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# A BILL FOR AN ACT

RELATING TO CIVIL RIGHTS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that 2022 is the fiftieth  
2 anniversary of the Patsy T. Mink Equal Opportunity in Education  
3 Act, otherwise known as Title IX of the Education Amendments of  
4 1972 (20 U.S.C. 1681 et seq.) or simply "Title IX". Hawaii is  
5 proud of Congresswoman Mink's signature legislation, which has  
6 given millions of girls and women educational opportunities that  
7 were undreamed of before the enactment of Title IX, in the  
8 classroom and on the playing field; in research, teaching, and  
9 graduate schools; and in science, medicine, law, and other  
10 professions. The legislature also recognizes, however, that  
11 Congresswoman Mink's celebrated legacy has not yet been fully  
12 realized. The recent federal administrative rules adopted in  
13 2020 by the Trump administration significantly diminished the  
14 rights and protections for students and employees under  
15 Title IX. For example, the new rules limit the application of  
16 federal Title IX policies to persons in the United States. This  
17 means that students participating in international programs,



1 such as study abroad, are no longer protected under federal  
2 Title IX rules. The new rules also narrowed the definition of  
3 "sexual harassment", making it more difficult for victims to  
4 receive relief under Title IX.

5 The legislature also finds that Act 110, Session Laws of  
6 Hawaii 2018, created a state corollary to Title IX by  
7 prohibiting discrimination on the basis of sex, including gender  
8 identity or expression, or sexual orientation, in any state  
9 educational program or activity, or in any educational program  
10 or activity that receives state financial assistance. The  
11 legislature further finds that in order to preserve  
12 Congresswoman Mink's intent to provide equal opportunity in  
13 education, further clarification of section 368D-1, Hawaii  
14 Revised Statutes, is required, as well as annual data reporting  
15 from the department of education, public charter schools, and  
16 the university of Hawaii, to ensure that the needs of victims of  
17 unlawful sex-based discrimination, including sexual harassment,  
18 gender-based harassment, and sexual assault, are properly  
19 addressed.

20 Accordingly, the purpose of this Act is to:



1 (1) Define the scope and application of chapter 368D,  
2 Hawaii Revised Statutes, and set forth requirements  
3 with which covered entities must comply; and

4 (2) Require annual reporting to the legislature on the  
5 number and types of Title IX cases received by the  
6 department of education, public charter schools, and  
7 the university of Hawaii, and other relevant  
8 information.

9 SECTION 2. Chapter 368D, Hawaii Revised Statutes, is  
10 amended by adding four new sections to be appropriately  
11 designated and to read as follows:

12 "§368D- Purpose; scope; construction. (a) The purpose  
13 of this chapter is to provide a framework for the enforcement of  
14 the state law corollary to Title IX of the Education Amendments  
15 of 1972 (20 U.S.C. 1681 et seq.) that is set out in section  
16 368D-1.

17 (b) This chapter shall apply to the conduct of all  
18 students and employees of any covered educational program or  
19 activity and of third parties, provided that the conduct occurs:

20 (1) On the premises of the covered educational program or  
21 activity; or



1       (2) Outside of the premises of the covered educational  
2       program or activity, if:

3       (A) The conduct occurred in connection with the  
4       covered educational program or activity; or

5       (B) The conduct may have a continuing adverse effect  
6       on, or may create a hostile environment within,  
7       the covered educational program or activity.

8       (c) If any conflict arises between applicable mandatory  
9       federal requirements under Title IX (20 U.S.C. 1681 et seq.) and  
10      any state law requirements, the federal requirements shall  
11      prevail.

12      (d) Nothing in this chapter shall be construed to  
13      prohibit:

14      (1) The membership practices of social fraternities or  
15      sororities or voluntary youth service organizations,  
16      as set forth in title 20 United States Code section  
17      1681(a)(6), as that section was in effect on  
18      January 1, 2019;

19      (2) Any educational institution receiving state funds from  
20      maintaining separate living facilities for different  
21      sexes, as set forth in title 20 United States Code



1 section 1686, as that section was in effect on  
2 January 1, 2019; or

3 (3) An educational institution from administering, or  
4 assisting in administering, a scholarship, fellowship,  
5 or other form of financial assistance pursuant to a  
6 domestic or foreign will, trust, bequest, or similar  
7 instrument that requires awards to be made to members  
8 of a particular sex specified therein; provided that  
9 the overall effect of sex-restricted financial  
10 assistance shall not discriminate on the basis of sex,  
11 as set forth in title 34 Code of Federal Regulations  
12 section 106.37(b)(1), as that section was in effect on  
13 January 1, 2019.

