



# Defending the Cause

**Kamehameha Schools defends its admissions preference policy against two federal lawsuits claiming Kamehameha's policy is racially discriminatory.**

**K**amehameha Schools made headlines in August when a federal judge instructed the institution to enroll a student admitted under the policy of giving admissions preference to Hawaiian applicants, but whose admission was rescinded when it was discovered that documents submitted to verify the student's ancestry were inaccurate.

The student's mother filed a lawsuit seeking to overturn the admissions policy as racially discriminatory.

That lawsuit came on the heels of another lawsuit filed in June 2003 by an anonymous plaintiff (referred to as John Doe) who claims that he was denied admission to Kamehameha because he was not Hawaiian.

Both plaintiffs believe that the schools' admissions preference policy is illegal under a federal civil rights statute enacted in 1866 which prohibits racial discrimination in the formation and enforcement of contracts. Both plaintiffs seek an end to the schools' policy; permanent admissions to KS; and monetary damages.

*Kamehameha Schools' mission is to fulfill Pauahi's desire to create educational opportunities to improve the capability and well-being of people of Hawaiian ancestry.*

- KAMEHAMEHA SCHOOLS STRATEGIC PLAN  
2000-20015

Court hearings on *Doe v. Kamehameha Schools* and *Mohica-Cummings v. Kamehameha Schools* were scheduled for Nov. 17 and 18.

"Rest assured, Kamehameha Schools will vigorously defend its current admissions policy," said Acting Chief Executive Officer **Colleen Wong**. "We should also keep in mind that these hearings are but the start of a long process as the losing

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party is likely to appeal to the extent allowed within our legal system.

"Our preference policy has been in place from the day Kamehameha Schools opened its doors, and it is essential to our mission. Kamehameha plays a critical role in developing leaders and preserving the Hawaiian culture, which benefits our entire state."

"Kamehameha's preference policy is legally justified because it serves to remedy past injustices and present imbalances," said attorney **Crystal Rose '75**, who represents Kamehameha Schools. "Kamehameha's educational programs are needed to put Hawaiians back on an equal footing."

Defense motions filed by Kamehameha Schools in U.S. District Court point out that the civil rights law cited by the plaintiffs was enacted in 1866 to remedy the effects of discrimination against former slaves. The statute was never intended to prohibit remedial educational programs such as those at Kamehameha, and has never been used to bar such programs.

The motions also note that in 2002, the United States Congress specifically recognized the need for educational services targeted at Native Hawaiians to address the effects of past deprivations, and expressly identified Kamehameha Schools as providing the types of educational programs needed.



## **Kamehameha's preference policy is essential to fulfilling the Schools' mission**

(On Aug. 24, the *Honolulu Advertiser* published the following article by the Kamehameha Schools Board of Trustees and Acting Chief Executive Officer.)

**W**e would like everyone to understand why our preference policy is legal and justifiable. Defining this as a “racial” contest – Hawaiians v. non-Hawaiians – misses the point. This is really about protecting an institution that was founded to improve the capability and well-being of an indigenous people who had suffered greatly in their once sovereign homeland. It is about recognizing and correcting the results of past wrongs, and building a stronger future for the entire state. It is about social justice.

When Princess Bernice Pauahi Bishop died in 1884, she had witnessed the suffering of her people. When Captain Cook arrived in 1778, Hawai'i was a nation of strong and accomplished people with a population estimated as high as 800,000. At the time of Pauahi's death, the Hawaiian population had dwindled to 40,000 largely due to diseases introduced by Western contact. Impoverished and poorly educated, Hawaiians had lost their land, and were losing their language, their culture and their pride. Princess Pauahi valued education and envisioned the Kamehameha Schools as the way to restore the capability and well-being of her people.

For 116 years, Kamehameha Schools has worked to fulfill that mission. We serve more than 16,000 children annually, through our campus programs, educational outreach, community efforts and scholarships. KS' enrollment of 6,200 preschool through grade 12 students makes it the largest independent school in the United States, however, our campuses can accommodate only a fraction of all Hawaiian children.

