., Ltd. v. Cadinha, 36 Haw. 732, 741 (1944).

6. The duty of loyalty "precludes a trustee from dealing with trust assets to his own advantage or benefit." Steiner v. Hawaiian Trust Co., 47 Haw. 548, 558 (1964). "The trustee violates the duty of loyalty . . . when the trustee uses trust property for the trustee's own financial or other purposes." Restatement (Third) of Trusts, Section 170, Comment 1 (1992).

"In administering the trust the trustee is under a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust." Id. Comment q. It is not necessary that the trustee gain from the transaction to find disloyalty. In re Green Charitable Trust, 431 N.W.2d 492, 503 (Mich. App. 1998).

7. "If the trustee appropriates trust property to his own use directly, it is even more clear that he should be removed. Neither the fact that the trustee acted honestly under an assumption that he was entitled to the property, nor the fact that restitution has been made, is a defense." Bogert, Trusts & Trustees, Section 527, p. 86-87 (2d ed. 1992) (footnotes omitted; original emphasis) (hereinafter "Bogert"). Accord, Moore v. Bowes, 64 P.2d 423, 424 (Cal. 1937).

8. Trustee Lindsey breached her duty of loyalty by using estate assets for her own purposes, including her Punaluu home and family travels, as set forth factually in Sections I-A and I-E supra.
9. Likewise, in disregarding contract provisions, escrow instructions and counsel advice, to the detriment of KSBE, Trustee Lindsey breached the duty of loyalty as set forth factually in Section I-B supra.
10. Trustee Lindsey's failure to disclose the shared sour investment and potential conflict of interest regarding her relationship with Bush before the KDP investment and her post-investment failure to disclose knowledge of an FBI investigation involving Bush breached the duty of loyalty as set forth factually in Section I-C supra. The latter breach was aggravated by the fact it occurred while she was an officer and manager of the KDP entities and while she knew the investment was in trouble yet receiving additional funding from KSBE sources but kept quiet about the FBI investigation that ultimately resulted in Bush's indictment, albeit unrelated to KDP transactions.
11. Trustee Lindsey also breached her duty of loyalty by placing her personal interest above those of the trust and its beneficiaries; specifically, by placing her perceived self-interest above the best interest of Kamehameha Schools as set forth factually in Sections IV, V and VI supra.

## **B. Duty To Comply with Trust Instrument/Majority Rule**

12. "The nature and extent of the duties and powers of the trustee are determined . . . by the terms of the trust," except where compliance is impossible, illegal, or changes are approved by the court. Restatement (Second) of Trusts, Section 164, at p. 341 (1959).
13. Under the Will, a majority of the five trustees is required to act on behalf of the trust. Takabuki v. Ching, 67 Haw. 515, 527 (1985).
14. Unilateral trustee action in the administration of the KSBE trust is a breach of the Will and improper trustee conduct. See In re Estate of Holt, 33 Haw. 352, 360 (1935) ("It is nevertheless well settled that where there are cotrustees it is improper for one to act alone in matters involving discretion and judgment.") This is so even if the trust benefits from the unilateral action. Id. at 359-60 (trustee's unilateral decision to bring a necessary suit which benefitted the estate still broke rule requiring consultation with other trustees).
15. All trustees have a statutory obligation to "participate in the administration of the trust." H.R.S. Section 554A-6(c). Even in a trust where a majority of trustees may take action on behalf of the trust, there "remains the duty of all trustees to participate in decision-making with respect to these matters and to be an informed fiduciary participant in deliberations." Restatement (Third) of Trusts, Section 184, Comment c (1991). Arising from this is a duty to inform each and every co-trustee of "all material facts relative to

administration of the trust that have come to his attention." Bogert, supra, Section 584 at p.43 (Supp. 1998).

"A trustee's failure to give notice, disclose information or to permit his co-trustees access to trust records is not to be treated as of little consequence in the absence of evidence that the trust or its beneficiaries were thereby damaged. Proof after the fact of what the effect of disclosure of information or giving notice is difficult. Who can say what a trustee might have suggested, or how the other trustees would have responded, if all the trustees had been fully informed before determining the policy or conduct of the trustees." Id. "By refusing to permit his co-trustee access to trust records or to inform his co-trustee of all material facts regarding the trust and its administration, a co-trustee commits a breach of trust for which he may be removed as a trustee." Id. at 44.

16. Trustee Lindsey committed breach of trust when she acted without consulting co-trustees in connection with the Baker-Van Dyke Collection, as set forth factually in Section I-B supra; when she failed to disclose information about Bush in connection with KDP, as set forth factually in Section I-C supra; when she delayed release of the Sheppards Associates final report and the communication division plan, as set forth factually in Section III-A-1 supra; and when she made the unauthorized public release of her confidential education report, as set forth factually in Section IV-K,L supra.

17. Trustee Lindsey's unilateral actions, as set forth factually in Section II, supra, constitute breach of trust. She converted her authority as lead Trustee for education to investigate matters at the school into one of control over major education decisions, inserting herself as a separate and independent decision-maker between the President of Kamehameha Schools and the Board. She held a de facto veto over school operational, budget and policy matters intended for decision by the full Board and exercised that de facto power without consulting or informing other trustees, thus committing breach of trust.

18. There was no credible evidence that Trustee Lindsey acted in reasonable reliance on the Will in taking any of the above actions, which would otherwise contradict a finding or conclusion of breach. See H.R.S. Section 554C-1(b) (Supp. 1998) (Re: prudent investor rule, applicable April 14, 1997).

### **C. Duty of Due Care**

19. The common law set forth the duty of care as follows:

A second fundamental trust obligation is to use reasonable skill and care to make trust property productive . . . or simply to act as an ordinary and prudent person would in dealing with his own property. . . . We understand that a trustee is not expected to be infallible in his judgments or decisions. . . . On the other hand, the reasonable prudent person standard applies to protecting and caring for the property and does not permit one

to prudently speculate for instance.

Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 340 (1982).

"The trustee who acts honestly and with ordinary prudence is not liable for errors of judgment." Hartmann v. Bertelmann, 39 Haw. 619, 625 (1952). "In determining whether a trustee has acted prudently the courts must look at the facts as they existed, unaided by subsequent events. Whether or not the trustee is negligent depends on the circumstances of the particular case and the court will favor the trustee if there is no mala fides and nothing willful in his conduct." Id. at 626.

20. The statutory obligation, in effect since Trustee Lindsey became KSBE Trustee, reads as follows: "[T]he trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent person dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, the trustee is under a duty to use those skills." H.R.S. Section 560:7-302 (1993).

21. Effective April 14, 1997, the Hawaii Uniform Prudent Investor Act imposed the following duty: "A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustees shall exercise reasonable care, skill, and caution." H.R.S. Section 554C-2(a); see Section 554C-11 (effective provision) (Supp. 1998). The statute includes a due diligence requirement, Section 554C-2(d); requires a trustee with special skills or expertise to use them, subsection (f); and imposes a duty of loyalty in investment and management of trust assets, Section 554C-5. The codified prudent investor rule governs all common law expressions of the duty when incorporated in the provisions of a trust, H.R.S. Section 554C-10 (Supp. 1998), and enunciates "circumstances that a trustee shall consider in investing and managing trust assets", Section 554C-2(c).

22. Each trustee owes a duty to the trust which is separate and independent from any duty of another trustee. The relative culpability of the co-trustees for a breach of fiduciary duty does not excuse any individual trustee for her breach of duty. Henley v. Birmingham Trust National Bank, 322 So. 2d 688, 693 (Ala. 1975) ("The principle of contributory or comparative fault or neglect as between co-trustees plays no role in measuring the proper discharge of this high duty imposed by law on each trustee.")

23. Mismanagement or waste of assets constitutes breach of fiduciary duty. See In re Green Charitable Trust, 431 N.W.2d 492, 500 (Mich. App.1988) ("In general, the question is whether the trustee has done its homework."); In re Dreier's Estate, 235 N.W. 439, 442 (Wis. 1931).

24. Trustee Lindsey breached her fiduciary duty by her involvement in the mismanagement and waste of trust assets, as set forth factually in Section I-B,C,D supra. It is questionable whether the Baker-Van Dyke Collection would meet the standards for prudent investment under the subsequently enacted Hawaii Uniform Prudent Investor Act, H.R.S. Section 554C-2(c) (Supp. 1998). But it is clear that her actions in disregarding the contract and making unauthorized advance payments from escrow violated fiduciary standards then existing under statute and common law. Likewise, her faithful urging of a bad deal with EMG went to the extent of trying to suppress staff attempts to objectively conduct a cost-benefit analysis. In addition, her failure to disclose the FBI investigation involving Bush while KSBE entities continued actively investing in KDP did not constitute "reasonable care, skill, and caution" in the management of trust assets under the newly enacted and applicable statute. H.R.S. Section 554C-2(a) (Supp. 1998).

25. Trustee Lindsey also breached her trust duty by claiming to have special skill as an educator but acting contrary to the manner in which such expertise would be exercised, thus violating H.R.S. Section 560:7-302. She failed to use common sense let alone educational expertise in the Kuala'au incident, as set forth factually in Section VII-C supra. She failed to demonstrate educational expertise in establishing unreasonably short deadlines for the curriculum project and using an autocratic rather than collaborative approach to the curriculum guides and the manner of teaching the Hawaiian language (about which she had no personal knowledge), as set forth factually in Sections II-B, D supra. She further failed by preparing a biased, inaccurate, and incomplete report of educational quality and personnel at Kamehameha Schools, as set forth factually in Section V supra, and then released the report to the public knowing it would damage the school's reputation, as set forth factually in Section IV supra. She failed to show educational expertise by regularly bypassing the chain of command with the result that her actions undermined the educational institution's president, as set forth factually in Section III-C supra. She failed to recognize the new and different context for application of those educational skills she did possess, thus making them ineffective or inappropriate, as set forth factually in Section II-G supra.

#### **D. Duty To Exercise Sound Discretion**

26. The Hawaii Supreme Court in Takabuki v. Ching, 67 Haw. 515, 530 (1985) (citations omitted) embraced Section 187 of the Restatement (Second) of Trusts (1959) regarding control of discretionary powers as follows: "'Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' . . . The rule is no different for charitable trusts." Accord, Restatement (Second) of Trusts, Section 382. Commentary to the applicable restatement section limits court interference "unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment." Restatement (Second) of Trusts, Section 187, Comment e, at p.403 (1959). The nature of an improper motive is further delineated as follows:

Thus, if the trustee in exercising or failing to exercise a power does so because of spite or prejudice or to further some interest of his own or of a person other than the beneficiary, the court will interpose. Although ordinarily the court will not inquire into the motives of the trustee, yet if it is shown that his motives were improper or that he could not have acted from a proper motive, the court will interpose. In the determination of the question whether the trustee in the exercise of a power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.

Restatement (Third) of Trusts, Section 187, Comment g, at p. 209 (1992).

27. The later Restatement sets forth factors for court consideration as follows:

In determining the question whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or nonexistence, the definiteness or indefiniteness, or an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

Id., Comment d, at p. 208.

