The Board sent these proposals to public hearing, and the changes have not yet been formally made to the administrative rules governing the schools. Nonetheless, it was clear that the members of the Board in 2008 favored changes that would eliminate any privacy claims that students can make regarding their personal effects while at school. In the November 2008 election, the composition of the Board changed and new members were added to it, and this matter may be subject to reexamination. This article is designed to explain the impact that the proposed changes would have on the constitutional rights of Hawai‘i’s students and, potentially, on the privacy rights of all of Hawai‘i’s citizens.

The proposed changes would amend the regulations governing School Searches and Seizures found in Section 8-19-14 et seq of the Hawai‘i Administrative Rules. The present language of these rules is as follows:

SUBCHAPTER 4 - SCHOOL SEARCHES AND SEIZURES

§8-19-14 Policy on school searches and seizures. Students have a legitimate expectation of privacy in school and during department-supervised activities on or off school property. Their expectation of privacy extends to their persons and personal effects as well as school property assigned for their individual use. School officials shall respect and uphold these privacy rights of students. Schools, on the other hand, have an equally legitimate need to maintain order and an environment where learning can take place. In fulfilling this legitimate need, school officials may on occasions need to carry out searches and seizures on school premises or during department-supervised activities. As a general policy such searches and seizures are permissible only when the health or safety of a person or persons would be endangered if a search or seizure is not carried out by school officials. Searches and seizures conducted by school officials shall abide by the provisions of this subchapter.

§8-19-15 Authority. Searches and seizures may be carried out on school premises or during department-supervised activities, on or off school property, by any school official who is responsible for the supervision of the student or property to be searched. A school official conducting a search shall be accompanied by another school official serving as a witness unless it is an emergency where prompt action is necessary to protect the health or safety of a person or persons. It is not necessary for school officials to obtain a warrant before conducting a search of a student or property.

§8-19-16 Conditions under which searches and seizures may be carried out.
(a) Searches and seizures may be carried out by school officials when all of the following conditions are met:
(1) At the time of the search there are reasonable grounds to suspect, based on the attendant circumstances, that the search will turn up evidence that the student or students have violated or are violating either the law or the student conduct prohibited under this chapter.
(2) The manner in which the search is to be conducted is reasonably related to the purpose of the search and not excessively intrusive in the light of the student’s age and sex and the nature of the suspected
offense.
(3) Unless the health or safety, or both, of an individual is in jeopardy, the student who will be subjected to a search shall be informed of the purpose of the search and shall be given an opportunity to voluntarily relinquish the evidence sought by the school official.
(b) The principal or designee of the school shall be informed by the school official who will conduct the search that a search is to be conducted and of the purpose of the search unless it is an emergency where prompt action is necessary to protect the health or safety of a person or persons.
(c) If more than one student is suspected of committing a violation, then the school official conducting the search shall start with the student most suspected of having the item which is related to the purpose of the search.

§8-19-17 Prohibited searches and seizures.
(a) Random searches are prohibited.
(b) Strip searches are prohibited.
(c) A school official shall not conduct a search requiring bodily contact of a student of the opposite sex except when such a search is necessary to prevent imminent harm to the health or safety of a person or persons.
(d) In the course of a search, the use of force against a student is prohibited unless the school official believes that the force to be used is necessary to prevent imminent harm to the health or safety of a person or persons. When the use of force is necessary, the degree of force shall not be designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation.
(e) Seizure of the personal effects of a student resulting from a search conducted under the provisions of this subchapter shall be limited to the object or objects for which the search was conducted. However, any other object observed during a search may be seized by a school official when possession of the object is a violation of law or the provisions of this chapter, including the possession of contraband constituting a class D offense under this chapter, or when non-seizure may pose a serious threat to the health or safety of a person or persons, including the school official conducting the search.

§8-19-18 Searches and seizures involving law enforcement officers. School officials shall cooperate with law enforcement officers in the conduct of criminal investigations on school premises and during department-supervised activities in accordance with the provisions of sections 22, 23, and 24 of this chapter relating to police interviews and arrests. However, school officials shall not conduct any search and seizure in conjunction with, or at the request of, law enforcement officers as part of a criminal investigation. Law enforcement officers shall be permitted to carry out searches and seizures which they deem necessary under the prevailing legal standards of criminal investigations.

