

JAN 17 2025

A BILL FOR AN ACT

RELATING TO SEX-BASED DISCRIMINATION.

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

1 SECTION 1. The legislature finds that the Patsy Mink Equal
2 Opportunity in Education Act, also known as Title IX, triggered
3 a seismic shift in the education landscape by prohibiting
4 discrimination on the basis of sex by any education program or
5 activity receiving federal funds. Hawaii is proud of
6 Congresswoman Mink's signature legislation, which has given
7 millions of girls and women educational opportunities in the
8 classroom, on playing fields, in employment, in graduate
9 schools, and in research, teaching, medicine, law, and other
10 professions that were out of reach prior to the enactment of
11 Title IX.

12 The legislature recognizes, however, that Congresswoman
13 Mink's goals for Title IX have not been fully realized, and that
14 the efficacy of Title IX federal protections against sex
15 discrimination in education has been diminished and eroded.
16 Decades after Title IX's enactment, the state department of



1 education remains out of compliance, as does the university of
2 Hawaii system.

3 The legislature notes that annual reports from the
4 university of Hawaii, department of education schools, and state
5 public charter schools on Title IX sex-based discrimination and
6 non-Title IX sexual harassment complaints received by the
7 schools suggest that, when compared with data from student
8 surveys, incidents of sex-based discrimination and sex-based
9 harassment go largely unreported. This creates a hostile
10 environment and can negatively impact a student's learning,
11 mental health, physical wellbeing, and ability to continue their
12 education. Stronger state protections are needed to ensure that
13 no student is denied, or faces barriers to, equal educational
14 opportunities on the basis of the student's sex.

15 The legislature also notes that the incoming federal
16 administration has expressed an intention to eliminate certain
17 federal civil rights protections and leave these issues to the
18 states. Maintaining a vague framework in state law and relying
19 primarily on federal Title IX protections may not be sufficient
20 in these times.



1 The legislature further finds that the courts have
2 consistently interpreted the relationship between federal and
3 state protections in areas where states have enacted stronger
4 laws as one where federal law establishes a baseline or "floor",
5 allowing states to provide greater protections without being
6 preempted, as long as there is no direct conflict with federal
7 law. This principle is rooted in the concept of federalism,
8 which permits states to legislate in areas not exclusively
9 reserved for federal authority, as long as their laws do not
10 obstruct federal objectives.

11 In *State v. Viglielmo*, 105 Haw. 197 (2004), the Hawaii
12 supreme court emphasized that states have a sovereign right to
13 adopt constitutional provisions and laws that confer broader
14 individual liberties than those provided by the federal
15 constitution. The court noted that Hawaii's constitution has
16 often been interpreted to afford greater protections than its
17 federal counterpart, particularly when a sound regard for the
18 purpose of the rights involved warrants such an expansion. This
19 case illustrates that state courts can interpret their
20 constitutions and statutes to provide enhanced protections, even
21 in areas where federal law applies, as long as the state law



1 does not contravene federal constitutional provisions or amount
2 to a taking without just compensation.

3 Accordingly, the purpose of this Act is to clarify and
4 strengthen the State's protections against sex-based harassment,
5 sex discrimination, and retaliation, including discrimination
6 based on gender identity, sexual orientation, pregnancy, and
7 pregnancy-related conditions.

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

11 **"§368D-A Protections against sex-based harassment, sex**
12 **discrimination, and retaliation.** (a) A covered entity shall
13 promptly and effectively respond to any complaint of sex-based
14 harassment, sex discrimination, or retaliation that occurred:

- 15 (1) On the covered entity's campus;
16 (2) On the covered entity's digital platform; or
17 (3) At a covered educational program or activity;
18 (b) A covered entity may dismiss a complaint of sex-based
19 harassment, sex discrimination, or retaliation at any time if
20 the complainant is no longer a student or an employee of the



1 covered entity; provided that the covered entity shall continue
2 to offer supportive measures to the complainant.

3 (c) A covered entity may use an informal resolution
4 process such as mediation or a restorative process to resolve a
5 complaint of sex-based harassment where both parties are
6 students.

7 (d) A covered entity shall not retaliate against an
8 individual for filing a complaint or for their participation or
9 lack of participation in an investigation of a compliant.

10 (e) A covered entity may refuse to investigate a
11 compliant; provided that the covered entity shall provide
12 written notice of the refusal by certified mail to the
13 complainant.

14 **§368D-B Protections for pregnant and parenting students.**

15 (a) A covered entity shall not discriminate against a student
16 based on past, current, or potential pregnancy or related
17 conditions.