28. In applying the Restatement equation to the facts herein, it is worth noting (1) the Will confers discretion upon the Trustees, acting as a majority, to make appropriate investments and "to make all rules and regulations as they may deem necessary for the government of . . . [Kamehameha Schools] and to regulate the admission of pupils", Exhibit A, p. 18 to Exhibit A-629; (2) the main purpose of the trust is educational; (3) the nature of the power is limited only by the purposes of the perpetual trust to educate children, giving preference to those of Hawaiian ancestry and "to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women", id.; (4) there exist definite external standards for the conduct of trustees in the NAIS Principles of Good Practice for Independent School Trustees; (5) Trustee Lindsey's motives for exercising discretion to release her education report and pursue the WASC investigations clearly were improper and self-interested to the detriment of the beneficiaries; and (6) Trustee Lindsey's natural concerns about retaining the trusteeship conflicted with the fact finder's intention to remove her discretion as lead trustee and the attorney general's efforts as *parens patriae* for the beneficiaries to oust her and other trustees and with those student-beneficiaries and other members of the institution who supported the removal efforts. It is also clear that the co-trustees did not delegate their decision making powers under the trust to Trustee Lindsey in the context of giving her lead Trustee or liaison responsibility for the Education Group or for communications.

29. Trustee Lindsey breached her duties by abusing the discretion conferred upon her as Trustee, including but not limited to the liaison capacity of lead Trustee for the Education Group, as set forth factually in Sections II, III, IV, VII supra, and in connection with her interference in staff efforts to properly evaluate the EMG proposals, Section I-D supra, the alteration of contract and escrow terms in connection with the Baker-Van Dyke Collection, Section I-B supra, and use of trust personnel to obtain government permits for her Punaluu residence, Section I-A supra. These abuses include every incident encompassed by the above referenced findings of fact and include but are not limited to release of her education report, unilateral mandates regarding Hawaiian language, the change to quarter system for intermediate grades, funding for the Shintani Diet, suspension of the Hawaiian Cultural Project in violation of NAIS standards, micromanagement of Kamehameha Schools in violation of NAIS standards, intervention on behalf of her grandson in violation of NAIS standards, and summoning Kualā'au in violation of NAIS standards.

### **E. Hostility**

30. "Mere friction between the trustee and the beneficiary is not a sufficient ground for removing the trustee unless such friction interferes with the proper administration of the trust." Restatement (Second) of Trusts, Section 107, Comment c, p.236 (1959). If not, a beneficiary who otherwise lacks sufficient grounds for removal of a trustee could nevertheless compel that removal simply by instigating a fight. Wolosuff v. CSI Liquidating Trust, 500 A.2d 1076, 1082 (N.J. 1985). Thus, "hostility coupled with other conduct, such as questionable investments, is ground for removal." Morrison v. Asher, 361 S.W.2d 844, 852 (Mo. 1962).

31. The Supreme Court stated the principle as follows:

The power of a court of equity to remove a trustee, and substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated.

May v. May, 167 U.S. 310, 320-21 (1897) (citations omitted). Accord, Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974, 987 (Wash. 1987) (charitable trust context).

32. This principle is applicable to charitable trusts. See Sunday School Union of African M.E. Church v. Walden, 121 F.2d 719, 724-25 (6th Cir. 1941) (affirming trustee's removal where hostility resulted from improper investments, co-mingled funds, negligence and mismanagement); Brown v. Memorial National Home Foundation, 329

P.2d 118 (Cal. App. 1958) cert. denied 358 U.S. 943 (1959) ("dominating" trustee of charitable trust, id. at 125, removed for running the foundation as her fiefdom, where there was hostility, strife and antagonism between the trustee and beneficiaries, the record amply demonstrated the trustee's "hostile reaction . . . to any questioning or criticism of her regime", id. at 129, and she lacked "experience and qualification" to manage a two-million dollar trust, id. at 130).

33. "Beneficiary', as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, . . . and as it relates to a charitable trust, includes any person entitled to enforce the trust." H.R.S. Section 560:1-201.

34. Trustee Lindsey took the view that "the students of Kamehameha Schools are the beneficiaries of the schools. And the school is the beneficiary of Bernice Pauahi Bishop." [Lindsey Trial Testimony, 1/7/99, Tr. p.73] Trustee Jervis took the following view: "Current students are current beneficiaries. Former students or alumnae, people who benefited from KSBE programs are former beneficiaries. And children yet to come into KSBE programs are future beneficiaries. They all fall under the beneficiary umbrella." [Jervis Trial Testimony, 1/4/99, Tr. p.112] Trustee Stender took the view that "the children" are the beneficiaries of the Estate. [Stender Trial Testimony, 2/17/99, Tr. p.97] Trustee Wong, through his attorney, argued in closing that the public is the beneficiary of a charitable estate and there are no specifically identifiable beneficiaries, suggesting this approach would eliminate possibility of removal for hostility in any but non-charitable trusts.

35. The Court concludes that the Kamehameha Schools as an institution and all current and future students thereof are beneficiaries of the Will and KSBE.

36. The record amply demonstrates Trustee Lindsey's hostile reaction to criticism, as set forth factually in Sections IV, VI, supra, even requiring issuance of a temporary restraining order. The hostility between Trustee Lindsey and beneficiaries is extensive, pervasive and interferes with the proper administration of the trust; specifically, Kamehameha Schools, as set forth factually in Sections II-G, III-C, IV-B,C,M, and VII supra.

### **III. BURDEN OF PROOF**

37. The Hawaii Supreme Court in In re Estate of Campbell, 42 Haw. 586 (1958) addressed the burden of proof in the context of an accounting, specifically deciding that the court can review the decision of trustees in the exercise of their discretion to sell trust land. The court adopted the rule which gives trustee actions "the presumption of regularity and good faith and imposes upon the person questioning the trustee's action the burden of overcoming the presumption, but which requires the trustee ultimately to justify his action if sufficient evidence is produced to overcome the presumption." Id. at 607. The burden to prove good faith of the questioned actions is by a preponderance of evidence. Id. at 607-08. Finding nothing in the record to overcome the presumption favoring the trustees, the appellate court affirmed judgment that the land sales were

authorized by the will. Id. at 609. This analysis appears to comport with the legal principles regarding the duty to exercise sound discretion, wherein the court will not interfere absent an abuse of discretion. Likewise, the trial court in Takabuki v. Ching, 67 Haw. 515, 524-25 (1985) invoked the preponderance standard in adjudicating the claim and counterclaim of two KSBE Trustees seeking surcharge for damages in connection with the exercise of their discretion regarding a specific investment. The Hawaii Supreme Court alternatively ruled that dismissal was appropriate where the trial court had found neither trustee abused his discretion but had inappropriately proceeded to issue instructions for the trustees to follow in the exercise of their discretion. Id. at 529-30.