This language, as it presently exists, is excellent, and it conforms to the constitutional principles governing privacy in Hawaii. In particular, it recognizes the important rights of privacy recognized in
Hawai‘i's Constitution, in Article I, Sections 6-7. The proposed new language would directly violate the Constitution and Laws of Hawai‘i. Allowing school officials to open lockers and to allow dogs to sniff these lockers, without any particularized suspicion that an individual student has violated any school rule, would send a totally inappropriate message to the students that they have no privacy rights and that our school officials have no respect for the constitutional rights that our predecessors have fought and died for. As Justice Louis Brandeis said, arguing that wiretaps should be viewed as searches for Fourth Amendment purposes: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

If the Board changes the language along the lines of the present proposal, it will be teaching our students, who will shortly become voters and community leaders, that their personal rights to privacy are unimportant and can be ignored even when there is no basis for suspecting that they have done anything wrong.

**The Proposal.** The 2008 Board of Education approved a proposal that would dramatically change the rules governing School Searches and Seizures in our state. As listed above, the existing language in HAR sec. 8-19-14 says that "Students have a legitimate expectation of privacy in school" and that this expectation extends to "school property assigned for their individual use," such as school lockers. The proposal would reverse this strong language to say, in equally strong language, the opposite. The language approved by the Board for what would become "Section 8-19-14 Policy on opening and inspection of student lockers" reads as follows:

School lockers provided to the students on campus are subject to opening and inspection (and external dog sniffs) by school officials at any time with or without cause, provided that such searches are not because of the student’s race, color, national origin, ancestry, sex, gender identity and expression, religion, disability or sexual orientation. Section 8-19-15 shall have no applicability to the opening
and inspection (and external dog sniff) of student lockers. None of the restrictions in Section 8-19-15 through Section 8-19-18 or Section 8-19-19 or related to general searches and seizures shall in any way be construed to create an expectation of privacy in student lockers. Students should assume that their lockers are subject to opening and inspection (and external dog sniff) any time with or without cause.

This proposed provision would thus allow intrusive searches in school lockers at any time by any school official, without any need for any particularized reason for the search. The formal adoption of this proposed language would mark a complete turnaround from the language now found in Section 8-19-14 and, as explained in more detail below, would be inconsistent with the holdings of the Hawaii Supreme Court in In Re Interest of Jane Doe, 77 Hawaii 435, 436-37, 887 P.2d 643, 646-47 (1994) (stating that "individualized suspicion" is "a necessary element" in determining whether a search of a student's personal effects is reasonable under the U.S. and Hawaii Constitutions). This approach would also be inconsistent with the holding of the U.S. Court of Appeals for the Ninth Circuit in B.C. v. Plumas Unified School District, 192 F.3d 1260, 1268 (9th Cir. 1999) (ruling that "the random and suspicionless dog sniff search of B.C. was unreasonable in the circumstances"). If the Board were to adopt the present proposed language, litigation challenging suspicionless searches can be predicted.

The General Federal Constitutional Standard Governing Searches of Students in Public Schools. The U.S. Supreme Court in New Jersey v. T.L.O., 469 U.S. 325 (1985), made the following rulings governing searches of students in public schools:

* Students in public schools do have legitimate expectations of privacy which are protected by the Fourth Amendment.

* Public school officials are government officials and must comply with Fourth Amendment requirements when conducting searches or seizures.
School officials do not need search warrants or probable cause to search a student, but they must still have a "reasonable suspicion" that the student being searched has violated a school rule and that evidence of the violation will be found in the particular place being searched. The search conducted must be consistent with its original objective and must not be excessively intrusive in relation to the nature of the suspected infraction or the student's age or sex.

Traditionally American citizens have had an abhorrence of random and suspicionless searches. The U.S. Supreme Court has, however, permitted random urinalysis testing of student-athletes and other students who engage in extracurricular activity, because of the school's "custodial and tutelary" responsibilities for its students. Courts have also upheld the use of metal detectors at entrances to schools when the use or threat of weapons has become a problem at the particular school.