14 (e) Nothing in this chapter shall preclude a student  
15 participating in any covered educational program or activity who  
16 is aggrieved by a violation of this chapter from filing a civil  
17 action in a court of competent jurisdiction.

18 **§368D- Definitions.** As used in this chapter:

19 "Consent" means an affirmative, conscious, and voluntary  
20 agreement to engage in an agreed-upon form of sexual contact;  
21 provided that:



1       (1) Silence, or the absence of protest or resistance, does  
2       not constitute consent; and

3       (2) A person is unable to give consent when the person is:

4           (A) Under the age of consent for sexual contact, as  
5           provided in part V of chapter 707;

6           (B) Developmentally or intellectually disabled; or

7           (C) Mentally incapacitated or physically helpless.

8       "Covered educational program or activity" means:

9       (1) Any state educational program or activity; or

10       (2) Any educational program or activity that receives  
11       state financial assistance.

12       "Covered entity" means an entity having a covered  
13       educational program or activity.

14       "Dating violence" means physical, sexual, emotional,  
15       financial, or psychological abuse or threats of abuse against  
16       another person who is or has been in a social relationship of a  
17       romantic or intimate nature with the alleged perpetrator;  
18       provided that the existence of the relationship is evidenced by  
19       the following factors:

20       (1) Length of the relationship;

21       (2) Type of relationship; and



1       (3) Frequency of interaction between the persons involved  
2                   in the relationship.

3       "Domestic violence" means physical, sexual, emotional,  
4 financial, or psychological abuse or threats of abuse against a  
5 family or household member. For purposes of this definition,  
6 "household member" means a cohabitant who is or was a spouse or  
7 intimate partner of the alleged perpetrator.

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

13       "Gender-based harassment" is a form of sex-based harassment  
14 that includes:

- 15       (1) Unwelcome conduct based on a person's actual or  
16                   perceived sex or gender;
- 17       (2) Verbal, physical, or electronic conduct based on sex,  
18                   gender, sexual orientation, or sex stereotyping that  
19                   creates a hostile, intimidating, or abusive  
20                   environment, even if the conduct is not sexual in  
21                   nature; and



1       (3) Harassment in response to a person's exhibition of a  
2       perceived stereotypical characteristic for the  
3       person's sex, or to a person's failure to conform to  
4       stereotypical notions of masculinity or femininity,  
5       regardless of the person's actual or perceived sex,  
6       gender, sexual orientation, gender identity, or gender  
7       expression.

8       "Incapacitated" or "incapacitation" means a mental or  
9       physical state in which a person lacks the ability to understand  
10      the consequences of the person's actions and, as a result, is  
11      unable to make a rational, reasonable decision. States of  
12      incapacitation include:

- 13      (1) Sleep;
- 14      (2) Unconsciousness;
- 15      (3) Intermittent consciousness; or
- 16      (4) Any other state in which the person is unaware that  
17      sexual contact is occurring.

18      "Retaliation" means adverse action taken against a person  
19      because of the person's good faith participation in any of the  
20      following activities:





- 1       (1) Seeking advice or assistance about conduct prohibited  
2       under this chapter;
- 3       (2) Opposing or filing a complaint against conduct that  
4       the person reasonably believes to be prohibited under  
5       this chapter; or
- 6       (3) Testifying, assisting, or participating in an  
7       investigation or other proceeding related to a  
8       complaint of conduct addressed by this chapter.

9       For purposes of this definition, "adverse action" means an  
10       action that would dissuade a reasonable person from filing or  
11       supporting a complaint brought pursuant to this chapter.

12       "Sex discrimination" means any unlawful distinction,  
13       preference, or detriment to a person, in relation to other  
14       persons, that is based upon the person's sex or gender and is  
15       sufficiently serious to unreasonably interfere with or limit the  
16       ability of a person who is:

- 17       (1) A student, or applicant for admission, from  
18       participating in, accessing, or benefitting from a  
19       covered entity's programs, services, or activities,  
20       including admission, academic standing, grades,  
21       academic assignment, and on-campus housing;



1       (2) An employee, or applicant for employment, from  
2       accessing employment or conditions and benefits of  
3       employment, including hiring, advancement, and work  
4       assignment;

5       (3) An authorized volunteer from participating in a  
6       volunteer activity; or

7       (4) A guest or visitor from participating in, accessing,  
8       or benefitting from a covered entity's programs,  
9       services, or activities.