38. While the question of law is not settled in this jurisdiction, the Court finds any removal petitioner must meet a higher standard of proof; that is, by clear and convincing evidence, for those types of fiduciary breaches that are fraudulent acts, see Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 286 (1989) (clear and convincing evidence required for fraud), self-dealing or breaches involving dishonesty. In contrast, an abuse of discretion or act of negligence involving breach of the duty of care; for example, an imprudent investment may be proven by a preponderance of evidence. Thus, the remedy sought does not dictate the burden of proof as to the underlying claim; rather, the burden of proof is determined by the nature of the allegation or claim that gives rise to the requested removal. This is so in civil litigation where the higher burden is imposed for fraud claims because of the nature of the claim, not related to the damages.

39. To the extent this Court is in error and to ensure that Trustee Lindsey not be removed on the basis of insufficient proof, this Court has applied the standard of clear and convincing evidence to establish each factual finding and has held the Petitioners in this case to that standard in adopting the Findings of Fact and Conclusions of Law herein.

#### **IV. APPROPRIATE REMEDY FOR ESTABLISHED BREACHES**

40. The Hawaii Supreme Court in In re Estate of Holt, 33 Haw. 352, 356 (1935) affirmed removal of a trustee for proven "charges of inefficiency and neglect." While there was nothing in the record to reflect dishonesty, the court noted much "from which the [trial] court could reasonably have inferred that Thayer [the deposed trustee] was not sufficiently careful and diligent in the performance of his duties to meet the requirements of good stewardship." Id. at 362. Accord, Scott, The Law of Trusts, Section 107, at p. 107-08 (1987) (A trustee "will be removed if his conduct is such as to show his unfitness to administer the trust.")

41. Grounds for removal include "the commission of a serious breach of trust". Restatement (Second) of Trusts, Section 107, at p.235 (1959). Appropriation of trust property for the trustee's own benefit is a serious breach. Bogert, supra, Section 527. A trustee's conflict of interest justifies the immediate removal of the trustee. Hanson v. First State Bank & Trust Co., 385 S.E.2d 266, 267 (Ga. 1989). The rule equally applies to charitable trusts. Leahy v. Commission for Blind, 456 P.2d 77, 79-80 (Ore. 1969). The remedy of removal for breach of loyalty arising from misappropriation of trust assets to

benefit the trustee "is a protective measure for the preservation of the property and not a penalty for past irregularities." Bogert, supra, Section 527, at p.87.

42. The question of remedy is addressed to the sound discretion of the court. In re Estate of Holt, 33 Haw. 352, 357 (1935) Mere error or breach of trust may not be sufficient to warrant removal. "There must be such misconduct as to show a want of capacity or of fidelity, putting the trust in jeopardy." Webb v. St. Louis County National Bank, 551 S.W.2d 869, 882 (Mo. App. 1977). "The party seeking removal must prove serious danger to the interests of the beneficiaries from the trustee's continuance in office . . . on account of breaches of trust which he has committed or threatens to commit." Bogert, Trusts, Section 160, at p.573 (6th ed. 1987) (footnote omitted).

43. Having failed properly to use her educational experience , Trustee Lindsey has no other experience or qualifications to recommend her as the fiduciary of a two-billion dollar charitable estate. Indeed, the business venture (KDP) and technological investment (EMG) she initiated were both questionable and were ultimately abandoned after more than seven million dollars of KSBE assets were invested. (Sections I-C,D supra.) The major acquisition she negotiated for the 1996 purchase of the Baker-Van Dyke Collection is still not consummated, and good title to the photo segment remains undetermined. (Section I-B supra) The record is replete with examples of Trustee Lindsey's lack of due care and abuse of discretion which together with the breaches of loyalty including misappropriation of trust assets to her own benefit lead this Court to conclude, like the trustee in Holt, that Trustee Lindsey was not sufficiently careful and diligent in the performance of her duties to meet the requirements of good stewardship of the trust. She must therefore be removed as KSBE Trustee.

44. The Petitioners have shown by clear and convincing evidence that Trustee Lindsey has breached the duty of loyalty, the duty to comply with the trust instrument, the duty of due care, the duty to exercise sound discretion and generated hostility between the beneficiaries and herself. She failed to act and administer the trust solely in the interest of the trust and its beneficiaries, failed to inform her co-trustees of all material facts relating to the administration of the trust and made unilateral decisions without the knowledge or approval of her co-trustees. She used trust property and personnel for her personal benefit, mismanaged trust property and the Kamehameha Schools, and has shown a consistent lack of poor judgment demonstrating she is unfit to be a trustee. Trustee Lindsey's continuance in office is not in the best interests of the trust and would be seriously detrimental to accomplishment of trust purposes.

45. Each of the foregoing bases constitutes a separate and independently sufficient ground for Trustee Lindsey's removal as trustee. Any one of them together with the hostility between the beneficiaries and Trustee Lindsey which interferes with the proper administration of the trust further compel the conclusion that removal is the necessary and appropriate remedy.

DATED: Honolulu, Hawaii, June 10, 1999.

