

SB-538

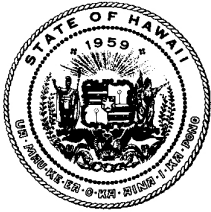
Submitted on: 3/12/2021 11:39:11 AM

Testimony for LAT on 3/16/2021 9:00:00 AM

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

Comments:

I am available for testimony and comments. Testimony will be submitted by the agency, separately.



DISABILITY AND COMMUNICATION ACCESS BOARD

1010 Richards Street, Room 118 • Honolulu, Hawaii 96813
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March 16, 2021

TESTIMONY TO THE HOUSE COMMITTEE ON LABOR AND TOURISM

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



HAWAI‘I CIVIL RIGHTS COMMISSION

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

March 16, 2021

Videoconference, Room 312, 9:00 a.m.

To: The Honorable Richard H.K. Onishi, Chair
The Honorable Jackson D. Sayama Vice Chair
Members of the House Committee on Labor and Tourism

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. 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.



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

Date: 03/16/2021

Time: 09:00 AM

Location: 312 Via Videoconference

Committee: House Labor & Tourism

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.

SB-538

Submitted on: 3/13/2021 8:49:52 PM

Testimony for LAT on 3/16/2021 9:00:00 AM

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

Comments:

We are in full support of the bill.

Brandon G. Young
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Phone: (808) 351-6676
Email: young.brandon4@gmail.com

31st Session of the State Legislature of the State of Hawaii
House Committee on Labor and Tourism
Testimony for SB 538 SD 1 on Tuesday, March 16, 2021 at 9:00 AM

March 14, 2021

Dear Chair and Vice-Chairs,

My name is Brandon Young, and I am a member of the National Federation of the Blind of Hawaii. I am submitting testimony on behalf of the National Federation of the Blind of Hawaii in support of bill SB 538 SD 1. This bill would help the blind of Hawaii and would allow claims of discrimination dealing with disabilities to be resolved here in Hawaii under our local Civil Rights Commission and not to have them be resolved on the mainland thousands of miles away from Hawaii.

We are in support of this measure because it would restore power to the Civil Rights Commission here in Hawaii. The Civil Rights Commission would be able to have the power to help with claims of discrimination here in Hawaii instead of having to go to Washington D.C. to resolve matters with the Department of Justice. The Civil Rights Commission helps with claims dealing with protections towards people with disabilities under the Americans with Disabilities Act and the Rehabilitation Act. If the measure would be passed, the Civil Rights Commission would have local jurisdiction over these cases. However, the Hawaii Supreme Court ruled that the federal law supersedes the state law, and that these matters have to be determined at the federal level. We are in support of this measure because if a blind person has a case before the Civil Rights Commission, we would like them to have the ability to resolve the matter locally and not have to spend the extra time and money to have to go to the mainland to solve these matters. We believe that this matter is important to the blind of Hawaii and all other disability groups.

I want to thank you for taking the time to call this measure for a hearing in your committee. I also want to thank you for considering our testimony for this measure. I want to again remind you that the National Federation of the Blind of Hawaii is in support of this matter and would like to support the Civil Rights Commission in this matter. I hope you have a wonderful day and I look forward to speaking at the hearing on Tuesday morning.

PETER L. FRITZ

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

COMMITTEE ON LABOR & TOURISM

Testimony on S.B. 538

Hearing: March 16, 2021

RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION

Chair Oishi, Vice Chair Sayama, 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. 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.

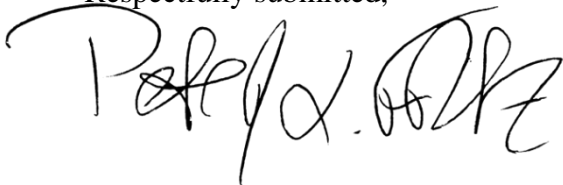
I was personally impacted by the Supreme Court’s decision. I filed a complaint for disability discrimination with the Hawaii Civil Rights Commission against a state agency. My complaint had to be dismissed by the HCRC because of the Supreme Court’s decision. An agency discriminated against me because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

A handwritten signature in black ink, appearing to read "Peter L. Fritz", written in a cursive style.

