



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

Date: 03/24/2021

Time: 02:30 PM

Location: 325 Via Videoconference

Committee: House Judiciary & Hawaiian
Affairs

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, HD 1, 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.

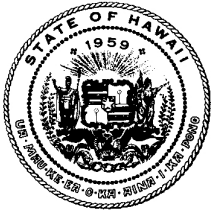
Under IDEA, students and families also have the option of filing a complaint externally with the U.S. Department of Education Office for Civil Rights. The Office for Civil Rights will investigate and/or work to resolve the complaint.

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.

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.



DISABILITY AND COMMUNICATION ACCESS BOARD

1010 Richards Street, Room 118 • Honolulu, Hawaii 96813
Ph. (808) 586-8121 (V) • Fax (808) 586-8129 • TTY (808) 586-8162

March 24, 2021

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

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

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

March 24, 2021
Room 325, 2:30 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: 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.

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.

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

SB-538-HD-1

Submitted on: 3/22/2021 3:06:43 PM

Testimony for JHA on 3/24/2021 2:30:00 PM

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

Comments:

Written testimony for the agency was submitted through a different account. I am available to testify and answer questions at the hearing.

NATIONAL FEDERATION OF THE BLIND OF HAWAII

Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of 2021

March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good Afternoon Mr. Chairman, vice chair, and members. I am James Gashel, testifying for the National Federation of the Blind of Hawaii (NFBH), supporting SB538 HD1.

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 SB538 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.

SB-538-HD-1

Submitted on: 3/22/2021 9:31:25 PM

Testimony for JHA on 3/24/2021 2:30:00 PM

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

Comments:

In support.

SB-538-HD-1

Submitted on: 3/23/2021 10:44:36 AM

Testimony for JHA on 3/24/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Stan Young	Hawaii State committee of Blind Vendors	Support	No

Comments:

Disability complaints should be able to be investigated and solved locally.

NATIONAL FEDERATION OF THE BLIND OF HAWAII

Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of 2021

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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

SB-538-HD-1

Submitted on: 3/23/2021 11:22:05 AM

Testimony for JHA on 3/24/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Clifford Miyashiro	Hoopono	Oppose	No

Comments:

i oppose bill unless more clear clarifactions are provided.

SB-538-HD-1

Submitted on: 3/22/2021 4:14:31 PM

Testimony for JHA on 3/24/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Douglas Moises	Individual	Support	No

Comments:

I am in support of this bill.

Brandon G. Young

980 Maunawili Rd

Kailua, Hawaii 96734

Phone: (808) 351-6676

Email: young.brandon4@gmail.com

31st Session of the State Legislature of the State of Hawaii

House Committee on Judiciary and Hawaiian Affairs

Testimony for SB 538 Sd1 HD1 on Wednesday, March 24, 2021 at 2:30 P.M.

March 22, 2021

Dear Chairs and Vice-Chairs,

My name is Brandon Young, and I am a member of the National Federation of the Blind of Hawaii. I am writing to testify in support of SB 538 SD 1 HD 1. This bill would restore the powers of the Hawaii Civil Rights Commission. This agency was stripped of its powers to resolve cases locally, and this bill would restore this power. The Hawaii Civil Rights Commission is strongly connected to the blind of Hawaii.

The Hawaii Civil Rights Commission helps people with disabilities when claims of discrimination are made against the government. The protections of Section 504 of the Rehabilitation Act of 1973 gives the power to the Civil Rights Commission to defend people with disabilities. We would support the passage of this bill so that the Hawaii Civil Rights Commission could support people with disabilities here in Hawaii and not have to make claims at the federal level. Currently, when claims are made, the persons have to travel to the Department of Justice in Washington D.C. if they want to make a claim against the government. This is a long travel. It also takes many hours and many dollars for those making the claims. I believe that if this bill is passed, then the people with disabilities of Hawaii will benefit greatly. I want to thank you for your time to hear our measure. I also want to thank you for considering my testimony on this matter. Have wonderful day.

PETER L. FRITZ

TELEPHONE (SPRINT IP RELAY): (808) 568-0077
E-MAIL: PLFLEGIS@FRITZHQ.COM

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

COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Testimony on S.B. 538 HD 1

Hearing: March 24, 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 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.

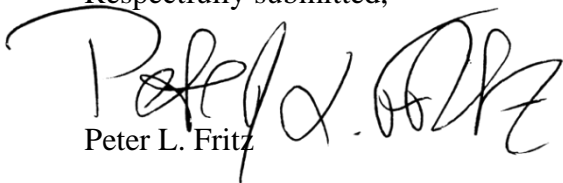
I was personally impacted by the Supreme Court’s decision. I filed a complaint for disability discrimination with the Hawaii Civil Rights Commission against a state agency. My complaint had to be dismissed by the HCRC because of the Supreme Court’s decision. An agency discriminated against me because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

Hoku Burrows

Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of 2021

March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good afternoon committee chair, vice chair, and committee members. My name is, Hoku Burrows, I am a blind woman residing at 824 Laula Way #1, Honolulu, HI 96814. I am a member of The National Federation of the Blind of Hawaii.

