



HAWAI‘I CIVIL RIGHTS COMMISSION

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February 4, 2019
Rm. 016, 3:10 p.m.

To: The Honorable Russell E. Ruderman, Chair
Members of the Senate Committee on Human Services

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai‘i Civil Rights Commission

Re: S.B. No. 569

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services (on the basis of disability). The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

For the reasons discussed below, the HCRC supports S.B. No. 569.

S.B. No. 569 clarifies the legislature’s intent that HRS § 368-1.5 provide a state law counterpart to Section 504 of the Rehabilitation Act of 1973, P.L. 93-112, as amended, which prohibits disability discrimination in federally-funded programs and services. Hawai‘i has a long tradition of enacting its own civil rights protections, complementing those provided at the federal level, to ensure that Hawai‘i residents have recourse to state administrative agencies and state courts to investigate, conciliate, and where appropriate, provide relief in civil rights cases. As has been demonstrated in the context of laws prohibiting discrimination in employment, public accommodations, and real estate transactions, Hawai‘i state analogs to federal civil rights statutes are also important because the civil rights values and priorities important to Hawai‘i do not always correspond to the interpretations of federal agencies. Moreover,

recourse to state courts is particularly critical for residents on islands other than O'ahu, because O'ahu is the only island on which a federal district court is located.

In *Hawaii Technology Academy and the Department of Education v. L.E. and Hawaii Civil Rights Commission*, 141 Hawaii 147, 407 P.3d 103 (2017), the Hawai'i Supreme Court held that the legislature did not intend the Hawaii civil rights commission to have jurisdiction over disability discrimination claims under HRS § 368-1.5, if protections under Section 504 of the Rehabilitation Act, P.L. 93-112, as amended, are applicable. This holding renders HRS § 368-1.5 largely superfluous, as nearly all state departments receive federal funds and are subject to Section 504. S.B. No. 569 amends HRS § 368-1.5 to give meaning and effect to the state law protection.

In oral argument on *Hawaii Technology Academy*, the Supreme Court expressed concern regarding how, in the specific context of K-12 education, the separate obligations and appeals processes under the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended, and a § 368-1.5 state corollary to the Rehabilitation Act could be divided among the Department of Education, the Hawai'i civil rights commission, and the state and federal courts.

In light of the Court's concerns, it makes sense that the bill excludes from the statute, and thus from the commission's jurisdiction under § 368-1.5, programs or activities that provide preschool, primary, or secondary educational services, including public and charter schools, which are covered by the IDEA. This narrow exclusion should not apply to other state programs and activities, which do not fall under IDEA coverage.



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
Senate Committee on Human Services
February 4, 2019 at 3:10 p.m., Room 016

by
Carrie K.S. Okinaga
Vice President for Legal Affairs and University General Counsel
University of Hawai'i

SB No. 569 – RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION

Chair Ruderman, Vice Chair Rhoads and members of the committee:

Thank you for the opportunity to present testimony in opposition to SB 569 – Relating to the Hawaii Civil Rights Commission. This bill is illogical on its face, and for no apparent reason, places only the University (as opposed to all public schools) in an untenable position of potentially inconsistent regulation by the federal and State regulators/enforcement.

The stated purpose of SB 569 is to “clarify” the legislature’s intent that H.R.S. § 368-1.5 provide a counterpart under state law to Section 504 of the Rehabilitation Act of 1973, P.L. 93-112, as amended (“Section 504”) which prohibits disability discrimination in federally-funded programs and services. The stated need for this “clarification” is the Hawaii Supreme Court’s decision in Hawaii Technology Academy and the Department of Education v. L.E. and Hawaii Civil Rights Commission, 141 Hawaii, 147, 407 P.3d 103 (2017), which held that the legislature intended H.R.S. § 368-1.5 to provide the HCRC with jurisdiction over disability discrimination claims in public education only when federal protections under Section 504 do not apply.

Instead of then amending H.R.S. § 368-1.5 to expressly include disability protections for all public school students (primary, secondary and post-secondary), the bill expressly excludes from the HCRC’s jurisdiction, public and charter schools that provide preschool, primary, or secondary education, even though the Hawai’i Technology Academy was a charter school. Because of this exclusion, the bill only applies to the University of Hawai’i as the exclusive public post-secondary institution in the State. The purported basis for excluding public and charter schools providing preschool, primary or secondary education from these “protections” is that federal law preempts State law when schools are offered protections and services under federal law, in particular, the Individuals with Disabilities Education Act, P.L. 101-476, as amended (“IDEA”) and Section 504.

