



DISABILITY AND COMMUNICATION ACCESS BOARD

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February 24, 2020

TESTIMONY TO THE SENATE COMMITTEE ON JUDICIARY

Senate Bill 2244 – Relating to the Hawaii Civil Rights Commission

The Disability and Communication Access Board strongly supports Senate Bill 2244 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

February 24, 2020
Rm. 016, 12:00 p.m.

To: The Honorable Karl Rhoads, Chair
The Honorable Jarrett Keohokalole, Vice Chair
Members of the House Committee on Judiciary

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

Re: S.B. No. 2244

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 supports S.B. No. 2244.

S.B. No. 2244 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. 2244 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. The IDEA mandates that each state create a framework for review if challenged. That administrative hearing decision can then be appealed to Federal

District Court or State Circuit Court. Another level of review is unnecessary. This narrow exclusion should not apply to other state programs and activities, which do not fall under IDEA coverage.

SB-2244

Submitted on: 2/21/2020 6:36:03 PM

Testimony for JDC on 2/24/2020 12:00:00 PM

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 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.

From: [L Elento](#)
To: [JDCTestimony](#)
Subject: Re: w/attachment: JDC SB2244 Hawaii Civil Rights Commission
Date: Wednesday, February 26, 2020 3:32:18 PM

Thank you for posting my late testimony. Will you also be able to include the 2 page attachment that I also sent? I attached it again to this email.

Linda Elento

On Tue, Feb 25, 2020 at 3:43 PM, L Elento
<ilikered3@rocketmail.com> wrote:

SB 2244 -- RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION.

Thank you for the opportunity to provide comments: to delete the proposed amendment to §368-11 on page 4, lines 6-8, referring to the federal special education law Individuals with Disabilities Act (IDEA), and to delete the related commentary on page 2, lines 10-17, beginning with “To address” allowing the Hawaii Civil Rights Commission enforcement and jurisdiction over complaints submitted under §368-1 and §368-1.5 including “otherwise qualified individuals” who are students.

Being “L.E.” (page 2, line 5), I am very familiar with the subject matter (companion HB 2420). The heart of the matter -- students are being excluded, by reason of his or her disability, from the participation in, being denied the benefits of, or being subjected to discrimination by state agencies (including the Department of Education and public charter schools).

Students with disabilities want inclusion and school choice, geographical exceptions, charter schools. Parents have the fundamental right to direct their children’s education. Students need the commission to enforce Hawaii Administrative Rules relating to disability discrimination, to investigate complaints of disparate impact of system policies on groups of individuals with disabilities, to fight the DOE acting as ***SEA and LEA*** and monitoring itself against disability discrimination. The commission was meant to provide fair and effective civil rights law enforcement.

This bill should reference the Americans with Disabilities Act, as amended. See Case Notes under Chapter 368 CIVIL RIGHTS COMMISSION: “Section 368 [sic], which was quite similar to Americans with Disabilities Act (ADA)...”

This bill should not include a restriction of “jurisdiction over claims within the scope of the” IDEA on page 4, lines 6-8, as it is unnecessary and does not interfere with the commission accepting a complaint under §368-1.5 from an otherwise qualified individual who is a student. §368-1 subsection (a) states the commission’s jurisdiction is over the subject of discriminatory practices made unlawful by...this chapter. The Legislature must ensure otherwise qualified students are not alienated from the commission’s jurisdiction, regardless of the IDEA.

A Ninth Circuit case (K.M. v. Tustin Unified School District) determined the IDEA, Sec. 504 and the ADA are not one and the same when it comes to requirement to provide equal opportunity and equally effective communication under Title II of the ADA.

Complying with the IDEA does not necessarily mean compliance with ADA and Section 504.

References: California Unruh Civil Rights Act; and Dear Colleague Letter from the US Departments of Justice and Education, dated November 12, 2014:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/disability.html>

*Attachment: Joint Letter from US Departments of Education, and Justice, dated March 3, 2015.

The Legislature should consider Act 177 (2019) and Act 110 (2018) regarding sex discrimination in education statute and LRB study, supported by the Hawaii Civil Rights Commission. See Note under Chapter 368D DISCRIMINATION IN STATE EDUCATIONAL PROGRAMS AND ACTIVITIES: Legislative reference bureau study of existing Title IX enforcement practices and procedures; report to 2019 legislature. L 2018, c 110, §3; L 2019, c 177, §2.