---

B. EDEN WEIL

JUDGE OF THE ABOVE-ENTITLED COURT

**\*Footnotes:**

1. At trial, Trustee Wong assumed Lindsey had followed the chain of command at the school because she impressed him as a process person and emphasized protocol. [**Wong Trial Testimony, 3/5/99, Tr. p.147**] School President Chun testified that when Lindsey became lead Trustee, Wong told Chun the president needed to deal with Lindsey on all education matters. Wong provided no further details. Over time and through their working relationship, Chun came to understand he must "go through her for matters dealing with the Education Group that needed to be dealt with at the Board level." [**Chun Trial Testimony, 2/18/99**]

2. Exhibit "A" to Trial Exhibit A-629 is the Will of the Princess and reads in pertinent part as follows: Thirteenth. I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings, and in furnishing the same with the necessary and appropriate fixtures, furniture and apparatus. I direct my trustees to invest the remainder of my estates in such manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers; the repairing buildings and other incidental expenses; and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above-mentioned to be determined solely by my said trustees they to have full discretion. I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to my said trustees may deem best. I also give unto my said trustees full power to make all rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of

a majority of said trustees. I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some newspaper published in said Honolulu, I also direct my said trustees to keep said school buildings insured in good companies, and in case of loss to expend the amounts recovered in replacing or repairing said buildings. I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants.

In relevant part, codicil No. 2 provides:

4<sup>th</sup>. Of the two schools mentioned in the thirteenth article of my said will, I direct the school for boys shall be well established and in efficient operation before any money is expended or anything is undertaken on account of the new school for girls. It is my desire that my trustees should do thorough work in regard to said schools as far as they go; and I authorize them to defer action in regard to the establishment of said school for girls, if in their opinion from the condition of my estate it may be expedient, until the life estates created by my said will have expired, and the lands so given shall have fallen in the general fund. I also direct that my said trustees shall have the power to determine to what extent said school shall be industrial, mechanical or agricultural; and also to determine if tuition shall be charged in any case.

3. Lindsey also testified that (1) changes in the way teachers are evaluated; (2) changes in the method that the student-teacher ratio is calculated; (3) changes in the standardized tests used; and (4) the evaluation of the Kamehameha Schools President are major decisions. [**Lindsey Trial Testimony, 1/6/99, Tr. p. 21-23**] The Court finds that the Board did authorize the teacher evaluation change for the secondary school at its June 4-5, 1996 retreat. [**Exhibit D-434, Attachment B, p.2, #32**] That does not mean she was justified in bypassing the school president when demanding its implementation in the summer of 1996. [**See Ramos Trial Testimony, 12/3/98**] Likewise, the Board approved use of a 14:1 student/teacher ratio in 1996 but didn't authorize Lindsey to negotiate the date of student enrollment by which the ratio would be calculated, and Lindsey admitted she did not inform the Board after negotiating a January date with secondary school principal Ramos. [**Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.47; Jervis Trial Testimony, 1/4/99, Tr. p.70-71**] The Court finds the Board did authorize elimination of the CTP-III standardized test. [**Exhibit D-995**] The substitution of the SAT-9 test was done without consultation of KES staff as to whether it was an appropriate test. [**Exhibit D-983, p.71 (Peterson Report)**] The Court further finds that Lindsey acted within her authority when she performed her evaluation of President Chun as contained in the Lindsey education report, but she acted without Board approval and in violation of NAIS Principles of Good Practice for Independent School Trustees in releasing the evaluation to the public. The Peterson report, completed June 30, 1998, for

the Board notes that the Board failed to evaluate Chun annually as NAIS guidelines require and that Lindsey's verbal advisory to Chun in 1997 "that his performance was considered below expectations" failed to indicate how he could improve and offered him no way to respond in writing. [Exhibit D-983, p.22] That notwithstanding, the Peterson report agreed with Lindsey's evaluation of Chun when recommending KSBE seek a new president. [Exhibit D-983, p.16-18]

4. In October 1996, Lindsey met with Freitas and the curriculum team in her Kawaiahaio office where they reviewed the K-6 curriculum. Trustee Lindsey wanted the KSBE History curriculum to add lessons about the Trustees and pictures of Trustees for KES students to identify. [Exhibit D-617, bates no. 13567; Holmes Trial Testimony, 2/22/99] The curriculum team members understood the "Trustee objective," as it became known, was to be integrated at the kindergarten level and insisted in memoranda that the objective be incorporated despite teacher resistance as developmentally inappropriate for kindergarten children. [Exhibit A-252] Lindsey disclaimed any knowledge of or responsibility for the Trustee objective being targeted for kindergarten. [Exhibit A-314, p.12; Lindsey Trial Testimony, 2/5/99, morning session, Tr. p.16]

5. That was Lindsey's second communication to Chun asserting KES students were doing worse over time. Her first was a handwritten note on July 15, 1996. [Exhibit D-388]

6. President Chun testified that it was necessary to receive Lindsey's approval for any Education Group item to be put on the agenda. [Chun Trial Testimony, 2/18/99] Thus, the administration had to first satisfy her unilateral requirements, as the curriculum project demonstrates.

7. To the extent that Lindsey relies upon decisions attributed to the June 4-5, 1996 Trustees retreat held at Turtle Bay, the memorandum of President Chun summarized Trustees' "major decisions" as they were related to him at a post-retreat briefing and included the following: "Develop a plan for assuring age-appropriate and outcome-based continuum within the curriculum." [Exhibit D-432, Attachment B, page 2, #30] The Court gives little weight to this document as evidence of Board authorization for Lindsey's curriculum project, particularly in light of the contrary testimony by three other Trustees. At most the exhibit charged the school with developing a plan for Board action.