Peter L. Fritz

Testimony of Roderick J. Macdonald

Submitted to the Hawaii State House of Representatives Committee on Labor & Tourism Rep. Richard H.K. Onishi, Chair Rep. Jackson D. Sayama, Vice Chair

tuesday, March 16, 2021, 9:00 am

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

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

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

Subject LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.
SB538 comments to remove

To: [reponishi@capitol.hawaii.gov <reponishi@capitol.hawaii.gov>]

From: L Elento <ilikered3@rocketmail.com>

Date: Mon, Mar 15, 2021 at 12:43 PM

Aloha,

SB538 does not need the exclusion of cases within the scope of IDEA (federal special education law) because the HCRC would not have jurisdiction over an IDEA complaint from a student/parent that would require exhaustion of administrative due process.

All other complaints under IDEA, Sec. 504 of the Rehab. Act, and ADA do not require exhaustion of administrative due process, although another complaint process, potentially costly, untimely, unfair or directly to the Hawaii DOE (not a third party).

The Hawaii Supreme Court included a reference to Fry v. Napoleon, SC, 2017, showing an IDEA complaint must be a complaint of denial of FAPE as defined by IDEA. Without a claim of IDEA FAPE, the administrative due process is not required nor does the IDEA have any authority over a disability discrimination complaint that does not allege a denial of IDEA FAPE.

And furthermore, the HCRC would not have authority over such complaint anyway, so the exclusion of cases within the scope of the IDEA is not legally applicable and would only cause confusion and deny students with disabilities any help from the HCRC. Our students with disabilities are included in the mention of all individuals in Hawaii.

References are in the following screenshots, provided by the US DOE.

- ▼ ~~that students with disabilities be educated with students who do not have disabilities to the maximum extent appropriate to the needs of students who have disabilities, **34 CFR 104.34(a); 34 CFR 300.114;**~~
- ◆ that the school provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in those services and activities. These services may include counseling, athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to agencies that provide assistance, employment of students by the school and assistance in making outside employment available, **34 CFR 104.37(a)(1),(2); 34 CFR 300.117.**
- ◆ that the school provide supplementary aids and services necessary to enable a student to participate in and benefit from regular education, **34 CFR 104.34(a); 34 CFR 300.42.**

Differences between Section 504 and IDEA


Section 504 provides some rights not specifically given in IDEA. For example, program accessibility, discrimination, and retaliation are not specifically addressed by IDEA, but can be addressed under Section 504.

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Section 504 requires that programs that receive federal money must be readily accessible to people — including parents — with disabilities. One part of program accessibility requires public buildings to be barrier free. Section 504 gives specific time lines for conversion of buildings to barrier-free status and includes specific standards for building accommodations. (The Americans with Disabilities Act (ADA) may establish parallel requirements for all public and nonsectarian private schools.)

Section 504 prohibits discrimination based on disability. Schools are required to provide students with disabilities opportunities to participate in and benefit from programs that are equal to that afforded students who do not have disabilities. This broad language may go beyond the "appropriate" standard of the IDEA. **34 CFR 104.4.**

Section 504 also prohibits retaliation. For example, if a person has engaged in a protected activity, such as filing a complaint against the school, and the school then takes actions intended to intimidate, threaten, coerce, or otherwise retaliate against the parent because of the complaint, Section 504 provides an avenue to address that illegal action. **34 CFR 104.61.** The Office for Civil Rights issued a "Dear Colleague" letter (April 24, 2013) affirming the rights of individuals to be free from the fear of retaliation, stating, "Discriminatory practices are often only raised and remedied when students, parents, teachers, coaches, and others can report such practices to school administrators without the fear of retaliation. Individuals should be commended for reporting concerns about compliance with the Federal civil rights laws, not punished." The letter goes on to address steps USDOE-OCR may take, if they find retaliation. Those steps include both remediating the injury to the individual who was the subject of the complaint, and ensuring that retaliatory actions do not occur in the future.