Further, educational-related definitions are provided in 368D-1 State educational programs and activities; discrimination prohibited. (a) No person in the State, on the basis of sex, including gender identity or expression as defined in section 489-2, or sexual orientation as defined in section 489-2, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under:

- (1) Any state educational program or activity; or
- (2) Any educational program or activity that receives state financial assistance. ...
- (e) Nothing in this chapter shall preclude a student participating in any educational program or activity who is aggrieved by a violation of this chapter from filing a civil action in a court of competent jurisdiction.
- (f) A person, or an organization or association on behalf of a person alleging a violation of this chapter may file a complaint pursuant to this chapter.
- (g) As used in this section:

"Educational program or activity that receives state financial assistance" means any educational program or activity that receives state financial assistance, in any amount, for any purpose. The term does not exclude an educational program or activity that also receives federal funds.

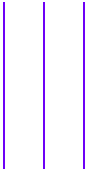
"State educational program or activity" means an educational program or activity of the University of Hawaii, the department of education, or public charter schools. [L 2018, c 110, §2; am L 2019, c 177, §2]

The Legislature needs to reiterate its intent to protect all "otherwise qualified individuals" from disability discrimination as described in §368-1.5, including students (page 2, line 21).

Ref.: 1989 House Journal, Standing Committee Report 372; HCRC 2014-2015 Annual Report.

The intent of the legislature in creating the HCRC was "...to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State's commitment to preserving the civil rights of all individuals."

The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure "...designed to provide a forum which is accessible to anyone who suffers an act of discrimination."



Sincerely, Linda Elento, Constituent



U.S. Department of Education
Office for Civil Rights



U.S. Department of Justice
Civil Rights Division

March 3, 2015

Robbi Cooper
State Co-Contact Decoding Dyslexia – Texas
9 Scott Crescent
Austin, Texas 78703

Dear Ms. Cooper:

This responds to your letter dated November 12, 2014, regarding the recently released Dear Colleague Letter from the Departments of Education and Justice that explained the responsibility of public schools to ensure that communication with students with hearing, vision, or speech disabilities is as effective as communication with other students. In your letter, you express concern that this Dear Colleague Letter did not address the communication needs of students with dyslexia, dysgraphia, or other disabilities that affect a student's ability to access and use information from printed sources or to write or express ideas in print.

The 2014 guidance resulted from an important appellate court decision in which the Departments of Justice and Education participated, *K.M. v. Tustin Unified School District*. In that case, the court of appeals agreed with the United States that the requirement to provide a meaningful educational benefit under the Individuals with Disabilities Education Act (IDEA) is different from the requirement to provide equal opportunity and equally effective communication under the Americans with Disabilities Act (ADA). While, in many instances, the services a school provides under the IDEA to ensure a free appropriate public education (FAPE) will also satisfy the school's obligation under the ADA to ensure equally effective communication, this is not always the case. Simply because a school district provided a student with a FAPE does not necessarily mean that the student was provided all the services due under title II of the ADA. To comply with both statutes, a school may have to provide additional and different aids and services.¹

The Dear Colleague Letter, following on *Tustin*, focuses on public schools' obligations to address the communication needs of a common category of students with disabilities—those with hearing, vision, or speech disabilities. But the guidance does not limit the scope of title II's

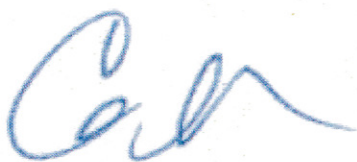
¹ The United States' brief and the federal appellate court decision are attached to this response.

protections for students with dyslexia, dysgraphia, or other disabilities. As explained in the guidance, title II's implementing regulation requires public entities to take appropriate steps to ensure that communications with any individual with a disability are as effective as communications with others, and to provide auxiliary aids and services where necessary to afford such individuals an equal opportunity to participate in, and enjoy the benefits of, the public entity's services, programs, or activities.

These requirements, among others, implement title II's broad equal opportunity mandate. If students with disabilities need particular auxiliary aids or services in order to equally benefit from the services, programs, and activities of the public school, it is the obligation of the school under title II's implementing regulations to provide them unless an applicable defense applies. For example, if a student with dyslexia or dysgraphia needs a computer to do classwork or needs speech recognition software on that computer in order to equally benefit from the school's services, programs, and activities, then the school must generally provide it unless an applicable defense applies. (Of course, the school may also be required to provide these same aids or services to ensure FAPE, which does not offer schools the defenses that are applicable to many of title II's implementing regulations).

Please be assured that the Departments of Education and Justice are committed to ensuring that all students with disabilities have access to equal opportunities at school. We appreciate your thoughts on this important issue and hope this information is helpful.

Sincerely,



Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education



Vanita Gupta
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

Encls.

cc: Kathy Stratton, Psy. D.