18 (b) Participation by student who is pregnant or has a
19 related condition in an alternative covered educational program
20 or activity shall not constitute a violation of this chapter;
21 provided that:



- 1 (1) Participation is voluntary; and
- 2 (2) The alternative covered educational program or
- 3 activity is comparable to those offered to students
- 4 who are not pregnant or have a related condition.
- 5 (c) A covered entity shall not require a student who is
- 6 pregnant or has a related condition to:
- 7 (1) Obtain approval from a parent, guardian, or health
- 8 care provider to participate in a school program or
- 9 activity if approval is not required of other
- 10 students; or
- 11 (2) Submit documentation to receive reasonable
- 12 accommodations, a modification, alternative
- 13 programming, or lactation space if prior documentation
- 14 was sufficient or documentation is not required of
- 15 other students.
- 16 (d) A covered entity shall allow a voluntary leave of
- 17 absence for a student who is pregnant or has a related condition
- 18 if the student's health care provider deems it medically
- 19 necessary and shall reinstate the student at their prior
- 20 academic status and, where practicable, prior extracurricular
- 21 status, upon the student's return.



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1 (e) A covered entity shall consult with a student who is
2 pregnant or has a related condition to offer individualized and
3 voluntary reasonable accommodations, unless the accommodation
4 would fundamentally alter the school's program or activity.

5 (f) A covered entity shall provide a private, clean, non-
6 bathroom lactation space for students who are pregnant or have a
7 related condition.

8 (g) A covered entity shall not apply a policy, practice,
9 or procedure that discriminates against a student's past,
10 current, or potential parental, family, or marital status based
11 on gender.

12 **§368D-C Protections for LGBTQI+ students.** A covered
13 entity shall allow individuals to participate in classes and
14 activities, use bathrooms and locker rooms, and dress and groom
15 themselves in a manner that is consistent with their gender
16 identity or expression.

17 **§368D-D Protections against sex-based harassment, sex**
18 **discrimination, or retaliation; mandatory reporting.** All non-
19 confidential employees of a covered entity shall report any
20 incidents of sex-based harassment, sex discrimination, or
21 retaliation to the covered entity's Title IX coordinator;



1 provided that if the incident of sex-based harassment, sex
2 discrimination, or retaliation occurs at the university of
3 Hawaii, the non-confidential employee may also inform the victim
4 how to contact the university of Hawaii's Title IX coordinator.

5 **§368D-E Consent; when ineffective.** (a) Consent to sexual
6 activity cannot be granted when it is:

7 (1) Given by a person who is under the age of consent or
8 who lacks the ability to give consent by reason of a
9 mental disease, disorder, or defect;

10 (2) Given by a person who is incapacitated, physically
11 helpless, disoriented, asleep, or unconscious for any
12 reason, including through the use of alcohol or drugs;
13 or

14 (3) Induced by force, intimidation, duress, deception, or
15 coercion.

16 (b) Silence, lack of protest, or lack of resistance shall
17 not be interpreted to mean granting of consent; provided that
18 resistance shall be considered a clear indication that consent
19 was not granted.



1 (c) The existence of a dating relationship, domestic
2 partnership, or marriage between the parties involved in a
3 complaint is not an indicator of consent.

4 (d) Consent shall be ongoing throughout any sexual
5 activity and may be withdrawn at any time.

6 **§368D-F Investigations.** (a) A covered entity shall act
7 promptly to resolve all complaints of sex-based harassment, sex
8 discrimination, or retaliation; provided that a covered entity
9 may impose reasonable delays for good cause when investigating a
10 complaint for sex-based harassment or sex discrimination.

11 (b) When investigating a complaint, a covered entity
12 shall:

13 (1) Presume the respondent is not responsible;

14 (2) Establish a process to determine the credibility of
15 any witnesses; provided that for complaints of sex-
16 based harassment involving more than one student
17 complainant or more than one student respondent, the
18 covered entity shall also establish a process for
19 interviewing each party and witness; and

20 (3) Use a preponderance of evidence standard as the degree
21 of proof required to determine if the alleged conduct



1 resulted in a violation of this chapter; provided that
2 if clear and convincing evidence is the standard of
3 proof required by the covered entity in all comparable
4 proceedings regarding instances of discrimination
5 based on race or disability, the covered entity shall
6 use that standard.

7 (c) A covered entity may require an employee or other
8 person authorized by a covered entity to provide aid, benefits,
9 or services under a covered education program or activity to
10 participate as a witness in, or otherwise assist with, an
11 investigation, proceeding, or hearing.

12 §368D-G Decisions. (a) If the decision-maker is
13 persuaded that the conduct alleged in a complaint resulted in a
14 violation of a covered entity's sex discrimination or
15 retaliation policy, the decision-maker shall issue a cause
16 finding.

17 (b) If the decision-maker is not persuaded that the
18 conduct alleged in the complaint resulted in a violation of a
19 covered entity's sex discrimination and retaliation policies,
20 the decision-maker shall issue a no cause finding.



