



## DISABILITY AND COMMUNICATION ACCESS BOARD

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February 25, 2020

### TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY

House Bill 2420, HD1 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports House Bill 2420, HD1 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).

We support the limited exemption for Department of Education cases that are to be resolved through a separate process provided for under the Individuals with Disabilities Education Act (IDEA).

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.

At the current time, citizens of Hawaii with disabilities do not have an avenue for many complaints against state and local government without the restoration of this provision in state law.

We strongly urge that you move this bill forward.

Respectfully submitted,

KIRBY L. SHAW  
Executive Director



# HAWAI‘I CIVIL RIGHTS COMMISSION

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February 25, 2020  
Rm. 325, 2:00 p.m.

To: The Honorable Chris Lee, Chair  
The Honorable Joy A. San Buenaventura, Vice Chair  
Members of the House Committee on Judiciary

From: Liann Ebesugawa, Chair  
and Commissioners of the Hawai‘i Civil Rights Commission

Re: H.B. No. 2420, H.D. 1

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 strongly supports H.B. No. 2420, H.D.**

**1.**

H.B. No. 2420, H.D. 1, 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 and providing stronger protections than those provided at the federal level, ensuring 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. These Hawai‘i state law protections, including those that are analogs to federal statutes, are critically important because our state civil rights values and priorities do not always correspond to federal agency interpretations. 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 Hawai‘i 147, 407 P.3d 103 (2017), the Hawai‘i Supreme Court held that the legislature did not intend the Hawai‘i 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. H.B. No. 2420, H.D. 1, 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 HCRC’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. IDEA ensures that all children with disabilities have a free, appropriate public education available, and states are mandated under the IDEA to create a

regulatory scheme within the state to implement federal law. Hawai'i's extensive regulations implement special education and allow contested administrative hearings in contested cases, which can be appealed to Federal District Court or State Circuit Court. This narrow exclusion should not apply to other state programs and activities, which do not fall under IDEA coverage.

**HB-2420-HD-1**

Submitted on: 2/21/2020 7:42:41 PM

Testimony for JUD on 2/25/2020 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Louis Erteschik	Hawaii Disability Rights Center	Support	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 schools. We believe excluding the IDEA claims is a reasonable compromise.

**PETER L. FRITZ**

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**HOUSE OF REPRESENTATIVES  
THE THIRTIETH LEGISLATURE  
REGULAR SESSION OF 2020**

**COMMITTEE ON JUDICIARY**  
Testimony on H.B. 2420 HD1  
Hearing: February 25, 2020

**RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION**

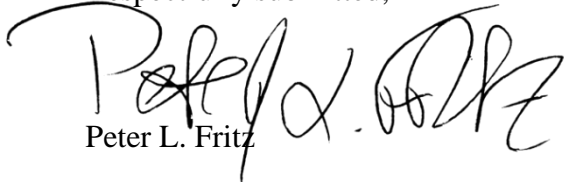
Chair Lee, Vice Chair San Buenaventura and members of the Committee. My name is Peter Fritz. I am an individual with a disability and testifying in **strong support of** House Bill 2420 HD1. This bill will restore statutory authority to the Hawaii Civil Rights Commission to enforce complaints of discrimination on the basis of disability by state programs. A decision by the Hawaii Supreme Court held that if an agency received certain federal funds, an individual's only remedy is to file a complaint with the Department of Justice or bring an action in federal court. Most State agencies receive some federal funds.

I was personally impacted by the Supreme Court's decision. I had filed a discrimination complaint against a state agency with the Hawaii Civil Rights Commission. The agency had filed a notice for a hearing and provided information about how to request an accommodation for a disability. However, the agency posted the notice after the period to request an accommodation had expired. A simple remedy would have been for the state agency to adopt a policy to provide adequate notice to request an accommodation. Because of the Supreme Court's decision my complaint with the Hawaii Civil Rights Commission was dismissed. I did not pursue the matter because of the difficulty and expense of filing an action in federal court and that filing in federal court seemed like using a sledge hammer when a simple hammer would be sufficient.

Without the restoration of this provision in state law, citizens of Hawaii with disabilities will not have a remedy under state law for disability complaints against state and local governments. 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 by state programs.

I strongly request that the Committee move this bill forward.

Respectfully submitted,

  
Peter L. Fritz