The Governing Hawaii Law Regarding Searches of Students. The Hawaii Supreme Court has followed the T.L.O. ruling and has found that "children in school have legitimate expectations of privacy that are protected by article I, section 7 of the Hawaii Constitution and the fourth amendment to the United States Constitution," and that "individualized suspicion" is "a necessary element" in determining whether a search of a student's personal effects is reasonable under the U.S. and Hawaii Constitutions. In 2004, the Hawaii Supreme Court confirmed those rules, particularly that individualized suspicion is a necessary precondition to conduct a search, and concluded that an anonymous Crime Stoppers' tip was not sufficient to serve as reasonable grounds to search a student for contraband.

The Governing Ninth Circuit Decision Regarding Canine Sniffs. The U.S. Court of Appeals for the Ninth Circuit (which includes Hawaii within its jurisdiction) addressed the question of canine searches in B.C. v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999). In that case, the Principal and Vice Principal of Quincy High School in Plumas County, California, instructed the students to vacate their classroom, and to pass by "Keesh", a drug-sniffing dog. "The dog was always three to four feet from the students as they exited and reentered the classroom," and "did not sniff around each student [or] touch the students in any manner." After they departed, Keesh "sniffed backpacks, jackets, and other belongings which the students left in the room." Keesh alerted on one student on two separate occasions, but no drugs were found on the student, indicating a "false positive."

The court's majority opinion in B.C. does not separate the two aspects of the search - the students passing by the dog and the dog's subsequent search of the belongings of the students - but concludes that the event, taken as a whole, "constitutes a search," because it "infringed B.C.'s reasonable expectation of privacy." The court emphasized that it is this "expectation of privacy" that is key, and that "the reach of the Fourth Amendment cannot turn on the presence or absence of a physical intrusion."

In reaching the conclusion that "the random and suspicionless drug sniff search of B.C. was unreasonable in the circumstances," the court distinguished Vernonia, supra, on two grounds: (1) Vernonia involved student-athletes "who voluntarily participate in school athletics [and who] have reason to expect intrusions upon normal rights and privileges, including privacy," while "the search in this case took place in a classroom where students were engaged in compulsory, educational activities," and (2) the Vernonia School District "was suffering an immediate drug crisis," while "the record here does not disclose that there was any drug crisis or even a drug problem at Quincy High in May 1996." Because of "the absence of a drug problem or crisis at Quincy High, the governmen't's important interest in deterring student drug use would not have been 'placed in jeopardy by a requirement of individualized suspicion.'" The Ninth Circuit thus required the governmen't to carry the burden that the search was necessary to
serve its goals, and that no other less intrusive alternative was available. The court also emphasized that "[i]t is well settled that students do not 'shed their constitutional rights . . . at the schoolhouse gate.'"37

Other Decisions Recognizing Privacy Interests in Student Lockers. Although the cases are inconsistent on this point, many courts have agreed with Hawaii’s traditional position that students have privacy interests in their school lockers. The California Supreme Court ruled in 1985, for instance, that a student has the "highest privacy interest in his or her own person, belongings, and physical enclaves, such as lockers."38 This conclusion was confirmed more recently by a California appellate court which explained that "[i]n California, a student has an expectation of privacy in his school locker."39 Other decisions have reached the same conclusion.40 One of the most eloquent statements regarding the importance of protecting students’ privacy interests in the contents of their lockers is found in In re Adam, 120 Ohio App.3d 364, 375-76, 697 N.E.2d 1100, 1108 (11th Dist. Lake County 1997), where the court explained that students have a legitimate expectation of privacy in their school lockers, and that this expectation is not eliminated by a sign posted on all locker bays that said:

The lockers supplied by the Board of Education and used by the students are the property of the Board of Education. Therefore, the student lockers and the contents of all the student lockers are subject to random search at any time without
regard to whether there is a reasonable suspicion that any locker or its contents contains evidence of a violation of a criminal statute or a school rule.

