



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

Date: 02/24/2021

Time: 09:45

Location: Via Videoconference

Committee: Senate Judiciary

Department: Education

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

Title of Bill: SB 0538 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.

Department's Position:

The Hawaii State Department of Education (Department) strongly supports SB 538, 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/or 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.



HAWAI‘I CIVIL RIGHTS COMMISSION

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

February 24, 2021
Videoconference, 9:45 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

Re: S.B. No. 538

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. 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 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.

SB-538

Submitted on: 2/19/2021 5:08:41 PM

Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
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 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.

NATIONAL FEDERATION OF THE BLIND OF HAWAII

Testimony before the Committee on Judiciary (JDC)

Hawaii State Senate

Thirty-First Legislature, Regular Session of 2021

February 24, 2021, 9:45 AM, hearing on SB538

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

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.

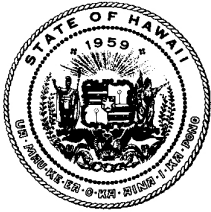
On its face Section 368-1.5 was intended to be our state's version of the federal law to prohibit discrimination against persons with disabilities. As a practical matter virtually all state agencies receive some amount of federal funds. These funds are also often used along with state funds in programs 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.



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

February 24, 2021

TESTIMONY TO THE SENATE COMMITTEE ON JUDICIARY

Senate Bill 538 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports Senate Bill 538 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



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

Date: 02/24/2021

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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.

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SB-538

Submitted on: 2/21/2021 10:58:55 PM

Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Carrie Ann Shirota	Individual	Support	No

Comments:

Aloha Senators,

I am writing in strong support of SB538, and also requesting that the State Legislature fully fund the Hawai'i Civil Rights Commission to fulfill its mandate to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.

Over the years, the HCRC's budget had dwindled affecting the staff's ability to conduct fair and impartial investigations into employment, housing, and public accommodation cases while simultaneously adding more protected bases under HCRC's jurisdiction. If we

Please pass SB538 and restore funding capacity to the Hawai'i Civil Rights Commission.

Thank you for the opportunity to submit testimony.

Sincerely,
Carrie Ann Shirota, Esq.

Honolulu, Hawaii

rhoads3 - Elena

From: Rod Macdonald <rjmacdonald@hawaiiintel.net>
Sent: Monday, February 22, 2021 11:00 AM
To: JDC Committee
Cc: rjmacdonald@hawaiiintel.net
Subject: Accommodation request: SB 538, relating to the Hawaii Civil Rights Commission

(I UST SENT TESTIMONY ON sb 537, RELATING TO aAMERICAN sIGN IANGUAGE, BUT FORGOT TO INCLUDE A "SUBJECT". MY APOLOGIES! PLEASE INCLUDE THAT TESTIMONY, SENT A FEW MINUTES AGO.)

Aloha,

My name is Rod Macdonald. I am both deaf and blind, and rely exclusively on braille to access online services. I am unable to access the Legislature's new "portal" for submitting testimony.

As a result I am writing to request the accommodation that you convey my testimony to the Committee on Judiciary (JDC) for its hearing on February 24, 2021, at 9:45 am.

Thank you

Rod Macdonald

Testimony of Roderick J. Macdonald
Submitted to the Hawaii State Senate
Committee on Judiciary (JDC)

Honorable Karl Rhoads, Chair
Honorable Jarrett Keohokalole, Vice Chair

DATE: Wednesday, February 24, 2021
TIME: 9:45 a.m.
PLACE: Via Videoconference

Re: SB 538 - SB 538 - RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION.

Mr. Chairman, Mr. Vice-Chair, Members:

Re: SB 538 - RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION.

My name is Rod Macdonald. I am a Honolulu resident who happens to be deaf and blind.

I am submitting this testimony to strongly urge you to pass SB 538, relating to the Hawaii Civil Rights Commission. This legislation clarifies the meaning of "program or activity receiving state financial assistance".

This clarification will allow the Hawaii Civil Rights Commission to pursue its statutory mission without challenge based on ambiguous interpretation of the law. This clarification will, in turn, help consumers like myself by giving us a clear resource for problem resolution, without the need to go to Federal Court.

As an example: On numerous occasions I have requested information from state of Hawaii agencies and contractors, information that should be readily available to the public. In theory it should be a fairly straight-forward request: A colleague can readily obtain a print copy of a document; I would like a copy of that document in electronic format instead of a paper copy. Simple?

Unfortunately, not so simple. I requested an electronic copy of a 2017-2018 contract between the Department of Human Services and the University of Hawaii. A colleague received this contract on paper within a few days. I submitted my request on the designated state form, and within a week I was sent an electronic text file of the contract. The problem: it was a scanned image of a paper copy, with over a thousand scanning errors that I just could not decipher in braille. I told DHS of this problem and received no answer.

A year later I requested an electronic copy of the 2018-2019 contract. This time I was provided with a number of files, some accessible and some not (they were "pictures" of the documents, not digital text). Some files were simply not provided. I was told that there was nothing DHS could do, since the Attorney General had ownership of the files, passwords were required for access, Ag staff were busy... sorry.

Additionally, I have made formal, written requests for information that should be accessible to the public, and simply received no response to my requests at all, or else received misleading information for a different time frame, or otherwise not what I had asked for. Sometimes the information requested comes from a contractor, and the agency simply passes it on, taking no responsibility for its accuracy or relevance.

So what does a consumer do in such cases? I was told that the Hawaii Civil Rights Commission is no longer able to respond to such complaints. As a consumer I have the options of filing a complaint in Federal court, filing a complaint with the U.S. Department of Justice, or perhaps hiring an attorney to file a lawsuit. There just isn't a Hawaii resource available to handle a discrimination complaint.

And, for the record, I did file a formal complaint with the U.S. Department of Justice. I was told that, without passing judgement on the merit of my complaint, DOJ was too busy to take it up and I was urged to seek a local remedy in Hawaii.

Knowing this, holders of information I am seeking are not shy about ignoring my requests - no one is going to hold them accountable.

I am a consumer with a dual disability that makes access to information difficult, even though multiple laws clearly state that I have a right to such information. What remedy do I have, realistically, if the holder of such information simply says no?

I strongly urge you to address this type of problem by passing SB 538. It is a remedy to a glaring shortcoming in our legal system. Please support this legislation.

Thank you,
Rod Macdonald, MA LHD