

DISABILITY AND COMMUNICATION ACCESS BOARD

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March 13, 2020

TESTIMONY TO THE SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

House Bill 2420, HD2 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports House Bill 2420, HD2 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).

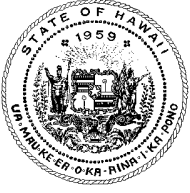
This bill would return the statute to its original intent and again provide an avenue for state jurisdiction in investigation of complaints of discrimination on the basis of disability in programs receiving state financial assistance.

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

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 • PHONE: 586-8636 • FAX: 586-8655 • TDD: 568-8692

March 13, 2020
Rm. 229, 9:30 a.m.

To: The Honorable Rosalyn H. Baker Chair
The Honorable Stanley Chang, Vice Chair
Members of the Senate Committee on Commerce, Consumer

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

Re: H.B. No. 2420, H.D. 2

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.

2.

H.B. No. 2420, H.D. 2, 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. 2, 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-2

Submitted on: 3/9/2020 5:32:15 PM

Testimony for CPH on 3/13/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Testifying for 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.

HB-2420-HD-2

Submitted on: 3/12/2020 8:43:02 AM

Testimony for CPH on 3/13/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
james gashel	Testifying for national federation of the blind of Hawaii	Support	Yes

Comments:

NATIONAL FEDERATION OF THE BLIND OF HAWAII

Testimony Before The Committee on Commerce, Consumer protection and Health (CPH)

Hawaii State Senate

Thirtieth Legislature

Regular Session of 2020

March 13, 2020, 9:30 AM, hearing on HB2420

Good morning madam chair vice chair, and members. My name is James Gashel. I am a resident of Honolulu and live at 2801 Coconut Avenue. I am testifying today on behalf of the National Federation of the Blind (NFB) of Hawaii.

The NFB of Hawaii strongly supports HB2420. We are here today because of the state Supreme Court's decision in the Hawaii Technology Academy case, holding in December 2017 that the Hawaii Civil Rights Commission lacks jurisdiction in disability discrimination cases when section 504 of the federal Rehabilitation Act also applies. We respectfully disagree with this decision.

The state law at issue is HRS 368-1.5. This law prohibits discrimination against qualified individuals with disabilities in any state agency program or any other program

receiving financial assistance from the state. The section of the federal Rehabilitation Act known as section 504 prohibits disability based discrimination in federal and federally assisted programs.

On its face Section 368-1.5 was intended to be our state's version of the federal law to prohibit discrimination against persons with disabilities. As a practical matter virtually all state agencies receive some amount of federal funds. These funds are also often used along with state funds in programs supported by the state. The presence of federal funds triggers coverage under section 504. But the Supreme Court's Tech Academy decision has also turned the presence of federal funds into a circuit-breaker by then excluding state civil rights protection, saying section 368-1.5 does not apply whenever section 504 does apply.

The practical effect of this ruling is to leave people with disabilities with a state law against discrimination but with no state remedy. Did the legislature intend that the state's receipt of federal funds should block our access to state remedies? We don't think so, but only you can make sure this is clarified.

Now, with the Supreme Court's ruling in the Tech Academy case, plaintiffs are forced to make a federal case out of every disability discrimination issue that cries out for resolution. But it's a very long way from here to Washington, DC, and it's awfully hard to get the federal government's attention too. Years go by, and still we wait for complaints to be acknowledged, let alone investigated or remedied. Did the legislature intend that the state's receipt of federal funds should block our access to state remedies? We don't think so, but only you can make sure this is clarified.

In point of fact the federal government is not uniquely qualified or particularly well suited to address every instance of disability based discrimination. By definition most complaints must be investigated and are best resolved at the local level. When people with disabilities are denied a state remedy we are also denied a prompt, effective and responsive resolution as well. Did the legislature intend that the state's receipt of federal funds should block our access to state remedies? We don't think so, but only you can make sure this is clarified.

Please pass HB 2420 to remove the limits the supreme Court has imposed on our access to effective state enforcement of our civil rights. Mahalo for the consideration

needed to right the wrong resulting from the Court's interpretation. and for your kind attention as well.

PETER L. FRITZ

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THE SENATE
THE THIRTIETH LEGISLATURE
REGULAR SESSION OF 2020

COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

Testimony on H.B. 2420 HD2

Hearing: March 13, 2020

RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION

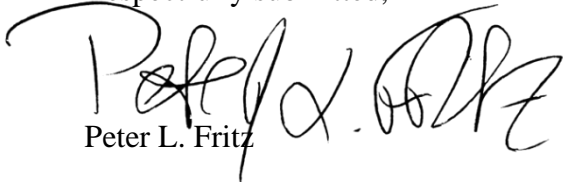
Chair Baker, Vice Chair Chang and members of the Committee. My name is Peter Fritz. I am an individual with a disability and testifying in **strong support of** House Bill 2420 HD2. This bill will restore statutory authority to the Hawaii Civil Rights Commission to enforce complaints of discrimination 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

From: [James Gashel](#)
To: [Rod Macdonald](#)
Cc: [CPH Testimony](#)
Subject: Re: Testimony of R.J. Macdonald Re: HB2420 HD2, Relating to the Hawaii Civil Rights Commission
Date: Wednesday, March 11, 2020 8:39:53 AM

Got it; thanks and probably see you there.

