

# HAWAI‘I CIVIL RIGHTS COMMISSION

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June 30, 2020  
Rm. 016, 9:46 a.m.

To: The Honorable Karl Rhoads, Chair  
The Honorable Jarrett Keohokalole, Vice Chair  
Members of the Senate Committee on Judiciary

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

**LATE**

Re: H.B. No. 2420, H.D. 2, S.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. 2, S.D. 1.**

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

The HCRC strongly supports H.B. No. 2420, H.D. 2, S.D. 1.



## DISABILITY AND COMMUNICATION ACCESS BOARD

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June 30, 2020

### TESTIMONY TO THE SENATE COMMITTEE ON JUDICIARY

House Bill 2420, HD2, SD1 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports House Bill 2420, HD2, SD1 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.

A 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 pass this bill.

Respectfully submitted,

KIRBY L. SHAW  
Executive Director

**HB-2420-SD-1**

Submitted on: 6/28/2020 12:46:45 PM

Testimony for JDC on 6/30/2020 9:46:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Support	No

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.

NATIONAL FEDERATION OF THE BLIND OF HAWAII

Testimony Before The Committee on Judiciary (JDC)

Hawaii State Senate

Thirtieth Legislature

Regular Session of 2020

June 30, 2020, 9:46 AM, hearing on HB2420, HD2, SD1

Good morning Mr. Chairman, 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, HD2, SD1. 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 its a very long way from here to Washington, DC, and its 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 JUDICIARY Testimony on H.B. 2420 HD2 Hearing: June 30, 2020

#### RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION

Chair Rhodes, Vice Chair Keohokalole, 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.

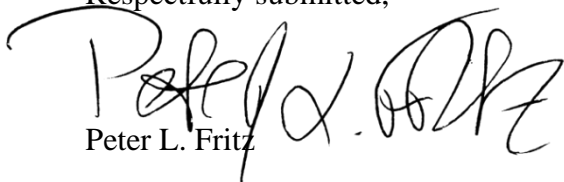
I was personally impacted by the Supreme Court's decision. I filed a complaint for disability discrimination with the Hawaii Civil Rights Commission against a state agency. My complaint had to be dismissed by the HCRC because of the Supreme Court's decision. An agency discriminated against me because the agency filed a notice for a hearing after the period to request an accommodation had expired. In other words, when the agency posted the notice, it was already too late to request an accommodation for the hearing. A simple remedy would have been for the state agency to adopt a policy to post the notice while there was still time to request an accommodation for a disability.

Because of the Supreme Court's decision, my only remedy was to bring an action in Federal Court or to file a complaint with the mainland office of the Department of Justice. I did not pursue the matter because of the difficulty and expense of filing an action in federal court. Filing in federal court seemed like using a sledge hammer when this matter could have been quickly resolved through a series of telephone calls.

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



June 30, 2020  
Testimony to the Senate Judiciary Committee  
RE: HB 2420, HD2, SD1 Relating to the Hawaii Civil Rights Commission



My name is Francine Wai and I am testifying in my personal capacity as a private citizen. I bring to the table my personal experience as well as my professional experience as the past Executive Director of the Disability and Communication Access Board, a position I recently retired from after 41 years of public service in the field of disability services and civil rights.

I am in STRONG SUPPORT of HB 2420, HD2, SD1.

I do not believe that I need to reiterate the purpose of HB 2420, HD2, SD1, suffice to say that it will remedy what many of us in the disability rights movement believe was a flawed decision in the Hawaii Supreme Court decision in Hawaii Technology Academy and the Department of Education v. L.E. and Hawaii Civil Rights Commission. With the removal of an avenue for state complaints of non-discrimination on the basis of disability in state programs and services, individuals with disabilities in the State of Hawaii no longer have a mechanism to seek relief under state law when aggrieved. As mentioned in prior testimonies on this bill, the result was an eviscerated state law. This bill would return the law to its original intent and operational practices of the HCRC prior to the Supreme Court decision.

This bill was introduced in the prior Legislative session when I testified in my official state capacity. The bill failed to pass due to concerns about the impact of the so-called 'expansion of coverage' to the Department of Education's cases that involved a dispute over a child's Individualized Education Plan (IEP) and programming for education and related services under the Individuals with Disabilities Education Act (IDEA). Ironically, it was such an issue that led to the case going to the Hawaii Supreme Court. In the intervening time, I worked in my official capacity on language that would address this concern. This language is incorporated into the current draft. As a result, I believe that the 'compromise' of excluding from HCRC jurisdiction programs or activities that provide preschool, primary or secondary educational services that are covered by the IDEA to guarantee a student a free, appropriate public education is reasonable. This narrow exclusion would not apply to other state programs and activities that do not fall under IDEA coverage while at the same time restoring an avenue in State law to handle complaints of disability discrimination.

I would defer to the HCRC on implementation issues but STRONGLY SUPPORT passage of this bill. Thank you for the opportunity to testify.

Sincerely,

/s/

Francine Wai  
francinewai@me.com

**LATE**

**HB-2420-SD-1**

Submitted on: 6/30/2020 10:18:46 AM

Testimony for JDC on 6/30/2020 9:46:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Linda Elento	Individual	Comments	No

Comments:

- Aloha. HB2420 is sloppy and should pass with deletion of the exclusion of claims within the scope of the IDEA, which is a federal education grants law, not civil rights as are Sec. 504 and the ADA.

This bill will needlessly exclude these students' disability discrimination complaints on the assumption, or hearsay, that a complaint to the commission is automatically within the scope of the IDEA.

\*\* IDEA claims are from parents who disagree with the identification, evaluation, or placement of a child, as does Sec. 504 according to its separate definitions and stand of FAPE. IDEA delineates specific requirements to provide impartial hearings with appeals in the courts for IDEA claims.

\*\* HRS 368-1.5 applies to "Any individual aggrieved by an alleged unlawful discriminatory practice may file with the commission's executive director a complaint in writing." This type of complaint is not an IDEA complaint.

\*\* A claim of identification, evaluation, or placement under IDEA or Sec. 504 is not the same as an alleged unlawful discriminatory practice.

Further,

There is no potential duplication of services as suggested in this bill.

Any reference to the federal special education law should be the P. L. 108-446, which is the most recent law replacing the original Education for All Handicapped Children Act in 1975, not P. L. 101-476. Congress reauthorized the IDEA in 2004 known as IDEIA, Individuals with Disabilities Education Improvement Act, and most recently amended it through P. L. 114-95, the Every Student Succeeds Act (ESSA), in Dec. 2015. (<https://sites.ed.gov/idea/about-idea/>, [dredf.org](http://dredf.org))

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Sincerely,

Linda Elento, Constituent.