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► **Advocacy Hint:** Use the protections available under Section 504 to address discrimination or retaliation when it involves students with disabilities. The United States Department of Education, Office for Civil Rights is responsible for enforcing these rights, whether the student with a disability is eligible under Section 504 or the IDEA.

Section 504 does not provide for a school-funded independent educational evaluation (IEE).

Section 504 does not explicitly provide for stay put when a hearing request is filed, although the Office for Civil Rights has issued guidance suggesting that there is an implied right to stay put: "To say that a school district can go ahead and implement a change of placement, even though the parent has a right to challenge the change, seems to undermine the rights given by due process. Thus, OCR believes that a fair due process system would encompass the school district waiting for the results of the process before making the change." (Letter to Zirkel, May 15, 1995.)

Section 504 does not include a right to post-expulsion FAPE during long term disciplinary removal.



Deliberate indifference can be shown if the school's response was clearly unreasonable in light of the circumstances. For example, if the school takes some remedial action such as counseling a staff member, and that action is inadequate and ineffective in stopping the harassment, the school must use different methods to eliminate the harassment. **Vance v. Spencer Co. Public School Dist.**, 231 F.3d 253, 260-61 (6th Cir. 2000). In contrast, a

school district may not be deliberately indifferent if it investigates any incidents reported to its staff, provides increased supervision, and provides counseling to students on how to behave. **Soper v. Hoben, 195 F.3d 845, 855 (6th Cir. 1999).**

Parents may be able to take advantage of the federal prohibitions against harassment as well. The Supreme Court decided in **Jackson v. Birmingham Bd. of Educ.**, that a coach was protected against retaliation after he complained of sex discrimination against students. **125 S.Ct. 1497 (2005).** The court determined that Title IX prohibits retaliation for making such a complaint, even if the complainant is not the victim of the discrimination. Thus, parents who face retaliation because they complained about harassment of their child may also be protected under Title II of the ADA and Section 504.

Harassment and the 2004 IDEA Amendments

In addition to protections under the ADA and Section 504, a student may be able to address harassment under Individuals with Disabilities Act (IDEA). Harassment may rise to the level of denying the student a free and appropriate public education (FAPE) that provides educational benefit to the student. Following the reasoning in **Davis**, indifference of staff to severe harassment could prevent the student from deriving benefit from the services he or she is being offered by the district. **See M.L. v. Federal Way School Dist., 394 F.3d 634, 650-51 (9th Cir. 2005).** (See Chapter 2 for a full description of FAPE.) To show a denial of FAPE, the student must establish that the harassment affected his or her ability to learn. **If the harassment did not prevent a student from getting educational benefit, he or she has no claim under IDEA. See, e.g., In re: Student with a Disability, 44 IDELR 86 (SEA WA 2005).** The student may also need to give the school an opportunity to prevent the harassment from continuing. **Id** This is a factual question that will need to be proven by the student based on the actual effect of the harassment on him or her.

Fry v. Napoleon, SC. 2017

MPAS Special Education: Advocate's Manual, rev'd October, 2017

Pg. 13-3

Michigan Protection & Advocacy Service, Inc.

How do I Address Disability-Based Harassment?

Schools are responsible only for stopping harassment that is "severe, pervasive, and persistent." In addition, parents, guardians, or students with disabilities must give actual notice to someone with authority to stop the harassment.

Advocacy Hint: You need records. Keep written records about including date, time, and any other students or staff involved. This information when you write your letters to the school.

Severe, Pervasive, and Persistent: Harassment depends on many factors, such as the ages of the harasser and victim, the number of people involved, the conduct or the





Sincerely, Linda Elento, Constituent
03-16-2021 LAT