Random searches of lockers may include a search with the assistance of dogs trained to detect the presence of drugs. 31

The Ohio court explained that such a school policy, even when accompanied by prominently posted signs, could not eliminate the students’ constitutional rights:

Indeed, one cannot envision any rule that minimizes the value of our Constitutional freedoms in the minds of our youth more dramatically than a statute proclaiming that juveniles have no right to privacy in their personal possessions. The contents of a student’s book bag in all likelihood represent the most personal of all student belongings. Included within this ever-present repository would be letters which are never meant to be sent, diaries which are not intended to be read by anyone, photographs of long lost friends or pets, and any other unmistakable evidence of the particularly unique stages of growing up. The government simply has no right to proclaim that, contrary to the right of privacy guaranteed by the United States Constitution, these personal articles will be subject to observation and dissemination by the adult community at will. It is hypocritical for a teacher to lecture on the grandeur of the United States Constitution in the morning and violate its basic tenets in the afternoon. 32

Hawaii’s Right to Privacy.
Hawaii’s Constitution contains two privacy provisions, emphasizing the particular importance we give to privacy in our community. Article I, section 7 lays out the traditional formulation to provide protection from unreasonable searches and seizures:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

The words referring to “invasions of privacy” and “communications sought to be intercepted” were added by the 1968 Constitutional Convention to “protect the individual’s wishes for privacy as a legitimate social interest” and to protect against “undue government inquiry into and regulation of the areas of a person’s life which are defined as necessary to insure man’s individual and human dignity.” 33

In a very recent decision interpreting this provision, State v. Hoyt, 113 Hawaii 283, 151 P.3d 764 (2007), the plurality opinion of the Hawaii Supreme Court pointed out that our Court has stated repeatedly that this provision provides a broader protection to individual privacy than does the Fourth Amendment to the U.S. Constitution:

Significantly, this court has declared
that, compared to the Fourth Amendment, article I, section 7 of the Hawai‘i Constitution guarantees persons in Hawai‘i a "more extensive right of privacy[]."

In the Namu case, the court explained that Article I, Section 7 of Hawaii’s Constitution was "designed to protect the individual from arbitrary, oppressive, and harassing conduct on the part of government officials". In the Tanaka case, the Hawaii Supreme Court held that police cannot search opaque, closed trash cans placed on the street or located in a trash bin without a search warrant, even though federal courts have interpreted the Fourth Amendment to allow such searches. Also, in State v. Rothman, 70 Hawai‘i 546, 779 P.2d 1 (1989), the Hawaii Supreme Court found that persons using telephones have a reasonable expectation of privacy under the Hawaii Constitution to the telephone numbers they call or receive on their private lines, even though the U.S. Supreme Court had ruled previously in Smith v. Maryland, 442 U.S. 735 (1979), that the Fourth Amendment did not require a warrant for the interception of such numbers.

The Hedge case involved whether a police officer had the necessary "reasonable suspicion" to justify stopping a driver, based on the driver's decision to turn away from (and thus avoid) alcohol checkpoints. The Court's conclusion was that the driver's decision to turn away did not provide evidence of operating the vehicle while intoxicated, and therefore that the police officer had no "objective basis-specific and articulable facts" to justify stopping and searching the driver, even though courts in other jurisdictions had reached the opposite result.

Then, the 1978 Constitutional Convention added an entirely new provision, which has become Article I, Section 6, to protect each individual's "personal autonomy." The language of this new provision is:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

This language thus emphasizes that privacy interests can be limited only when the government has a "compelling" need to do so, and that legislative action is required to protect privacy concerns. The committee report supporting this right quoted from Justice Brandeis' opinion in Olmstead, supra, and emphasized that the right was designed to protect each individual's "right to personal autonomy, to dictate his lifestyle, to be oneself." Again, the Hawaii Supreme Court has interpreted this provision to ensure that the people of Hawai‘i have broader privacy protections than are afforded under the U.S. Constitution.

**Dog Sniffs Are Fallible.** As indicated above, the Ninth Circuit noted in the B.C. case, that the dog Keesha had twice alerted on a student, but that no drugs were found on the student. In his dissent in Illinois v. Caballes, 543 U.S. 405, 411-12 (2005), Justice David Souter emphasized that "[i]n an infallible dog, however, is a creature of legal fiction" and explained that "the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times." He cited evidence introduced by the State of Illinois in the Caballes case showing "that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time," and he listed rulings from other courts that had reported that dogs gave false positives from 8% to 38% of the time. These many failures result, in part, from the fact that a "substantial portion of United States currency . . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence."