10       "Sexual assault" means an act of unwanted physical contact  
11 of a sexual nature with an intimate body part of another person  
12 that is committed by an acquaintance or stranger. Intimate body  
13 parts include genitalia, groin, breasts, buttocks, or mouth.

14 Contact is unwanted when:

15       (1) The contact occurs without the consent of the other  
16       person; or

17       (2) The other person is incapacitated or otherwise  
18       incapable of giving consent.

19       "Sexual contact" means:

20       (1) Intentional touching or penetration of another  
21       person's clothed or unclothed body, including the



1           other person's mouth, neck, anus, genitalia, groin,  
2           breast, or buttock, in a sexual manner, with any part  
3           of the body or with any object; or

4           (2) Causing another person to touch the person's own body,  
5           or the body of another person, in the manner described  
6           in paragraph (1).

7           "Sexual exploitation" means violating another person's  
8           sexual privacy or taking sexual advantage of another person in  
9           an unjust or abusive manner, without the person's consent. The  
10          term includes:

11          (1) Photographing or otherwise recording another person  
12          who is engaged in sexual activity, intercourse, or  
13          penetration, or who is in a state of undress, without  
14          the person's knowledge or consent;

15          (2) Sharing photographs, or video or audio recordings, of  
16          another person who is engaged in sexual activity,  
17          intercourse, or penetration, or who is in a state of  
18          undress, without the person's knowledge or consent;

19          (3) Watching another person who is currently engaging in  
20          sexual activity, without the person's knowledge or  
21          consent;



- 1       (4) Allowing other persons to watch sexual activity  
2       without the knowledge or consent of all persons  
3       engaging in the sexual activity;
- 4       (5) Exposing a person's intimate body part, including  
5       genitalia, groin, breast, or buttock, to another  
6       person without the person's consent;
- 7       (6) Engaging in sexual activity while in a public place  
8       and in view of another person who does not consent to  
9       witnessing the sexual activity; and
- 10       (7) Tampering with another person's beverage with the  
11       intent to impair the person's ability to withhold  
12       consent or to knowingly consent to sexual activity,  
13       regardless of whether any sexual activity actually  
14       occurs.

15       For purposes of this definition, "sexual exploitation" does not  
16       include sexual assault.

17       "Sexual harassment" means unwelcome sexual advances,  
18       requests for sexual favors, or other verbal or physical conduct  
19       of a sexual nature; provided that:

- 20       (1) Submission to, or rejection of, the conduct is either  
21       an explicit or implicit term or condition of a



1 person's education, employment, or participation in a  
2 covered entity's programs, services, or activities;

3 (2) Submission to, or rejection of, the conduct by a  
4 person is used as a basis for decisions affecting the  
5 person's education, employment, or participation in a  
6 covered entity's programs, services, or activities; or

7 (3) The conduct is unwelcome to either the person to whom  
8 the conducted is directed, or to another person having  
9 direct awareness of the conduct; provided further that  
10 the conduct:

11 (A) Is severe, persistent, or pervasive; and

12 (B) Has the purpose or effect of either:

13 (i) Unreasonably interfering with the person's  
14 academic or work performance; or

15 (ii) Creating an intimidating, hostile, or  
16 offensive educational or work environment.

17 "Stalking" means two or more acts of unwanted and harassing  
18 behavior that are:

19 (1) Directed at a specific person;



1       (2) Sufficiently serious to cause physical, emotional, or  
2       psychological fear, or to create a hostile,  
3       intimidating, or abusive environment; and

4       (3) Objectively and subjectively perceived as hostile,  
5       intimidating, or abusive.

6       "State educational program or activity" means an  
7       educational program or activity of the university of Hawaii, the  
8       department of education, or public charter schools.

9       "Title IX" refers to the federal Education Amendments of  
10      1972, codified as title 20 United States Code section 1621 et  
11      seq.