8. In 1995 Lindsey met with the Hawaiian language teachers and inter alia informed them she consulted with various research persons. The teachers requested opportunity to meet with them but Lindsey declined to arrange it. [Keahi Trial Testimony, 11/30/98; Eyre Trial Testimony, 11/30/98]

9. Trustee Stender explained that the prior Board (of which he was a member but she was not) directive was that the Kamehameha Schools not be a Hawaiian immersion school. He testified that the current Board talked about what the prior Board had done but the language immersion issue was different from Lindsey's directive as to language courses about which the prior Board had made no decisions and had not even discussed. [Stender Trial Testimony, 2/12/99, Tr. p.20-21] Hawaiian language teacher Keahi testified that

she taught under nine Trustees, three school presidents, and seven school principals. No Trustee had ever before interfered with the teaching of Hawaiian language in the classroom. **[Keahi Trial Testimony, 11/30/98]**

10. Expert witness Witt testified that a public school superintendent is the equivalent role of a private school president, and the trustee role is supposed to be different from a school president. **[Witt Trial Testimony, 2/22/99, Tr. p.62]** Indeed, the role of private trustee is more clearly analogous to membership on the board of education, not a superintendent or district superintendent. Lindsey testified that she learned her Trustee role partially equated with the board of education but that understanding "evolved as we went along and faced different issues." **[Lindsey Trial Transcript, 1/6/99, Tr. p.18]** The Peterson report, commissioned by Trustees Lindsey, Wong and Peters, and presented to the Board after its completion on June 30, 1998, criticizes the CEO approach to governance and recommends the Board "adopt the NAIS model of Governance". **[Exhibit D-983, p.18]** The model is enunciated in NAIS Principle Number 4: "The board sets policy; the administration implements policy. An individual trustee does not become involved in specific management, personnel or curricular issues." **[Exhibit A-553, p.1; accord, Exhibit D-983, p.18]**

11. E.g. student-teacher ratio calculated on the basis of year-end data should establish educational budget ceilings; EMG worked well for Maui and will improve the Kapalama campus.

12. E.g. replacing CTP-III standardized tests used in private sector with SAT-9 tests used in public schools **[Exhibit A-144, p.1]** thus destroying the KES historical data base for selective admissions classes and forcing future comparison exclusively with public not private schools. **[Exhibit D-983, p.70-71]** (The change in testing instruments received Board approval through the budgeting process on December 17, 1996. **[Exhibit D-995]**) The switch to SAT-9 was done without consulting KES staff as to whether the SAT-9 test was appropriate for the school. **[Exhibit D-983, p.71]**

13. E.g. the curriculum project mandated by Trustee Lindsey in 1996.

14. E.g. appearing unannounced in classrooms.

15. "Trustee Lindsey reviewed the curriculum continuum to assist in resolving philosophical differences that impeded student progression." **[Exhibit A-314, p.11 (Lindsey's Response to Fact Finder's Report, Response No. 6)]** One philosophical shift sought to be achieved by Lindsey was use of basal texts not utilized by Kamehameha Elementary School which had embraced a whole language approach to elementary education. **[Asam Trial Testimony, 12/23/98]** (See Peterson report discussing curriculum debate between phonics and whole language at KES and satellite schools. **[Exhibit D-983, p.106]**)

16. The Board adopted the following Mission Statement in 1974:

The Trustees policy is to provide as many meaningful educational services as resources will permit for the beneficiaries, giving preference to children and youth of whole or part-Hawaiian ancestry to assist them in their efforts to develop their highest potential as effective participants in contemporary society.

**[Exhibit A-649, p.19]** The 1974 statement was replaced by the following:

Kamehameha School Bishop Estate exists to carry out in perpetuity the wishes of Ke Ali'i Bernice Pauahi Bishop to educate children and youth of Hawaiian ancestry to become good and industrious men and women. This will be done through the Kamehameha Schools as resources permit:

To accomplish this Mission we will:

Promote the educational development and growth of all people at KSBE;

Foster Protestant religious worship, morals and spiritual values;

Prudently and actively manage assets to meet our educational goals;

Conduct ourselves with a clear commitment to po'okela - excellence;

Encourage, cultivate and inspire students, graduates and staff to serve the Hawaiian community and the community at large;

Preserve and perpetuate Hawaiian culture, traditions and values;

Instill throughout the organization Hawaiian ancestral values including:

- Pono - To be moral and proper
- 'Imi'Ike - To seek knowledge
- Laulima - To work cooperatively
- Lokomaika'i - To share
- Na'au Pono - To possess a deep sense of justice
- Malama - To care for each other

- Ha'aha'a - To be humble

**[Exhibit A-672, p.4]**

17. At the same time in 1996, the girls' cross-country team requested Lindsey's approval for the design and wording for their practice sweatshirt and sweatpants. **[Exhibit A-121; Truesdel Trial Testimony, 12/1/98]** When the team received the response back from Lindsey's office, the Hawaiian words "Heihei Kukini" were crossed out and replaced with the words "Heihei Holo." **[Exhibit A-121]**

18. The anger was exacerbated because the community programs which had not fared well under the E&Y evaluation were diligently "re-engineering" themselves to address their respective identified weaknesses, and the re-engineering effort was sanctioned by administration and known to the Board.

19. The attrition rate was anticipated by the prior Board and school staff because KES admissions were then on random or lottery basis. That policy changed to selective admissions for the kindergarten class of 1990. **[Exhibit A-521, p.3]** Thus, KES 6th graders entering the 7th grade in 1997, all having been admitted to KES under the new selective admissions policy, were not tested for admission to the secondary school. Only non-KES applicants must meet the 7th grade selective admissions standards for those seats available in the expanded class size.

20. Lindsey's memorandum of August 12, 1997, to Vice President Freitas **[Exhibit A-241]** demanding an explanation for the curriculum project deadline having been missed is inconsistent with the claim to have relinquished lead trustee responsibilities on that date. Exhibit D-569, dated November 17, 1997, to President Chun is to the same effect.