Best,
James Gashel

M: 808.234.9259
E: jgashel0923@gmail.com

Sent from my iPhone

On Mar 10, 2020, at 7:55 PM, Rod Macdonald <rjmacdonald@hawaiiantel.net> wrote:

Senate Committee on Commerce, Consumer Protection and Health

Senator Rosalyn H. Baker, Chair

Friday, March 13, 2020

9:30 am

Conference Room 229

Hawaii State Capitol

Re: HB2420 HD2 - Relating to the Hawaii Civil Rights Commission

Madam Chair, Members:

My name is Rod Macdonald. I am a consumer who happens to be deaf and blind.

This fact frequently makes accessing information a challenging undertaking, since I cannot read printed matter and cannot hear speech. Accessing services and information in an accessible manner is a very big deal for me.

I am submitting this testimony to strongly urge you to pass HB2420 HD2, relating to the Hawaii Civil Rights Commission because it will allow the Hawaii Civil Rights Commission to help individuals like me get the documents that they need instead of having to go to Federal Court.

On numerous occasions I have requested information from state of Hawaii agencies and contractors, information that should be readily available to the public. In theory it should be a fairly straight-forward request: A colleague can readily obtain a print copy of a document; I would like a copy of that document in electronic format instead of a paper copy. Simple?

Unfortunately, not so simple. As an example, I requested an electronic copy of a 2017-2018 contract between the Department of Human Services and the University of Hawaii. A colleague received this contract on paper within a few days. I submitted my request on the designated state form, and within a week I was sent an electronic text file of the contract. The problem: it was a scanned image of a paper copy, with over a thousand scanning errors that I just could not decipher in braille. I told DHS of this problem and received no answer.

A year later I requested an electronic copy of the 2018-2019 contract. This time I was provided with a number of files, some accessible and some not (they were

"pictures" of the documents, not digital text). Some files were simply not provided. I was told that there was nothing DHS could do, since the Attorney General had ownership of the files, passwords were required for access, Ag staff were busy... sorry.

Additionally, I have made formal, written requests for information that should be accessible to the public, and simply received no response to my requests at all, or else received misleading information for a different time frame, or otherwise not what I had asked for. Sometimes the information requested comes from a contractor, and the agency simply passes it on, taking no responsibility for its accuracy or relevance.

So what does a consumer do in such cases? I am told that the Hawaii Civil Rights Commission is no longer able to respond to such complaints. As a consumer I have the options of filing a complaint in Federal court, filing a complaint with the U.S. Department of Justice, or perhaps hiring an attorney to file a lawsuit. There just isn't a Hawaii resource available to handle a discrimination complaint.

And, for the record, I did file a formal complaint with the U.S. Department of Justice. I was told that, without passing judgement on the merit of my complaint, DOJ was too busy to take it up and I was urged to seek a local remedy in Hawaii. Knowing this, holders of information I am seeking are not shy about ignoring my requests - no one is going to hold them accountable.

I am a consumer with a dual disability that makes access to information difficult, even though multiple laws clearly state that I have a right to such information. What remedy do I have, realistically, if the holder of such information simply says no?

I strongly urge you to address this problem by passing HB2420 HD2. It is a remedy to a glaring shortcoming in our legal system. Please support this legislation.

Thank you,

Rod Macdonald, MA LHD

From: [David Simmons](#)
To: [CPH Testimony](#)
Cc: [Rod Macdonald](#); [Eleanor Macdonald](#)
Subject: Testimony of David Simmons HB2420 HD2, Relating to the Hawaii Civil Rights Commission
Date: Wednesday, March 11, 2020 8:14:22 PM

Senate Committee on Commerce, Consumer Protection and Health
Senator Rosalyn H. Baker, Chair

Friday, March 13, 2020
9:30 am
Conference Room 229
Hawaii State Capitol

Re: HB2420 HD2 - Relating to the Hawaii Civil Rights Commission

Aloha Madam Chair Senator Baker and Members:

My name is David Simmons. I am a consumer who happens to be Deaf. I support this bill because you believe it is necessary that HCRC have the authority to represent Deaf people in discrimination cases, such as when a Deaf person is denied an interpreter by a state agency.

Any further questions, please let me know.

Mahalo hui loa.

--
Namaste,

:DS



My native language is American Sign Language, while I am bilingual, you may notice English translation errors. Contact me if you have any questions or need clarification.

