



STATE OF HAWAII  
DEPARTMENT OF EDUCATION  
P.O. BOX 2360  
HONOLULU, HAWAII 96804

**Date:** 02/26/2019

**Time:** 02:45 PM

**Location:** 224

**Committee:** Senate Labor, Culture and the  
Arts

Senate Judiciary

**Department:** Education

**Person Testifying:** Dr. Christina M. Kishimoto, Superintendent of Education

**Title of Bill:** SB 0569, SD1 RELATING TO THE HAWAII CIVIL RIGHTS  
COMMISSION.

**Purpose of Bill:** Includes programs and activities that also receive federal financial assistance within the meaning of programs and activities receiving state financial assistance. Reiterates the legislature's intent of ensuring non-discriminatory access to State financially assisted programs, as it relates to the Hawaii civil rights commission's jurisdiction. (SD1)

**Department's Position:**

The Department of Education (Department) supports the intent and overall concept of SB569 SD1; we are also providing comments and a suggested amendment.

This measure coincides with the Department's goals and strategic priorities as it pertains to protected civil rights. If passed in its current form, the Department is concerned that the measure as it applies to public school students in grades Pre-K through 12 with disabilities is duplicative of and would circumvent the remedies and procedures already established through applicable Hawaii Administrative Rules (HAR), Board of Education (Board) policies, and the United States Department of Education, Office for Civil Rights (OCR) guidance, and could confuse and even hinder the current process. Further, the Department believes this could lead to duplication of effort between three different government agencies (e.g., the Hawaii Civil Rights Commission (HCRC), the Department, and OCR) with three concurrent investigations regarding the same underlying facts. This in turn could potentially lead to inconsistent investigative outcomes.

The Department respectfully suggests that this measure be amended to exclude public school students from the HCRC's disability discrimination jurisdiction because HAR and Board policies already cover the State's obligations as it pertains to the Department's students.

It has been the Department's experience that complaints filed with the HCRC and its federal counterpart, the Equal Employment Opportunity Commission (EEOC), pertain only to issues of

employment discrimination. In contrast, allegations filed by the Department's parents or guardians of students or by students themselves may be investigated or resolved in accordance with the corresponding HAR, Board policies, and/or filed with OCR. Both HAR Chapter 8-60 and HAR Chapter 8-61 include procedural safeguards and a due process procedure.

Applicable rules and policies specific to students enrolled in the Department's schools include the following:

- Chapter 8-60, HAR *Provision of a Free Appropriate Public Education for a Student With a Disability* "shall be construed as supplemental to, and in the context of, the Individuals With Disabilities Education Act" and "other federal laws and regulations relating to the provision of a free appropriate public education to a student with a disability." Among other things, Chapter 8-60, HAR ensures that all students with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepares them for further education, employment, and independent living; and ensures that the rights of student with disabilities and their parents are protected;

- Chapter 8-61, HAR *Nondiscrimination on the Basis of a Disability in Programs or Activities Receiving Federal Financial Assistance*) provisions are construed as supplemental to and in the context of, Section 504 of the Rehabilitation Act of 1973, as amended and the Americans with Disabilities Act, and longstanding interpretations of Section 504 issued by the United States Department of Education. According to Chapter 8-61, HAR, as a matter of commitment, policy, and compliance with federal and state laws, the Department assures that it will provide an equal education opportunity to all students with a disability in its jurisdiction, regardless of the nature and severity of the disabilities;

- Chapter 8-19, HAR *Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrest, and Restitution for Vandalism* is in the process of revisions to establish a proactive student discipline system that emphasizes positive behavior intervention and supports. Protected classes, as defined in the proposed revision, includes disability;

- The Department is proposing to repeal HAR Chapter 8-41, and replace it with a new Chapter 8-89, HAR, *Civil Rights Policy and Complaint Procedure for Students Complaints against Adults* which the Board of Education has approved to hold public hearings. Chapter 8-89, HAR, provides protections for students with disabilities, including updates to the complaint procedures; and

- Board Policy 305-10, *Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees* strictly prohibits discrimination, including harassment against a student based on a protected class, including students with physical or mental disabilities.

Finally, the Department is committed to providing equal access to a quality public education within a positive learning environment for all of Hawaii's primary and secondary education youth, including students with disabilities.

Thank you for the opportunity to provide testimony on this measure.