**Conclusion.** The change being considered by the Board of Education would reverse long-standing Hawai‘i policies regarding the privacy rights of our students. The proposed new language is directly inconsistent with (1) the principles found in Article I, Sections 6-7 of Hawaii’s Constitution, (2) the consistent rulings of the Hawaii Supreme Court which have required individualized suspicion for searches of students, and (3) the governing ruling of the U.S. Court of Appeals for the Ninth Circuit, which declared a canine sniff of students and their possessions to be unconstitutional. The people of Hawaii, by the changes made after the 1968 and 1978 State Constitutional Conventions, have pushed hard to expand the scope of personal privacy, but this proposed change would move in the opposite direction. The adoption of this proposal would constitute a rejection of the values of individual freedom that citizens of the United States and of Hawai‘i have fought and died for during many previous generations, and it would send a completely inappropriate message to our students, who will become active members of our political community soon. It must be hoped that the reconstituted 2009 Board of Education will take a new look at this proposal and will reject or modify it.

**A Suggestion.** There may be circumstances when the use of a trained drug-sniffing dog might be reasonable to deal with a disruptive outbreak of drug activity in a school, and, if the Board continues to believe that some proper role for canine sniffing exists, the following language would allow school officials the flexibility to call upon a trained canine in such a circumstance:

If a school principal has a well-founded belief, based on articulable credible evidence, that illegal drugs have been brought into a school, the principal may authorize a trained drug-sniffing dog to go to the area where the drugs are believed to be, for the purpose of obtaining further evidence to justify a search of that area.

This language would reduce the open-endedness of the search, would require the principal to make the decision to bring in a dog, and would require the principal to be able to explain the evidentiary basis for such a decision. This approach would achieve the goals of those who believe that drug-sniffing canines can reduce the use of drugs in schools while also protecting the personal privacy rights our predecessors have fought for during previous generations and which are now prominently protected in the U.S. and Hawai‘i Constitutions.
7. *Id. at 443, 887 P2d at 653; In re Doe, 104 Hawaii 403, 91 P3d 485 (2004) (confirming that individualized suspicion is a necessary precondition to conduct a search, and concluding that an anonymous Crime Stoppers' tip was not sufficient to serve as reasonable grounds to search a student for contraband).
8. *Id. at 334.
9. *Id.
10. *Id. at 341-42.
11. *Id. at 342.
12. See, e.g., *Commonwealth v. Mistrle, 912 A.2d 1265 (Pa. 2006) (expressing that "generalized, suspicionless searches" are permitted only if they serve "a paramount public interest" that cannot be achieved in other ways).
15. *Id. at 443, 887 P2d at 653.
17. *Id. at 1270 (Brunetti, J., dissenting).
18. *Id. at 1263 (majority opinion).
19. *Id.
20. *Id. at 1266.
21. *Id. at 1266 n. 8 (quoting from Katz v. United States, 389 U.S. 347 (1967)).
22. *Id. at 1268.
23. *Id. at 1267 n. 10 (quoting from 515 U.S. at 637).
24. *Id.
25. *Id. at 1268.
26. *Id. at 1268 (quoting from Chandler v. Miller, 520 U.S. 305, 314 (1997), and Skinner v. Rice County Labor Executives’ As'n, 489 U.S. 602, 624 (1989)).
27. *Id. at 1267 (quoting from Trosky v. Des Moines Independent Community School Dist., 393 U.S. 503 (1968)).
31. *120 Ohio App. at 368, 697 N.E.2d at 1103.
32. *Id. at 373-76, 697 N.E.2d at 1108.
35. *81 Hawaii at 123, 913 P2d at 49 (quoting from Nakanoto v. Fai, 64 Hawaii 16, 23, 635 P2d 946, 952 (1981), and State v. Quinn, 74 Hawaii 161, 177-78, 840 P2d 358, 365-66 (Levinson, J., concurring)).
36. *Id. at 268, 151 P3d at 767.
39. *Id. at 412.
40. *Id. (quoting from United States v. Carr, 25 P3d 1194, 1214-17 (Becher, J., concurring and dissenting in part)).