I am in strong support SB538 HD1 and ask that you pass the measure.

I strongly support the testimony submitted by The National Federation of the Blind of Hawaii and ask that you take our testimony into serious consideration.

Mahalo for your commitment to blind people of Hawaii and your consideration of my testimony supporting SB538 HD1.

Jaclyn Leilani Borsa

Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of 2021

March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good afternoon committee chair, vice chair, and committee members. My name is, Jaclyn Leilani Borsa, I am a blind woman residing at 91-031 Parish Drive, Ewa Beach, HI 96706. I am a member of The National Federation of the Blind of Hawaii.

I am in strong support SB538 HD1 and ask that you pass the measure.

I strongly support the testimony submitted by The National Federation of the Blind of Hawaii and ask that you take our testimony into serious consideration.

Mahalo for your commitment to blind people of Hawaii and your consideration of my testimony supporting SB538 HD1.

Katie Keim

Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of 2021

March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good afternoon committee chair, vice chair, and committee members. My name is Katie Keim, a blind business woman residing at 2943 Kalakaua Avenue in Honolulu. I am a member of The National Federation of the Blind of Hawaii.

I am in strong support of SB538 HD1 and the position submitted by The National Federation of the Blind of Hawaii and ask that you take our testimony into serious consideration.

Mahalo for hearing my testimony and your consideration to vote in support of SB538 HD1.

Tammy Robar
Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)
Hawaii State House of Representatives
Thirty-First Legislature, Regular Session of 2021
March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good afternoon committee chair, vice chair, and committee members. My name is Tammy Robar, I am a blind woman residing at 91-1045 Makaike Street, Ewa Beach, 96706. I am a member of The National Federation of the Blind of Hawaii.

I am in strong support of SB538 HD1 and ask that you pass the measure.

I strongly support the testimony submitted by The National Federation of the Blind of Hawaii and ask that you take our testimony into serious consideration.

Mahalo for your commitment to blind people of Hawaii and your consideration of my testimony supporting SB538 HD1.

Virgil Stinnett
Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)
Hawaii State House of Representatives
Thirty-First Legislature, Regular Session of 2021
March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good afternoon committee chair, vice chair, and committee members. My name is Virgil Stinnett, a resident at 2943 Kalakaua Avenue in Honolulu. I am a blind businessman and a leader and member of The National Federation of the Blind of Hawaii.

I am in strong support of SB538 HD1 and ask that you pass the measure.

I strongly support the position of The National Federation of the Blind of Hawaii and ask that you take our testimony into serious consideration.

Mahalo and Aloha for your commitment to blind people of Hawaii and hearing my testimony in support of passing SB538 HD1 .

Deb Braiman

Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of 2021

March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good afternoon committee chair, vice chair, and committee members. My name is Debra Braiman, I am a blind woman residing in Honolulu at 728 Kinau Street. I am a member of The National Federation of the Blind of Hawaii.

I am in strong support of SB538 HD1 and ask that you pass the measure.

I strongly support the position submitted by The National Federation of the Blind of Hawaii and ask that you take our testimony into serious consideration.

Mahalo for your commitment to blind people of Hawaii and your support by passing SB538 HD1.

Dr. Ann Lemke
Testimony before the Committee on Judiciary and Hawaiian Affairs (JHA)
Hawaii State House of Representatives
Thirty-First Legislature, Regular Session of 2021
March 24, 2021, 2:30 PM, hearing on SB538 HD1

Good afternoon committee chair, vice chair, and committee members. My name is Dr. Ann Lemke, I am a retired professor of Windward Community College, a blind woman residing in Kauai and a member of The National Federation of the Blind of Hawaii.

I am in strong support of SB538 HD1 and ask that you pass the measure.

I strongly support the position submitted by The National Federation of the Blind of Hawaii believing this is necessary to fix problems pursuant to people with disabilities filing legitimate complaints in the state of Hawaii.

Mahalo for your commitment to blind people of Hawaii and your support by passing SB538 HD1.

SB-538-HD-1

Submitted on: 3/23/2021 2:19:33 PM

Testimony for JHA on 3/24/2021 2:30:00 PM

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

Comments:

Aloha, This measure would benefit our students with disabilities and does not require an exclusikn of IDEA cases, as IDEA does not have authority over disability discrimination complaints from students; IDEA has authority over complaints of denial of FAPE. I believe adding a clause about IDEA would cause confusion and appear to exclude a valid disability discrimination complaint regarding an education or student matter, including early intervention services under DOH. The reason of denial of FAPE is the requirement for exhaustion of administrative due process. Weneed the state statute to be fair to all individuals including students. I appreciate your attention to the references provided in my testimony to the Senate Judiciary Committee in the previous hearing of this bill. Mahalo. Linda Elento, Constituent.