Because 87 percent of Hawaiian children are students in the public schools system, we have established collaborations with public schools and early childhood education providers in predominantly Hawaiian communities. Many of the nearly 20,000 Kamehameha Schools graduates have distinguished themselves as leaders in all areas of society – in government, the military, business, health, education and culture.

However, there is still work to be done. Consider these statistics:

- In 2000, Hawaiian children in public schools scored 11 percentage points below non-Hawaiian public school classmates on reading tests.
- About one in five Hawaiian high school students are held back a grade.
- Nearly 23 percent of working Hawaiians hold managerial/professional positions, compared to 34 percent of non-Hawaiians.
- The statewide unemployment rate for Hawaiians is 9.8 percent and 5.8 percent for non-Hawaiians.
- Nearly half – 40 percent – of the adults in prison identify themselves as Hawaiian.
- Hawaiians comprise 19 percent of the state population, but account for 39 percent of the people in homeless shelters.
- 47 percent of the children in homeless shelters are Hawaiian.
- The poverty rate for Hawaiian families is more than twice that of non-Hawaiian families.
- Hawaiians have the highest death and sickness rate of any major ethnic group in Hawai'i.

**Kamehameha Schools' policy on admissions is to give preference to children of Hawaiian ancestry to the extent permitted by law.**



*“ [Pauahi’s] heart was heavy when she saw the rapid diminution of the Hawaiian people going on decade after decade...she foresaw that they would have to compete with other nationalities...And so, in order that her own people might have the opportunity for fitting themselves for such competition...these schools were provided for, in which Hawaiians have the preference...”*

– CHARLES REED BISHOP  
FOUNDER’S DAY SPEECH, 1887

Kamehameha Schools uses our own resources to heal our people. We provide academic education for children who will then use that knowledge to provide better lives for their families, who in turn help build healthy communities.

We provide cultural education that reconnects our children with the values of respect and sharing that guided their ancestors and builds their pride and sense of dignity. This is how we improve the capability and well-being of the Hawaiian people, and how we improve the well-being of society as a whole, and contribute to a better future for Hawai’i.

Our policy has never been Hawaiians-only.

We’ve always sought to address the educational needs of Hawaiians first. It must remain that way until Hawaiians are leading in scholastic achievement; until they are under-represented in prisons and homeless shelters; until their well-being is restored. Our preference policy is legally justifiable and it is right. We are not blocking the schoolhouse door, we are holding it open for the children who need it most.

We will vigorously defend our right to do so.

**J. Douglas Ing**  
**Robert Kihune**  
Constance Lau  
Diane Plotts  
Nainoa Thompson  
**Colleen Wong**



Attorney **Crystal Rose**, contracted to work with Kamehameha’s internal Legal Group on the two admissions lawsuits, addresses the crowd at the Sept. 5 Kapālama Campus meeting.



**Bob Moore '53** asks a question at a Sept. 5 Kapālama Campus informational meeting for staff, parents and alumni regarding the Mohica-Cummings v. Kamehameha Schools and Doe v. Kamehameha Schools lawsuits which challenge the legality of KS’ policy on admissions to give preference to children of Hawaiian ancestry. Community meetings were also held on Kaua’i, Maui, Moloka’i, East and West Hawai’i and in Waimea.

**This is really about protecting an institution that was founded to improve the capability and well-being of an indigenous people who had suffered greatly in their once sovereign homeland.**

## Why Kamehameha Schools Should Prevail in Its Effort to Defend its Admissions Policy

by Jon M. Van Dyke

(On Aug. 24, 2003 the *Honolulu Star Bulletin* published the following article by Jon M. Van Dyke, a law professor at the William S. Richardson School of Law at the University of Hawai'i and a consultant for the Office of Hawaiian Affairs. It is reprinted with permission.)

