

## DISABILITY AND COMMUNICATION ACCESS BOARD

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March 31, 2021

### TESTIMONY TO THE HOUSE COMMITTEE ON FINANCE

Senate Bill 538, HD1 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports Senate Bill 538, 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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March 31, 2021  
Rm. 308, 1:30 p.m.  
via Videoconference

To: The Honorable Sylvia Luke, Chair  
The Honorable Ty J.K. Cullen, Vice Chair  
Members of the House Committee on Finance

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

Re: S.B. No. 538, 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 S.B. No. 538, 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. 200, H.D.1, addresses this concern.)**

S.B. No. 538, 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. S.B. No. 538 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. This measure would grant HCRC jurisdiction over public schools for allegations of disability discrimination against students unrelated to the IDEA requirement of a free and appropriate public education, such as cases that fall under Section 504 of the Rehabilitation Act. It would also grant jurisdiction over similar Section 504 of the Rehabilitation Act complaints against the University of Hawai'i system.

**The HCRC is in strong support of S.B No. 538, H.D.1.**



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

**Date:** 03/31/2021

**Time:** 01:30 PM

**Location:** 308 Via Videoconference

**Committee:** House Finance

**Department:** Education

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

**Title of Bill:** SB 0538, HD1 RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION.

**Purpose of Bill:** Clarifies the meaning of "program or activity receiving state financial assistance". Excludes cases within the scope of the Individuals with Disabilities Education Act from the jurisdiction of the Hawaii civil rights commission. Effective 12/25/2040. (HD1)

**Department's Position:**

The Hawaii State Department of Education (Department) strongly supports SB 538, HD1, which proposes to clarify the meaning of "program or activity receiving state financial assistance" to exclude cases within the scope of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) from the jurisdiction of the Hawaii Civil Rights Commission.

The Department already has multiple avenues in place to investigate alleged non-compliance with IDEA, including but not limited to filing an informal complaint with the district/school, requesting a due process hearing, and submitting a written complaint to the Department's Monitoring and Compliance Branch.

Under IDEA, students and families also have the option of filing a complaint externally with the U.S. Department of Education Office for Civil Rights. The Office for Civil Rights will investigate and/or work to resolve the complaint.

Furthermore, if students feel that they are being discriminated against on the basis of their disability, then a complaint may be filed with the Civil Rights Compliance Branch. The Civil Rights Compliance Branch conducts internal investigations of complaints arising from alleged protected class discrimination, harassment, or bullying.

Thus, excluding cases within the scope of IDEA from the Hawaii Civil Rights Commission under Chapter 368, Hawaii Revised Statutes, is appropriate. As such, the Department is in support of SB 538, HD1.

Thank you for this opportunity to provide testimony.

The Hawai'i State Department of Education is committed to delivering on our promises to students, providing an equitable, excellent, and innovative learning environment in every school to engage and elevate our communities. 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).

**SB-538-HD-1**

Submitted on: 3/29/2021 3:22:21 PM

Testimony for FIN on 3/31/2021 1:30:00 PM

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

Comments:

We are in full support.

Brandon Young

March 29, 2021

31<sup>st</sup> Session of the State Legislature of the State of Hawaii

House Committee on Finance

Testimony for SB 538 SD 1 HD 1

Dear Chair and Vice-Chair,

My name is Brandon Young, and I am testifying on behalf of the National Federation of the Blind of Hawaii. I am testifying in support of SB 538. This bill would restore the power to the Hawaii Civil Rights Commission. The restoration of these rights and powers would allow local cases of discrimination to be decided on here in Hawaii. This would take out the many hours and dollars that would be required for parties to take their claim to Washington D.C and the Department of Justice. I would urge your passage of this bill.

The Hawaii Civil Rights Commission deals with claims of discrimination of those who are disabled. These protections come under Section 508 of the Rehabilitation Act of 1973. This act gives rights and protections to those people who are disabled against discrimination on the fact of their disability. The Hawaii Supreme Court ruled that the Hawaii Civil Rights Commission did not have the power to decide claims and that the federal standard would rule the day. This has caused much hardship for those with claims here in Hawaii. The passage of this bill would restore these rights and powers to the Hawaii Civil Rights Commission which they should surely have. I want to thank you for considering this matter with a hearing in front of your committee. I also want to thank you for taking your time to consider my testimony. I hope you have a wonderful day and I look forward to meeting with you in the future.



**PETER L. FRITZ**

TELEPHONE (SPRINT IP RELAY): (808) 568-0077

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

**COMMITTEE ON FINANCE**

Testimony on S.B. 538 HD 1

Hearing: March 31, 2021, 1:30 p.m.

**RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION**

Chair Luke, Vice Chair Cullen, and members of the Committee. My name is Peter Fritz. I am an individual with a disability and testifying in **strong support** of Senate Bill 538 HD1. 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.

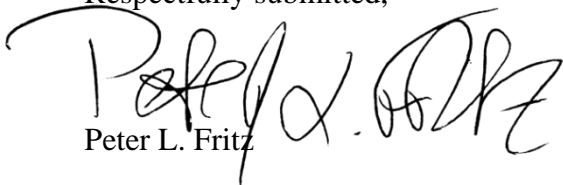
I was personally impacted by the Supreme Court’s decision. I filed a complaint for disability discrimination with the Hawaii Civil Rights Commission against a state agency. My complaint had to be dismissed by the HCRC because of the Supreme Court’s decision. An agency discriminated against me because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

**LATE**

**SB-538-HD-1**

Submitted on: 3/31/2021 8:34:58 AM

Testimony for FIN on 3/31/2021 1:30:00 PM

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

Comments:

Aloha, We appreciate your consideration to pass this measure "as is" with the defective date. A conference committee is necessary to review the fairness to students, infants and toddlers who have disabilities, and remove the proposed law's exclusion of "cases within the scope of the IDEA."

The Department of Education Superintendent's testimony, with input from civil rights compliance and special education offices, was not correct, as the US DOE Office of Civil Rights is not "under IDEA" nor does the IDEA federal special education law have authority over a disability discrimination complaint, as defined in HRS 368. The standard for an IDEA complaint requiring following administrative due process is for the reason of a denial of a FAPE. A disability discrimination complaint without the reason being a denial of FAPE should be accepted by the Hawaii Civil Rights Commission.

Sincerely,

Linda Elento, Constituent.