



## DISABILITY AND COMMUNICATION ACCESS BOARD

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FEBRUARY 2, 2021

### TESTIMONY TO THE HOUSE COMMITTEE ON LABOR AND TOURISM

#### House Bill 838 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports House Bill 838 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

**HB-838**

Submitted on: 1/29/2021 6:47:26 PM

Testimony for LAT on 2/2/2021 9:00:00 AM

<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:

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 why the Civil Rights Commission might not want to overlap with existing remedies under the IDEA when it comes to public schools. We believe excluding the IDEA claims is a reasonable compromise.



# HAWAI'I CIVIL RIGHTS COMMISSION

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February 2, 2021  
Rm. 312, 9:00 a.m.  
Videoconference

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

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

Re: H.B. No. 838

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 H.B. No. 838. 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. 838 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. H.B. No. 838 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.

NATIONAL FEDERATION OF THE BLIND OF HAWAII

Testimony before the Committee on Labor and Tourism (LAT)

Hawaii State House of Representatives

Thirty-First Legislature, Regular Session of 2021

February 2, 2021, 9:00 AM, hearing on HB838

Good morning Mr. Chairman, vice chair, and members. My name is James Gashel. I am a resident of Honolulu and live at 2801 Coconut Avenue. I am testifying today on behalf of the National Federation of the Blind of Hawaii (NFBH).

The NFB of Hawaii strongly supports HB838. 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 HB838 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.

**Brandon G. Young**

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Testimony before the Committee on Labor and Tourism (LAT)

Hawaii State House of Representatives

31<sup>st</sup> Legislature, 2021

February 2, 2021, 9:00 AM, hearing on HB838

Dear Chair and Vice-Chairs of the Committee,

My name is Brandon Young and I am a member of the National Federation of the Blind of Hawaii. I am writing in support of HB 838 and its Senate companion. I believe that there should be some conformability to Federal regulations and believe that disputes should be able to be resolved here in Hawaii as opposed to Washington D.C. where the Department of Justice is housed. I am submitting testimony in concurrence to the testimony that was submitted by Mr. James Gashel representing the National Federation of the Blind of Hawaii. I also am in support of this bill.

I am in belief that all people with disabilities should be protected by the Americans with Disabilities Act and Section 504 under the Office of Civil Rights in the Department of Justice. I think that it would be easier and less time consuming if matters of adjudication were able to be resolved locally here in Honolulu. I believe that this would save much time and energy. I believe that this bill would help to solve the confusion of the different rulings of the Federal Courts and the State of Hawaii Supreme Court. I hope that this bill would open up an avenue for those persons to resolve their cases in a local arena as opposed to traveling thousand of miles to the mainland. I would hope that you would pass this bill. Thank you for your time and consideration in hearing my testimony on this matter.



# PETER L. FRITZ

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

### COMMITTEE ON LABOR & TOURISM Testimony on H.B.838 Hearing: February 2, 2021

#### RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION

Chair Onishi, 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** House Bill 838. 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.

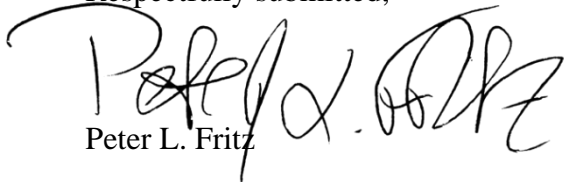
I was personally impacted by the Supreme Court’s decision. I filed a complaint for disability discrimination with the Hawaii Civil Rights Commission against a state agency. My complaint had to be dismissed by the HCRC because of the Supreme Court’s decision. An agency discriminated against me because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

Send

From: ilikered3@rocketmail.com

Linda Elento

To: RepOnishi@Capitol.Hawaii.gov

HB838 Comments



Aloha, Chair Onishi, Vice Chair Sayama, and Members of the LAT committee.

The Hawaii Civil Rights Commission, for over 20 years, accepted complaints from individuals, except students with disabilities.

Several years ago I submitted my minor son's disability discrimination complaint against a public school to the HCRC. I found it to be unfair that the HCRC would help individuals but not disabled students such as mine.

HB838's exclusion of "cases within the scope of the Individuals with Disabilities Education Act from the jurisdiction of the Hawaii civil rights commission" is not necessary. This is a case of apples and oranges.

🍏 A student's civil rights case of discrimination due to disability --

🍏 -- is not a valid complaint within the scope of the IDEA.

🍏 HRS 368-1.5 applies to "[a]ny individual claiming to be aggrieved by an alleged unlawful discriminatory practice..."

🍏 An IDEA complaint must state a failure to Provide a Free Appropriate Public Education. *Fry v. Napoleon Community Schools*, 137 S.Ct. 743 (2017).

🍏 Rehab. Act, Sec. 504 and ADA, Title II, e.g., the school must give an eligible disabled child an equal opportunity to participate in an extracurricular activity or sport (<https://www.legaidhawaii.org/legal-aid-impact/helping-to-make-strides-for-jason>).

🍏 FAPE as defined by IDEA; IDEA Part B; 34 CFR Part 300; claims from parents who disagree with the identification, evaluation, or placement of a child, stating a denial of FAPE under IDEA. A state complaint states a violation of a requirement in IDEA Part B, 34 CFR 300.153.

🍏🍏 *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, ex rel. 78 F. Supp. 3d 1289 (C.D. Cal. 2015), determined that the IDEA, Sec. 504, and ADA are not one and the same. Lip reading may have met the IDEA requirements for a student, but the school's denial of providing a CART system was a civil rights law matter.

🍏🍏 <https://sites.ed.gov/idea/about-idea/#IDEA-Purpose>

🍏🍏 *Fry v. Napoleon Community Schools*, 137 S.Ct. 743 (2017). A school's one-to-one aide may have met IDEA requirements, but the school's denial of a child's service dog working with student at school was a civil rights law matter.

My concern is that the HCRC does not fully understand IDEA special education law and may assume a student's disability-related complaint is a special education complaint. The IDEA does not apply to HRS 368. There is no reason to contemplate potential duplication of services. In my experience and of others, student complaints to the USDOE OCR office are ineffective and costly.

A similar bill HB1101 (2021) referred to LAT gives the HCRC jurisdiction over disability discrimination complaints towards agencies that receive state and federal funds and specifies disability discrimination complaints from eligible students with disabilities.

HB838 stating complaints within the scope of the IDEA are excluded would be misleading, cause confusion and further deny IDEA-eligible students the right to file a disability discrimination complaint with HCRC because the HCRC, the school, or student/parent did not understand the difference.

Thank you for your consideration of my testimony, concerns and suggestion to remove the references to the IDEA exclusion: Page 2, Lines 9-16, and Page 4, Lines 6-8.

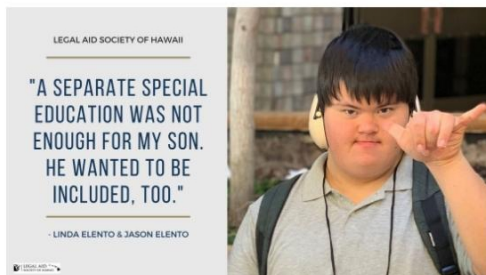
<https://www.legalaidhawaii.org/legal-aid-impact/helping-to-make-strides-for-jason>



# HELPING TO MAKE STRIDES FOR JASON



11/5/2020



**The Legal Aid Society of Hawaii helped make strides for my son, Jason, to be included in his first field trip with his non-disabled peers.**