### **N**ative Hawaiians have a unique status as beneficiaries of the lands that support the Kamehameha Schools

The vast lands that provide the financial support for the Kamehameha Schools were the lands allocated by Kamehameha III to the high *ali'i* most closely linked to the Kamehameha line. Because these *ali'i* did not produce offspring, the lands were transferred laterally upon the death of each *ali'i*, and 353,000 acres accumulated in the name of Princess Ruth Ke'elikōlani. Princess Ruth died without issue in 1883, passing these lands on to her cousin Princess Pauahi, who then died (also without any children) one year later, in 1884.

The Hawaiian *ali'i* understood that they held their lands not as fee-simple private property in the Western sense, but rather in trust for all the Native Hawaiian people, because that was the central understanding of their culture and heritage. While *ali'i* had rights and privileges, they also had significant duties and responsibilities.

It was also recognized that the *maka'āinana* (the common Hawaiian people) did not receive their fair share of the lands at the time of the Mahele (in 1848) and had a continuing claim to the lands allocated to the *ali'i*. The Native Hawaiian people must, therefore, be seen as the beneficiaries of the Kamehameha Schools lands, with a particular property-right claim to these lands that the rest of us do not share.

### **Private institutions have autonomy under U.S. law**

The Kamehameha Schools is a private institution, and hence is not subject to the constitutional requirements that govern state institutions. The U.S. Supreme Court has confirmed the autonomy given to private institutions in several recent opinions and has recognized the right of these institutions to engage in discriminatory practices.

We value private autonomy and permit private associations to make choices regarding



their membership in order to protect diversity and individual freedom. We allow the Boy Scouts to discriminate against homosexuals and the Roman Catholic Church to discriminate against women, not because we approve of such discrimination, but because we want to protect the ability of private associations to make their own decisions in such matters.

### **Native peoples are viewed as a "political" rather than a "racial" category**

A number of recent Supreme Court cases support the view that restricting admission to persons of Hawaiian ancestry should not be classified as "racial" discrimination, because it is based on the special "political" status of native people and because of the particular link of the Hawaiian people to the lands that provide the funding for the Kamehameha Schools.

Although racially-based programs are presumptively unconstitutional unless they are found to be necessary to achieve a compelling governmental interest, courts tend to uphold programs established for native people if they are rationally related to the goals of promoting self-determination and self-sufficiency for the native group.

Whether this more deferential standard of judicial review should apply to programs established for Native Hawaiians has been called into question by the decision in *Rice v. Cayetano* (2000), but that case was limited on its facts to the question of voting for Office of Hawaiian Affairs trustees, and the court's opinion explicitly refrained from making any broader pronouncement on other Native Hawaiian programs.

### Why do native peoples have a special status?

Native communities are given a unique status under U.S. law because unlike other immigrant groups, who came to the United States understanding that they would be part of a pluralistic multicultural country, native people never made that commitment – they were here when the rest of us came. In addition, unlike other ethnic groups, native people have no “mother culture” that continues elsewhere – if they are not allowed to protect and develop their culture here, it will disappear altogether.

Native Hawaiians still have strong unresolved claims for the land and sovereignty they lost as a result of the overthrow of the kingdom and annexation of Hawai‘i, which both the U.S. Congress and the Hawai‘i state Legislature have recognized as “illegal” and in violation of international law, and these claims also justify allowing them to maintain separate and distinct programs to preserve and protect their cultural integrity.

Native Hawaiians are just as native as other Native Americans in the continental United States and Alaska, and Congress has said repeatedly that they must be governed by the same constitutional principles. In Judge David Ezra’s opinion issued Aug. 20, he noted the significance of the “Congressionally-sanctioned mandate to provide special measures to Native Hawaiians.” International law also recognizes the rights of all indigenous peoples to autonomy and separate programs.

### The admission program of the Kamehameha Schools is unique and raises issues that have not been resolved by any other decision.

Our country has reached a strong consensus against racial discrimination, but even this type of discrimination is tolerated if practiced by a truly private organization. The 1964 Civil Rights Act prohibits discrimination in places of public accommodation, but not in private country clubs or private schools.

Title VI of that statute prohibits racial discrimination by schools receiving federal funds, but the Kamehameha Schools no longer accepts any federal money.