The Hawaii State Department of Education seeks to advance the goals of the Strategic Plan which is focused on student success, staff success, and successful systems of support. This is achieved through targeted work around three impact strategies: school design, student voice, and teacher collaboration. Detailed information is available at [www.hawaiipublicschools.org](http://www.hawaiipublicschools.org).





# HAWAI‘I CIVIL RIGHTS COMMISSION

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

February 26, 2019  
Rm. 224, 2:45 p.m.

To: The Honorable Brian Taniguchi, Chair  
Members of the Senate Committee on Labor, Culture and the Arts

The Honorable Karl Rhoads, Chair  
Members of the Senate Committee on Judiciary

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

Re: S.B. No. 569, 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 S.B. No. 569, S.D. 1.**

S.B. No. 569, 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 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 HCRC 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, S.D. 1 amends HRS § 368-1.5 to give meaning and effect to the state law protection.

In its original form, S.B. No. 569 exempted the Department of Education (DOE) and charter schools from coverage under HRS § 368-1.5. This exemption was based on concern that, in the specific context of K-12 education, there is a complex system in place relating to individualized education program (IEP)-related plans designed to comply with the right to a free and appropriate public education (FAPE) provided by the Individuals with Disabilities Education Act (IDEA), P.L. 101-476. In order to avoid confusion, particularly in regard to exhaustion of remedies required under the IDEA for challenges relating to IEPs, S.B. No. 569 originally excluded from the statute, and thus from the HCRCs 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 Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended.

In S.B. No. 569, S.D. 1, the committee on Human Services amended the bill to remove the exclusion applying to DOE and charter schools, giving the HCRC jurisdiction over cases covered both by the IDEA and Section 504 of the Rehabilitation Act, as amended. The effect of this amendment, including HCRC jurisdiction over cases involving IEPs, would be tempered, in reality, by the U.S. Supreme Court’s decision in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), which held that exhaustion of administrative remedies under IDEA is required if the claim asserted in a complaint would

be cognizable under the IDEA. *Fry* established that any case concerning an IDEA-protected right to a free and appropriate public education (FAPE) would have to be pursued first through procedures specified in the IDEA, and go through an IDEA due process hearing, before the HCRC could accept a complaint. Therefore, should S.B. No. 569, S.D. 1, be enacted in its present form, the HCRC would have jurisdiction over claims relating to individualized education programs only once other administrative remedies have been exhausted.

HCRC understands that the State of Hawai‘i has a system in place regarding cases alleging violation of IDEA-based rights to a free and appropriate public education (FAPE), and would support the bill whether it includes the broader exemption for DOE and charter schools provided in the original bill, or a more narrowly tailored exclusion of those claims which are eligible for adjudication pursuant to the IDEA.

HCRC strongly supports S.B. No. 569, S.D. 1.



## DISABILITY AND COMMUNICATION ACCESS BOARD

1010 Richards Street, Room 118 • Honolulu, Hawaii 96813  
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February 26, 2019

### TESTIMONY TO THE SENATE COMMITTEES ON LABOR, CULTURE, AND THE ARTS AND JUDICIARY

#### Senate Bill 569, SD 1 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports Senate Bill 569, 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).

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,

FRANCINE WAI  
Executive Director

**SB-569-SD-1**

Submitted on: 2/21/2019 10:41:46 PM

Testimony for LCA on 2/26/2019 2:45:00 PM

| <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 particularly support the SD1 version which deleted the blanket exclusion of schools that was in the original version of the bill. 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.



**SB-569-SD-1**

Submitted on: 2/25/2019 2:12:54 PM

Testimony for LCA on 2/26/2019 2:45:00 PM

| <b>Submitted By</b> | <b>Organization</b>  | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|--|---------------------------|---------------------------|
| Melodie Aduja       | Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i | Support                   | No                        |

Comments:

**SB-569-SD-1**

Submitted on: 2/25/2019 9:33:23 AM

Testimony for LCA on 2/26/2019 2:45:00 PM

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| PL Fritz            | Individual          | Support                   | No                        |

Comments:

**SB-569-SD-1**

Submitted on: 2/21/2019 10:30:50 PM

Testimony for LCA on 2/26/2019 2:45:00 PM

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Mike Golojuch       | Individual          | Support                   | No                        |

Comments:

I support SB569.

Mike Golojuch, Sr.