

JAN 21 2022

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: Michelle A. Kadani



S.B. NO. 2636

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.