12      §368D-     Designation of coordinator; publication of  
13      information; adoption of policies. No later than January 1,  
14      2023, all covered entities shall:

15      (1) Designate a person, who shall be known as the Title IX  
16      coordinator, to oversee the covered entity's  
17      implementation of the requirements of this chapter,  
18      and the covered entity's response to alleged  
19      violations thereof;

20      (2) Annually publish the name and contact information of  
21      the Title IX coordinator to students and on the



1 website of the covered educational program or  
2 activity; and

3 (3) Adopt a written policy for addressing complaints  
4 brought pursuant to this chapter. The written policy  
5 shall include provisions that address:

6 (A) The scope of the policy;  
7 (B) The conduct or behavior prohibited under the  
8 policy;  
9 (C) Definitions necessary to interpret and apply the  
10 policy;  
11 (D) The applicable evidentiary standard of review,  
12 which shall be by preponderance of the evidence;  
13 (E) The roles of various personnel of the covered  
14 educational program or activity; and  
15 (F) Any resources available students and employees of  
16 the covered educational program or activity,  
17 including any advocacy services, assistance  
18 programs, and confidential or non-confidential  
19 support services.

20 §368D- Annual report to legislature. No later than  
21 September 1 of each year, each state educational program or



1 activity shall submit to the legislature a report that includes  
2 information pertaining to the immediately preceding school year,  
3 as follows:

4       (1) The university of Hawaii shall include in its report  
5 to the legislature:

6       (A) The total number of complaints alleging a  
7 violation of this chapter that were received by  
8 the university, and the number of complaints  
9 received in each of the following categories:

10       (i) The number of complaints received at each  
11 campus of the university;

12       (ii) The number of complaints that involve each  
13 type of conduct prohibited under section  
14 368D-1(b); and

15       (iii) The number of confidential complaints,  
16 informal complaints, and formal complaints,  
17 as applicable;

18       (B) Of the total number of complaints for each campus  
19 reported under subparagraph (A), the number of  
20 complaints involving:





- 1            (i) A student complainant and a student
- 2            respondent;
- 3            (ii) A student complainant and an employee
- 4            respondent;
- 5            (iii) An employee complainant and an employee
- 6            respondent; and
- 7            (iv) An employee complainant and a student
- 8            respondent;
- 9            (C) Of the complaints reported under subparagraph
- 10           (A), the number of complaints in which:
- 11           (i) An investigation was commenced but a
- 12           decision has not yet been rendered;
- 13           (ii) An investigation was completed and a
- 14           decision was rendered; and
- 15           (iii) A party has filed an appeal, and the appeal
- 16           is pending;
- 17           (D) The percentage of employees at each campus of the
- 18           university who have completed a training course
- 19           on the university's Title IX policies and
- 20           procedures, and on any other policies and



- 1           procedures adopted by the university in  
2           accordance with this chapter; and
- 3           (E) The percentage of students enrolled at each  
4           campus of the university who have completed a  
5           training course on the university's Title IX  
6           policies and procedures, and on any other  
7           policies and procedures adopted by the university  
8           in accordance with this chapter; and
- 9           (2) The department of education and each public charter  
10           school shall include in their respective reports to  
11           the legislature:
- 12           (A) The total number of complaints alleging a  
13           violation of this chapter that were received by a  
14           covered educational program or activity of the  
15           department of education or the public charter  
16           school, as applicable, and the number of  
17           complaints received in each of the following  
18           categories:
- 19           (i) The number of complaints received at each  
20           department of education complex area or  
21           public charter school, as applicable; and



- 1           (ii) The number of complaints that involve each
- 2                     type of conduct prohibited under section
- 3                     368D-1(b);
- 4           (B) Of the total number of complaints reported under
- 5                     subparagraph (A) for each department of education
- 6                     complex area or public charter school, as
- 7                     applicable, the number of complaints involving:
- 8                     (i) A student complainant and a student
- 9                             respondent;
- 10                    (ii) A student complainant and an employee
- 11                             respondent;
- 12                    (iii) An employee complainant and an employee
- 13                             respondent; and
- 14                    (iv) An employee complainant and a student
- 15                             respondent;
- 16           (C) Of the total number of complaints reported under
- 17                     subparagraph (A) for each department of education
- 18                     complex area or public charter school, as
- 19                     applicable, the number of complaints in which:
- 20                     (i) An investigation was commenced but a
- 21                             decision has not yet been rendered;



- 1                   (ii) An investigation was completed and a
- 2                                   decision was rendered; and
- 3                   (iii) A party has filed an appeal, and the appeal
- 4                                   is pending; and
- 5                   (D) For the department of education only, the
- 6                                   percentage of teachers, counselors, principals,
- 7                                   and vice-principals, disaggregated by complex
- 8                                   area, who have completed a training course on the
- 9                                   department's Title IX policies and procedures,
- 10                                  and on any other policies and procedures adopted
- 11                                  by the department in accordance with this
- 12                                  chapter."