21. Mr. Ing represents Trustee Stender in this action.

22. Lindsey explained her concern that the Board would take no action on her report, especially after receiving a response from Chun, but she thought media coverage would focus the necessary attention. **[Lindsey Trial Testimony, 1/7/99, Tr. p. 64]** She was mistaken. Trustee Wong testified that the Board took no action on Lindsey's concerns after release of her education report. **[Wong Trial Testimony, 3/9/99]** This inaction was consistent with the Board having ignored Stender's concerns about the school which he had raised at various times dating back to 1994. **[Id.]** Lindsey correctly noted that Stender took certain of his concerns to the media at a time when Trustees had agreed to maintain silence. **[Exhibits D-283; D-285]** Stender's breach of Board confidentiality in no way justified her own.

23. PEP staff continued work on a supplemental response, reorganizing comprehensive student performance data, which Chun submitted to the Board on January 8, 1998. **[Exhibit A-337]**

24. The Peterson report, commissioned by Trustees Lindsey, Wong and Peters and completed on June 30, 1998, had a different view: "It has been shown that when internal battles go public, the institution and the students always lose." **[Exhibit D-983, p.16]** The Peterson report noted "public criticism of individual Trustees and school directives" which began in 1996 and "culminated in a November 25, 1997 report prepared by Trustee Lindsey which openly criticizes the Schools' curriculum, teachers and administrators". **[Id.]** That, together with the printed responses and subsequent public criticism of Lindsey by Stender were "but a few examples where the Board violated basic NAIS principles and demonstrated poor judgment through its lack of public support for the President, faculty and institution." **[Id.]** This led the authors of the Peterson report to Finding III.A-2: "There is a significant and public conflict between the President and the Board that has adversely affected the image of the Schools." **[Id.]**

25. For example, the 1995 Portfolio documented improvement on the "Writing Performance Assessment" used at Kamehameha, and noted that "Kamehameha writing skills are well above the level achieved by the entering college freshman norm group." **[Exhibit A-645, p.13]** The 1996 Portfolio showed continuing increases in SAT scores and continuing increases in the number of Kamehameha graduates attending college. **[Exhibit A-646, p.62, 68]** It also discussed the school's efforts since the mid-1980's to carry out a "verbal skills across the curriculum effort to raise student achievement." **[Exhibit A-646, p.62]**

26. The improved mean scores also were significant because 100% of seniors took the College Boards in recent years whereas it was optional in the past **[Ramos Trial Testimony, 12/2/98]** Lindsey testified that she believed KSS should set an average class College Board score of 600 math and 600 verbal as a future goal, which is well above the UH minimum requirements of 510. Kukea testified that only 55% of students in private schools achieve 510 scores **[Kukea Trial Testimony, 2/10-11/99]** and no private school in Hawaii has a 600 average.

27. In the context of the K-6 data used in Giuli's report, Tibbetts similarly testified that regression to the mean is the tendency for a high scoring group to test lower or to move toward the mean upon retesting. **[Tibbetts Trial Testimony, 2/8/99]** Lindsey's understanding of the same theory is as follows: If students were given "the exact same test, exact same form, you will find students having knowledge of taking the test a month or two before and taking the test immediately again would regress to the mean." **[Lindsey Trial Testimony, 2/1/99, Tr. p.207]** She did not find the theory relevant to Giuli's study "because it was apparent to me that there were different tests given at different times." **[Id.]** Popham testified that Lindsey's education report demonstrates she is ignorant of the principles of regression to the mean, a theory taught in introductory education research courses. **[Popham Trial Testimony, 2/3/99, Tr. p.51-52]**

28. One factor that explains the higher reading scores at kindergarten is that half the children who enter KES at kindergarten are repeating kindergarten. These students are a year older. If the KES kindergartners are compared with children at the same age, the scores do not stack up at the highest stanine. The learning growth curve is steepest at the

younger ages, further explaining the greater abilities (test performance) of an additional year at the kindergarten level. **[Tibbetts Trial Testimony, 2/8/99; Exhibit A-652, Figure 2.1]**

29. Lindsey testified she sent a memo to Trustees amending the statement by adding "at grade level." **[Lindsey Trial Testimony, 1/6/99, Tr. p.115]** The credible evidence is to the contrary. **[See Stender Trial Testimony, 2/12/99, Tr. p.76-77]** Testimony from KSBE employee Walsh regarding the edits Lindsey approved shows the last draft language was "who can't read." **[Exhibit A-486 (original emphasis)]** That was changed to "can barely read" in the final version of the education report. **[Exhibit A-282, bates no. 1013 (original emphasis); Walsh Trial Testimony, 11/17/98]** It is not clear whether Lindsey clarified her finding with the Honolulu Advertiser and Star-Bulletin reporters who added "at 12th grade levels" in the December 6, 1997 articles **[Exhibits A-299, p.3; A-300]** or whether the reporters inferred that from the more specific finding that those "students in the Class of 1997 scored below average stanines in reading, as measured by the 1997 SAT-9." **[Exhibit A-282, bates no. 1018]**

30. At trial Lindsey said the retesting was the only time she was concerned about the effect of regression to the mean, expecting the scores to improve if they took the same test. But she did not inquire and had not researched it by the time of trial. **[Lindsey Trial Testimony, 2/1/99, Tr. p.207-08]**

31. Lindsey's assertion as a criticism of the school is surprising given it was her curriculum project team that had worked from June 1996 to August 1997 to present her with draft curriculum guides. **[Exhibit A-241]**