1 §368D-H Training. All covered entities shall provide
2 training to all employees on how to recognize and report sex-
3 based harassment, sex discrimination, and retaliation. Covered
4 entities shall provide additional training for all Title IX
5 officials, including coordinators, investigators, decision-
6 makers, informal resolution facilitators, confidential
7 advocates, and any person who can modify or terminate supportive
8 measures."

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

11 "**§368D-1 Covered educational programs and activities;**
12 **discrimination prohibited.** (a) No person in the State, on the
13 basis of sex, including gender identity or expression as defined
14 in section 489-2, [~~or~~] sexual orientation as defined in section
15 489-2, or pregnancy or related condition, shall be excluded from
16 participation in, be denied the benefits of, or be subjected to
17 discrimination under any covered educational program or
18 activity.

19 (b) Nothing in this chapter shall preclude a person who is
20 aggrieved by a violation of this chapter from filing a private
21 civil action, which may include actions for compensatory and



1 punitive damages as well as injunctive relief, in a court of
2 competent jurisdiction.

3 (c) A person, or an organization or association on behalf
4 of a person alleging a violation of this chapter may file a
5 complaint pursuant to this chapter.

6 (d) A covered educational program or activity shall be in
7 compliance with this chapter during the school year when state
8 funds are received or expended.

9 (e) A private civil action brought pursuant to this
10 section shall be commenced within than two years of:

11 (1) The date of the last incident constituting a violation
12 of this chapter; or

13 (2) If a complainant has filed a complaint, the date of a
14 determination, finding of fact, appeal, or final
15 determination, whichever is the latest;

16 provided that if a covered entity refuses to conduct an
17 investigation, a suit shall be brought within two years of the
18 date the complainant received notice of the covered entity's
19 decision pursuant to section 368D-A."

20 SECTION 4. Section 368D-2, Hawaii Revised Statutes, is
21 amended by amending subsection (a) to read as follows:



1 "(a) The purpose of this chapter is to [~~provide a~~
2 ~~framework for the state law corollary to Title IX that is~~
3 ~~established by section 368D-1.~~] enforce and implement
4 protections against sex-based harassment, sex discrimination,
5 and retaliation as provided in Title IX and article I, sections
6 3 and 6 of the state constitution."

7 SECTION 5. Section 368D-3, Hawaii Revised Statutes, is
8 amended as follows:

9 1. By adding seventeen new definitions to be appropriately
10 inserted and to read:

11 "Admission" means selection for part-time, full-time,
12 special, associate, transfer, exchange, or any other enrollment,
13 membership, or matriculation in a covered educational program or
14 activity.

15 "Complainant" means:

16 (1) A student or employee enrolled at or employed by a
17 covered entity who is alleged to have been subjected
18 to conduct by another student or employee of the
19 covered entity that could constitute sex-based
20 harassment, sex discrimination, or retaliation under
21 this chapter; or



1 (2) A person other than a student or employee who is
2 alleged to have been subjected to conduct that could
3 constitute sex-based harassment, sex discrimination,
4 or retaliation under this chapter and who was
5 participating in or attempting to participate in a
6 covered educational program or activity at the time of
7 the alleged sex-based harassment, sex discrimination,
8 or retaliation.

9 "Complaint" means an oral or written request to the covered
10 entity that can objectively be understood as a request for the
11 covered entity to investigate and make a determination about
12 alleged sex-based harassment, sex discrimination, or retaliation
13 under this chapter.

14 "Confidential employee" means:

15 (1) An employee of a covered entity whose communications
16 made within the scope of their duties are privileged
17 and confidential under federal or state law;

18 (2) An employee of a covered entity whom the covered
19 entity has designated as a confidential employee
20 pursuant to this chapter for the purpose of providing
21 services related to sex-based harassment, sex



1 discrimination, or retaliation to individuals;
2 provided that if the employee has duties other than
3 providing services related to sex-based harassment,
4 sex discrimination, or retaliation, the employee's
5 confidential status shall extend only to information
6 received in connection with the provision of services
7 related to sex-based harassment, sex discrimination,
8 or retaliation; or

9 (3) An employee of a covered entity who is conducting an
10 approved human-subjects research study designed to
11 gather information about sex discrimination; provided
12 that the employee's confidential status shall extend
13 only to information received while conducting the
14 study.

15 "Consent" means knowing, voluntary, and clear permission by
16 word or action to engage in sexual activity.

17 "Decision-maker" means an impartial individual or
18 individuals designated by the covered entity's Title IX
19 coordinator who has decision-making authority within the
20 administrative compliant procedure. "Decision-maker" may refer
21 to either an individual or a panel.



1 "Employee" means all individuals employed by a covered
2 entity.