The University of Hawai’i is subject to Section 504, i.e., federal law. The U.S. Department of Education Office for Civil Rights (“OCR”) fields complaints based on disability discrimination, and OCR has been active in enforcing upon its interpretations of regulations pertaining to web accessibility as well as student housing access at the University. Students may also file a complaint with the U.S. Department of Justice and/or file a federal lawsuit. The same logic behind excluding the public primary and secondary schools from HCRC’s jurisdiction should apply to the University.

The University of Hawai'i strives to ensure that our students with disabilities are offered equal access and services at all of our campuses and programs, and the resources and accommodations offered by the University to its students, see, e.g., the KOKUA program (<http://hawaii.edu/kokua/>). We have requested via the HCRC's attorneys the facts or situations that may have given rise to the need for this bill, such that the risk of inconsistent regulation and enforcement would be worth taking (and only for the University apparently), and have offered dialogue with the HCRC, with no response to date.

Based on the foregoing, the University of Hawai'i strongly urges the committee to hold this bill. In the alternative, if this bill was intended to address public schools that are not subject to Section 504, i.e., federal law, the University respectfully requests that the committee amend the preamble in SB 569 to also exclude public universities that provide post-secondary education services from HCRC jurisdiction, and that "or universities" and "or post-secondary" be added to the proposed HRS § 368-1.5(e), as follows:

(e) As used in this section, the term "program or activity" does not include public schools or universities that provide preschool, primary, [or] secondary, or post-secondary education services."

Thank you for your time and consideration.

SB-569

Submitted on: 2/1/2019 5:49:15 PM

Testimony for HMS on 2/4/2019 3:10:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Comments	Yes

Comments:

When the State Supreme Court issued its opinion that is the subject of this bill it definitely impacted the potential remedies that were available to individual with disabilities. For that reason we are pleased to see the legislature reiterate what we believe was its original intent. We support the clarification regarding the jurisdiction over entities receiving federal finances.

We understand why the Civil Rights Commission might not want to overlap with existing remedies under the IDEA when it comes to public and charter schools. However, we do not support a blanket exclusion of schools. Schools may commit a variety of acts that potentially violate the civil rights of students in ways that go beyond their requirements under the IDEA. They may commit ADA violations for instance, and that conduct should be subject to the jurisdiction of the Commission. The inclusion of that exemption goes beyond merely reiterating the original intent of the legislature.

SB-569

Submitted on: 2/1/2019 4:10:48 PM

Testimony for HMS on 2/4/2019 3:10:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Michael Golojuch Jr	Testifying for LGBT Caucus of the Democratic Party of Hawaii	Support	Yes

Comments:

Aloha Representatives,

The LGBT Caucus of the Democratic Party of Hawaii supports the passage of SB 569.

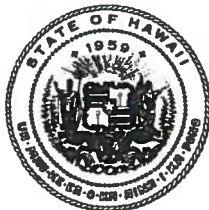
Mahalo for your consideration and for the opportunity to testify.

Mahalo,

Michael Golojuch, Jr.

Chair

LGBT Caucus of the Democratic Party of Hawaii



LATE

DISABILITY AND COMMUNICATION ACCESS BOARD

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February 4, 2019

TESTIMONY TO THE SENATE COMMITTEE ON HUMAN SERVICES

Senate Bill 569 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports Senate Bill 569 which will restore statutory authority to the Hawaii Civil Rights Commission to enforce complaints of discrimination on the basis of disability in programs receiving state financial assistance under §368-1.5, Hawaii Revised Statutes (HRS).

Since its enactment, §368-1.5, HRS, has been the state counterpart to the federal Section 504 of the Rehabilitation Act prohibiting discrimination on the basis of disability. Unfortunately, the Hawaii Supreme Court, in *Hawaii Technology Academy and the Department of Education v. L.E. and Hawaii Civil Rights Commission*, eliminated this avenue of redress for citizens in Hawaii who believe that they have been aggrieved. Rather than being viewed as a counterpart to Section 504 of the Rehabilitation Act, the Supreme Court held that §368-1.5, HRS, did not apply if Section 504 applied (i.e., if a program received federal financial assistance).

This bill would return the statute to its original intent and again provide an avenue for state jurisdiction in investigation of complaints of discrimination on the basis of disability in programs receiving state financial assistance.

We strongly urge that you move this bill forward.

Respectfully submitted,

FRANCINE WAI
Executive Director