32. Trustees Lindsey, Wong and Peters, at Peters' recommendation, chose Peterson Worldwide Consulting (Peterson) of San Francisco to undertake the study. Trustees Stender and Jervis opposed that choice preferring to engage more recognizable educational consultants like Stanford University, UCLA, Carnegie Foundation or Booz-Allen & Hamilton, all recommended to Park by Coopers & Lybrand on February 16, 1998. **[Exhibit D-632 (received only as to notice as to Park); Exhibit D-631; Park Trial Testimony, 2/24-25/99]** While Administration Group Director Park recommended sending requests for bids to all five firms, the majority Trustees voted to send a single RFP only to Peterson who was retained and timely completed the report for which KSBE paid approximately \$500,000. **[Park Trial Testimony, 2/24-25/99]** The study was done to satisfy a recommendation of Judge Yim and was part of Probate Court proceedings emanating from the Fact Finder's report. **[Exhibit A-630]** At trial Peterson's Vice-President Philip Rowley testified he received a telephone voice mail message from KSBE private counsel William McCorrison a couple days before the KSBE engagement: "You might be bidding on the educational work. I might have an education guy you might want to consider." **[Rowley Trial Testimony, 3/10-11/99]** McCorrison's firm previously had retained Peterson for other clients in unrelated cases. **[Id.]** Following Rowley's first meeting at Kamehameha campus, Park warned him the "nature of the engagement is extremely political." **[Id.; Exhibit A-378]**

33. Lindsey was unaware of the 1992 ESP "until Trustee Stender informed her of its existence only after the current strategic plan was almost complete." **[Exhibit A-314, p.17 (footnote omitted)]** The current strategic plan was adopted by the Board in August 1997.

34. In an August 4, 1995 memo, Trustee Stender asked the other Trustees to reconsider the termination of certain community outreach programs, including the summer school program, the adult education programs, the traveling pre-school program, the alternative education program, and financial aid for special needs students. **[Exhibit A-54]** By memo dated August 29, 1995, Trustee Wong informed Stender that the other four Trustees refused to reinstate the programs. **[Exhibit D-582]** In her education report Lindsey referred to the demise of these programs as "phasing out of costly programs and rechanneling of \$11 million to our productive core programs." **[Exhibit A-282, bates no. 1015]** Indeed, the Board had established highest priority for "core" educational programs during its 1993-94 strategic planning retreats **[Exhibit A-561, p.6]** when they defined core educational programs as those "educating KSBE students in KSBE facilities using KSBE teachers and KSBE curriculum." **[Exhibit A-282, bates no. 1015]**

35. Trustee Lindsey urged the Board to set a later deadline, but Trustee Jervis refused.

36. Organizational goals #13, #14 and #15 of the 1997 Education Strategic Plan stress the promotion of effective communication throughout the organization, positive community relations, and unity in pursuit of KSBE's mission among its 'ohana, including alumni and parents of students. Our interviews with staff, negative newspaper articles and the formation of an employee union evidenced a lack of internal communication and unilateral decision-making without internal or external stakeholder input. As a result, the image of the institution has been tarnished and community relations have been adversely impacted. Additionally, the Education Strategic Plan will be resisted because the Trustees demonstrate no ownership or commitment to the goals.

**[Exhibit D-983, p.50]**

37. Expert Popham opined: "Based on her evaluation of an instructional quality in this report, I think the author of this report is both incompetent and unfair and I conclude that such an individual is not qualified to serve as an educational policymaker because the policies she will make regarding instructional effectiveness are likely to be unsound and those unsound policies will surely harm the children." **[Popham Trial Testimony, 2/3/99, Tr. p.67]** Lindsey relies in part on the June 30, 1998 Peterson report as sustaining her findings. Her reliance is misplaced. While Peterson findings duplicate some but not all of the Lindsey education report, the Peterson study provides a much more comprehensive and balanced view of student performance at every level but particularly praising KSS (e.g. findings V.D-9; V.E-8) **[Exhibit D-983, Section V]**

38. The Peterson report, commissioned by the majority Trustees after Yim's Fact Finder report and completed June 30, 1998, concurred with certain concerns raised by WASC

including (1) "perception that the Board is out of touch with the Secondary School", (2) need for a planning process that would "develop ownership on the part of those who will be asked to implement the plan", (3) "need to involve faculty in decisions relating to the allocation of personnel resources", and (4) "[l]oss of faculty respect for administrators perceived to be primarily concerned for control . . . of faculty". **[Exhibit D-983, p.76]**

39. Board Chair Wong explained he has not entirely read Chun's original response and not reviewed the supplemental response at all and added that it is difficult to get all Trustees together to discuss these important issues regarding the school. **[Wong Trial Testimony, 3/9/99]**

40. Board Chair Wong, a former UPW business agent, personally favored the formation of the faculty union but formally opposed it as a member of the Board. **[Wong Trial Testimony, 3/5/99, Tr. p.30-32]** He blamed President Chun for teacher frustration in not being heard and given answers to their concerns. **[Id. at 29-30]** The Court finds Wong's view simplistic and inaccurate in failing to consider Lindsey's contributing actions and the Board's refusal to deal with Na Kumu and faculty unrest.

41. Neil Hannahs works in the KSBE Asset Management Group and was the school's representative for its entry in the 1995 Kamehameha Day parade. On the morning of the parade, Lindsey was "quite upset" with the sign on her parade car. She said the sign was "inappropriate, potentially damaging to the institution's image ... and, whoever made the sign was insubordinate." **[Hannahs Trial Testimony, 12/2/98]** Lindsey's specific complaint was that her sign had only her name while Trustee Stender's car also identified his spouse and grandchild. Hannahs explained that each Trustee had been given the opportunity to word their sign. This did not mollify her anger. Hannahs testified he was humiliated to be at the end of a tirade by one's boss and publicly reprimanded. **[Id.]**

42. Lindsey denied the swearing words, but the Court finds Fong's recall credible. She is less likely to remember the specifics because of being upset. In addition, Fong noted Lindsey's swearing in an April 15, 1997 summary of the event which he created only four days after it occurred. **[Exhibit A-181]**