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GOVERNOR



KEITH T. HAYASHI
SUPERINTENDENT

STATE OF HAWAII
DEPARTMENT OF EDUCATION
KA 'OIHANA HO'ONA'AUAO
P.O. BOX 2360
HONOLULU, HAWAII 96804

Date: 02/07/2023

Time: 02:00 PM

Location: 309 VIA VIDEOCONFERENCE

Committee: House Education

Department: Education

Person Testifying: Keith T. Hayashi, Superintendent of Education

Title of Bill: HB 1210 RELATING TO ALTERNATIVE SPORTS LEAGUES FOR HIGH SCHOOL STUDENTS.

Purpose of Bill: Requires the Department of Education to create and manage a sports league for high school students in West Oahu, to further aid the development of high school students. This league is open to all high school students, regardless of whether the student attends a public, private, charter, or home school.

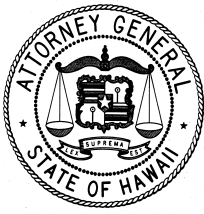
Department's Position:

The Department of Education (Department) respectfully offers comments on HB 1210.

The Department would welcome the appropriations to support new facilities and to provide for additional opportunities for students. However, additional funding would be required to hire personnel such as coaches, support staff, officials, etc. to sustain and maintain this special league. Additionally, private and home-schooled students are currently not allowed to participate in the Department's athletic programs.

The Department appreciates the intent of this proposal and the inclusion of funding but should this measure move forward, the Department asks that any funding does not affect the priorities in the Department's Hawaii State Board of Education approved budget.

Thank you for the opportunity to provide testimony on HB 1210.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:

H.B. NO. 1210, RELATING TO ALTERNATIVE SPORTS LEAGUES FOR HIGH SCHOOL STUDENTS.

BEFORE THE:

HOUSE COMMITTEE ON EDUCATION

DATE: Tuesday, February 7, 2023 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Anne T. Horiuchi, Deputy Attorney General

Chair Woodson and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

The bill requires the Department of Education (DOE) to create and manage a sports league for high school students in West Oahu, to further aid the development of high school students. The bill would make the league open to all high school students, regardless of whether the student attends a public, private, charter, or home school.

The bill's requirement that the DOE operate a sports league that includes private school children who do not attend its public schools conflicts with section 1 of article X of the Hawaii Constitution, which states, in part: "nor shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution[.]" Although the inclusion of private school students in the sports league appears to benefit the children and does not appear to directly benefit any sectarian or nonsectarian private educational institutions, that argument was rejected by the Hawaii Supreme Court in *Spears v. Honda*, 51 Haw. 1, 6, 449 P.2d 130, 134 (1969). The Court noted that it was clear from the proceedings of the Constitutional Convention of 1950 that the Convention "delineated the scope of the State's role in the education of children in public and nonpublic schools, and it specifically rejected the child benefit theory as it applied to bus transportation and similar general welfare programs for nonpublic school

students." *Id.* (emphasis added). To address this issue, we respectfully recommend the following revisions to the bill:

1. Section 1 of the bill should remove the reference to private school. (Page 2, line 13.)
2. On page 3, lines 3-7, revise section 302A- (b) to read as follows: "This alternative sports league program shall be available to any student attending any high school that is geographically contained within the above area, without regard to whether the high school is public, [~~private,~~] charter, or home school."

Additionally, the bill's requirement that the DOE operate a sports league conflicts with section 302A-1128, Hawaii Revised Statutes (HRS). With respect to the DOE's powers and duties, that statute states that the DOE "shall have entire charge and control and be responsible for the conduct of all affairs pertaining to public instruction in the public schools the department establishes and operates" (emphasis added). If it is the Legislature's intent that the DOE administer the scheduling and organizing of competitive athletics, then the Legislature should amend section 302A-1128, HRS, to clarify the DOE's powers and duties accordingly. To address this issue, we respectfully recommend the following:

1. Revise new section 302A- I on page 3, lines 8-9: "The department of education shall organize and administer this program pursuant to section 302A-1128.
2. Amend section 302A-1128, Hawaii Revised Statutes, to read as follows:

"§302A-1128 Department powers and duties. The department shall have entire charge and control and be responsible for the conduct of all affairs pertaining to public instruction in the public schools the department establishes and operates, including the scheduling and organizing of competitive athletics throughout the State's department schools, and including operating and maintaining the capital improvement and repair and maintenance programs for department and school facilities; provided that all state-funded prekindergarten programs, and private partnership-funded prekindergarten programs in the public schools, except for special education and Title I-funded prekindergarten programs, shall be under the administrative authority of the executive office on

early learning; provided further that the department shall continue to provide, and have administrative authority over, services generally provided to the schools excluding those services related to curriculum, instruction, assessment, and professional learning support, but including operating and maintaining capital improvement and repair and maintenance programs for any facility on a department school campus at which the executive office on early learning administers programs, and evaluation of teaching staff. The department may establish and maintain schools for secular instruction at such places and for such terms as in its discretion it may deem advisable and the funds at its disposal may permit. The schools may include high schools, kindergarten schools, schools or classes for special education or Title I-funded prekindergarten, boarding schools, Hawaiian language medium education schools, and evening and day schools. The department may also maintain classes for technical and other instruction in any school where there may not be pupils sufficient in number to justify the establishment of separate schools for these purposes.

The bill also provides that the sports league "shall have teams divided by biological gender for each sport" (page 3, lines 14-15). This requirement may conflict with existing state law that prohibits discrimination on the basis of sex, including gender identity or expression, by the DOE. See section 1 of article X of the Hawaii State Constitution, and sections 368D-1(a) and 368D-3, HRS. Furthermore, the Department is concerned that this provision may also violate federal law. In *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), the U.S. Supreme Court clarified that the prohibition on discrimination because of sex in Title VII of the Civil Rights Act of 1964 includes discrimination based on an individual's transgender status. See *id.*, at 1741. The Biden Administration has stated: "Under *Bostock's* reasoning, laws that prohibit sex discrimination – including Title IX of the Education Amendments Act of 1972, as amended (20 U.S.C. 3601 *et seq.*) . . . – prohibit discrimination on the basis of gender identity or sexual orientation[.]" Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021). Consequently, the Department recommends that this provision (page 3, lines 14-15) be stricken from the bill.

Additionally, the Department respectfully recommends the following revisions:

1. The sentence on page 1, line 10, must be completed.

2. On page 3, line 20: replace "Hawaii Revised Statutes §103B and §103D" with "chapters 103B and 103D".

Thank you for the opportunity to provide comments on this measure.