

HB-838-HD-1

Submitted on: 2/8/2021 12:55:44 PM

Testimony for JHA on 2/10/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	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 that the Civil Rights Commission does not want to overlap with existing remedies under the IDEA when it comes to public schools, and we don't oppose that exclusion.



HAWAI'I CIVIL RIGHTS COMMISSION

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

February 10, 2021
Rm. 325, 2:00 p.m.
Videoconference

To: The Honorable Mark M. Nakashima, Chair
The Honorable Scot Z. Matayoshi, Vice Chair
Members of the House Committee on Judiciary and Hawaiian Affairs

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

Re: H.B. No. 838, 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. 838, H.D. 1. At the same time, however, the HCRC must note serious concern over its diminished enforcement capacity if proposed budget and staffing cuts are imposed.

H.B. No. 838, 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. 838, 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. This narrow exclusion, for IDEA cases, should not apply to other state programs and activities, which do not fall under IDEA coverage.

The HCRC is in strong support of H.B No. 838, H.D. 1.

NATIONAL FEDERATION OF THE BLIND OF HAWAII

Testimony before the Committee on Labor and Tourism (LAT)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of the Legislature of the State of Hawaii,
Wednesday, February 10, 2021 at 2:00 P.M. Hearing for HB 838 HD 1

Good morning Mr. Chairman, vice chair, and members. My name is Brandon Young, and I am a resident of Kailua and I live at 980 Maunawili Rd. I am testifying today on behalf of the National Federation of the Blind of Hawaii (NFBH).

The NFB of Hawaii strongly supports HB838. 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 HB838 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 to this bill as well.

PETER L. FRITZ

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HOUSE OF REPRESENTATIVES
THE THIRTY-FIRST LEGISLATURE
REGULAR SESSION OF 2021

COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Testimony on H.B.838 HD1
Hearing: February 10, 2021

RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION

Chair Nakashima, Vice Chair Matayoshi, 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 838. This bill will restore statutory authority to the Hawaii Civil Rights Commission (“HCRC”) to investigate complaints of discrimination on the basis of disability by state programs. At the present time, an individual does not have a state remedy for disability discrimination because of a decision by the Hawaii Supreme Court that 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. This bill would restore the HCRC’s authority to investigate disability complaints.

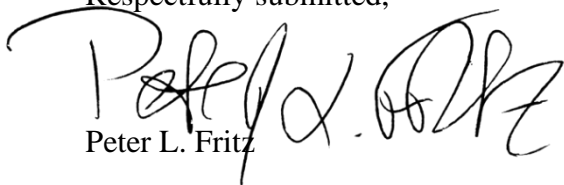
I was personally impacted by the Supreme Court’s decision. I filed a complaint for disability discrimination with the Hawaii Civil Rights Commission against a state agency. My complaint had to be dismissed by the HCRC because of the Supreme Court’s decision. An agency discriminated against me because 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 Hawaii 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 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



DISABILITY AND COMMUNICATION ACCESS BOARD

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FEBRUARY 10, 2021

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

House Bill 838 HD1 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports House Bill 838 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

HB-838-HD-1

Submitted on: 2/9/2021 3:53:18 PM

Testimony for JHA on 2/10/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Robin Wurtzel	Hawai`i Civil Rights Commission	Support	No

Comments:

I am available for comments. Testimony was submitted by the agency

HB-838-HD-1

Submitted on: 2/9/2021 5:58:51 PM

Testimony for JHA on 2/10/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Linda Elento	Individual	Comments	No

Comments:

Aloha, I would like to provide oral testimony via Zoom. Thank you for the Legislature's recognition of the need for students with disabilities to have their disability discrimination rights protected, both federal (Sec. 504 of the Rehab. Act and ADA) and state antidiscrimination laws.

Since IDEA special education funding grants law is not an antidiscrimination law, the exclusion specified is unnecessary and will cause confusion. The scope of IDEA equity claims is a denial of FAPE under IDEA, not a civil rights, disability discrimination matter as is HRS 368-1.5 and discrimination in HRS 368D.