13           SECTION 3. Section 368D-1, Hawaii Revised Statutes, is  
 14 amended to read as follows:

15           "§368D-1 [State] Covered educational programs and  
 16 activities; discrimination and other conduct prohibited. (a)  
 17 No person in the State, on the basis of sex, including gender  
 18 identity or expression as defined in section 489-2, or sexual  
 19 orientation as defined in section 489-2, shall be excluded from  
 20 participation in, be denied the benefits of, or be subjected to  
 21 discrimination under[+]



1       ~~(1) Any state educational program or activity, or~~  
 2       ~~(2) Any educational program or activity that receives~~  
 3           ~~state financial assistance.] any covered educational~~  
 4           ~~program or activity.~~

5       ~~[(b) Nothing in this chapter shall be construed to~~  
 6       ~~prohibit the membership practices of social fraternities or~~  
 7       ~~sororities or voluntary youth service organizations, as set~~  
 8       ~~forth in title 20 United States Code Section 1681(a)(6), as in~~  
 9       ~~effect on January 1, 2019.~~

10       ~~(c) Nothing in this chapter shall be construed to prohibit~~  
 11       ~~any educational institution receiving state funds from~~  
 12       ~~maintaining separate living facilities for different sexes, as~~  
 13       ~~set forth in title 20, United States Code Section 1686, as in~~  
 14       ~~effect on January 1, 2019.~~

15       ~~(d) Nothing in this chapter shall be construed to prohibit~~  
 16       ~~an educational institution from administering or assisting in~~  
 17       ~~administering a scholarship, fellowship, or other form of~~  
 18       ~~financial assistance pursuant to a domestic or foreign will,~~  
 19       ~~trust, bequest, or similar instrument that requires awards be~~  
 20       ~~made to members of a particular sex specified therein; provided~~  
 21       ~~that the overall effect of sex restricted financial assistance~~



1 ~~shall not discriminate on the basis of sex, as set forth in~~  
2 ~~title 34, Code of Federal Regulations section 106.37(b)(1), as~~  
3 ~~in effect on January 1, 2019.~~

4 ~~(e) Nothing in this chapter shall preclude a student~~  
5 ~~participating in any educational program or activity who is~~  
6 ~~aggrieved by a violation of this chapter from filing a civil~~  
7 ~~action in a court of competent jurisdiction.~~

8 ~~(f) A person, or an organization or association on behalf~~  
9 ~~of a person alleging a violation of this chapter may file a~~  
10 ~~complaint pursuant to this chapter.~~

11 ~~(g) As used in this section:~~

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

17 ~~"State educational program or activity" means an~~  
18 ~~educational program or activity of the University of Hawaii, the~~  
19 ~~department of education, or public charter schools.]~~

20 (b) The following types of conduct shall be prohibited  
21 under any covered educational program or activity:



- 1        (1) Sex discrimination;
- 2        (2) Sexual harassment;
- 3        (3) Gender-based harassment;
- 4        (4) Sexual exploitation;
- 5        (5) Sexual assault;
- 6        (6) Domestic violence;
- 7        (7) Dating violence;
- 8        (8) Stalking; and
- 9        (9) Retaliation.
- 10       (c) Any person, or an organization or association on
- 11 behalf thereof, who alleges a violation of this chapter may file
- 12 a complaint with a covered entity pursuant to this chapter."

13        SECTION 4. This Act does not affect rights and duties that  
14 matured, penalties that were incurred, and proceedings that were  
15 begun before its effective date.

16        SECTION 5. If any provision of this Act, or the  
17 application thereof to any person or circumstance, is held  
18 invalid, the invalidity does not affect other provisions or  
19 applications of the Act that can be given effect without the  
20 invalid provision or application, and to this end the provisions  
21 of this Act are severable.



1 SECTION 6. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 7. This Act shall take effect upon its approval.

4

INTRODUCED BY: *Linda Lehman*  
JAN 21 2022





# H.B. NO. 1775

**Report Title:**

Education; Educational Programs and Activities; Sex  
Discrimination; Title IX Corollary; Enforcement

**Description:**

Specifies additional forms of discrimination and other prohibited conduct under Chapter 368D, HRS. Requires covered entities to adopt written policies and undertake other specified enforcement actions no later than 1/1/2023. Requires annual reports to Legislature.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