Those challenging the Kamehameha Schools’ admission policies rely upon the 1866 Civil Rights Act, which prohibits racial discrimination in the making of contracts.

That statute was interpreted by the U.S.

Supreme Court in *Runyon v.*

*McCrary* (1976) to prohibit a private school that purported to be open to all from excluding African-American applicants, but this decision may not be applicable to the Kamehameha Schools because it does not purport to be open to all applicants.

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### Kū I Ka Pono: Justice for Hawaiians

#### Participating Organizations:

Kamehameha Schools  
Queen Lili‘uokalani Trust  
Office of Hawaiian Affairs  
‘Ilio‘ulaokalani Coalition  
State Council for Hawaiian Homesteads Association  
Kamakakūokalani Center for Hawaiian Studies  
Native Hawaiian Leadership Project  
Native Hawaiian Legal Corporation  
Papa Ola Lōkahi  
O‘ahu Council of Hawaiian Civic Clubs  
Native Hawaiian Education O‘ahu Island Council  
Ho‘omalua Ma Kualoa  
Ka Lahui Hawai‘i  
Hakipu‘u Learning Center  
Hālau Kū Māna  
Hālau Lōkahi  
Nā Kumu o Kamehameha Leadership



Coordinated by the ‘Ilio‘ulaokalani Coalition, the Kū I Ka Pono: Justice for Hawaiians march was a community event designed to highlight the legal challenges facing Hawaiian entitlement programs. An estimated 10,000 marchers took part.

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The case of *McDonald v. Santa Fe Trail Transportation Co.* (1976) allowed a white person to file a claim under the 1866 Act, but that case involved employment discrimination. The Supreme Court has upheld the right of a private organization to discriminate on the basis of race in the case of *Moose Lodge No. 107 v. Irvis* (1972).

No court has yet examined the unique situation of a school established by a member of a native royalty (of a kingdom later overthrown and annexed by the United States in violation of international law) to provide education for native children using revenues generated by native lands she held in trust for the benefit of her people.

If a court saw a conflict between the broad goals of the 1866 Civil Rights Act and the “Congressionally-sanctioned mandate to provide special measures to Native Hawaiians” noted in Judge Ezra’s opinion issued on Aug. 20, the more specific (and later-enacted) statutes recognizing the importance of these preferential programs for Native Hawaiians would prevail over the more general principles found in the 1866 statute.

If a court felt obliged to apply the strict-scrutiny/compelling-state-interest level of judicial review, the goal of allowing natives who are beneficiaries of a trust established for them to have a preference in the utilization of their shared native property should meet that high standard.

### **The Schools’ tax-exempt status**

Another major concern of the trustees of the Kamehameha Schools has been the Schools’ tax-exempt status, which could conceivably be



revoked by the Internal Revenue Service. In 1983, the U.S. Supreme Court did uphold the revocation of the tax-exempt status of Bob Jones University in South Carolina because it had engaged in racial discrimination against African-Americans with regard to its student body.

But the applicability of the Bob Jones case to the Kamehameha Schools is remote because the Supreme Court said such tax-exempt status can be revoked only when the institution’s purpose is “so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”

The U.S. Constitution condemns racial discrimination, but it also recognizes the separate and distinct status of native peoples, and the United States formally affirmed the legitimacy of native autonomy in President Nixon’s Special Message to Congress of July 8, 1970.

### **The Schools play a vital role**

The Kamehameha Schools has played an important role in our community by promoting and protecting Hawaiian culture and providing children of Hawaiian ancestry with a place where they can be together for a time, to learn about and build upon that heritage.

Everyone living in Hawai’i – non-Hawaiians as well as Hawaiians – will benefit if our host culture can continue as a developing and dynamic part of our community. The unique ability of the Kamehameha Schools to promote the bond that Hawaiians have to their ancestors and their culture is an essential element in that effort. It is appropriate, therefore, and lawful, for the Schools to continue to admit only students of Hawaiian ancestry.