3 "Incapacitated" means a state where a person is unable to
4 react or respond in a clear manner to that which is going around
5 them due to a temporary or permanent physical or mental health
6 condition, involuntary physical restraint, or the consumption of
7 incapacitating drugs. "Incapacitated" is not synonymous with
8 intoxication, impairment, blackout, or drunk.

9 "Investigator" means an impartial investigator assigned by
10 the covered entity's civil rights coordinator to gather facts,
11 assess relevance, synthesize the evidence, and compile the
12 information into a fact-finding report.

13 "Parental status" means a person who is:

- 14 (1) A biological, adoptive, foster, or stepparent;
15 (2) A legal custodian, guardian, or person acting in loco
16 parentis; or
17 (3) Actively seeking legal custody, guardianship,
18 visitation, or adoption of an individual eighteen
19 years of age or younger or an individual over the age
20 of eighteen who is incapable of self-care because of a
21 physical or mental disability.



1 "Pregnancy or related conditions" means pregnancy,
2 childbirth, termination of pregnancy, or lactation and any
3 medical conditions related to pregnancy, childbirth, termination
4 of pregnancy, or lactation, including recovery.

5 "Retaliation" means an adverse action taken by the covered
6 entity, an employee of the covered entity, or a student enrolled
7 with the covered entity in response to a claimant exercising any
8 right or privilege secured by Title IX or this chapter.

9 "Retaliation" includes but is not limited to lowering grades or
10 restricting access to educational resources; social ostracism,
11 bullying, or harassment by peers or employees of the covered
12 entity; unjustified disciplinary actions, such as suspensions or
13 terminations; and threats, intimidation, or pressure to withdraw
14 a complaint.

15 "Sex-based harassment" means unwelcome conduct that occurs
16 with a frequency or severity to create a hostile work
17 environment or an environment that denies or limits a student's
18 ability to participate in or benefit from a covered educational
19 program or activity and is:

- 20 (1) Of a sexual nature, including but not limited to
21 sexual advances, sexual violence, requests for sexual

1 favours, or other verbal, nonverbal, or physical
2 conduct of a sexual nature; or

3 (2) Based on a student's sex, sexual orientation, gender
4 identity or expression, or pregnancy or related
5 condition.

6 "Sex discrimination" means the disparate treatment of an
7 individual because of the individual's sex, sexual orientation,
8 gender identity or expression, or pregnancy or related condition
9 that results in the individual being excluded from participation
10 in, denied the benefits of, or subject to discrimination under a
11 covered educational program or activity.

12 "Supportive measures" means measures offered, as
13 appropriate, to:

14 (1) Restore or preserve access to a covered educational
15 program or activity in a manner that protects the
16 safety of the parties involved; or

17 (2) Provide support to the parties involved during the
18 grievance process or during an informal resolution
19 process."

20 2. By amending the definition of "covered educational
21 program or activity" to read:



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1 "Covered educational program or activity" means:

2 (1) The [~~University~~] university of Hawaii, [~~the~~]
3 department of education, or public charter schools;
4 [~~or~~]

5 (2) Any educational program or activity that receives
6 state financial assistance, in any amount, for any
7 purpose; provided that this term does not exclude an
8 educational program or activity that also receives
9 federal funds[~~or~~];

10 (3) Programs or activities that are run or organized by a
11 student organization officially recognized by the
12 university of Hawaii, department of education, or
13 public charter school, or that receive state financial
14 assistance in any amount; or

15 (4) Conduct that is subject to disciplinary authority by
16 the university of Hawaii, department of education, or
17 public charter schools."

18 SECTION 6. Section 368D-4, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "[~~f~~]**§368D-4**[~~}]~~ **Annual report to legislature.** No later
21 than September 1 of each year, the University of Hawaii,



1 department of education, and state public charter school
2 commission shall submit to the legislature a report that
3 includes information pertaining to the immediately preceding
4 school year, as follows:

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

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

12 (i) The number of complaints received at each
13 campus of the university;

14 (ii) The types of complaints, including but not
15 limited to sexual harassment, [~~gender-based~~]
16 sex-based harassment, sexual assault,
17 domestic violence, or stalking; and

18 (iii) The number of confidential complaints,
19 informal complaints, and formal complaints,
20 as applicable;



- 1 (B) Of the total number of complaints for each campus
2 reported under subparagraph (A), the number of
3 complaints involving:
- 4 (i) A student complainant and a student
5 respondent;
 - 6 (ii) A student complainant and an employee
7 respondent;
 - 8 (iii) An employee complainant and an employee
9 respondent; and
 - 10 (iv) An employee complainant and a student
11 respondent;
- 12 (C) Of the total number of complaints for each campus
13 reported under subparagraph (A), the number of
14 complaints in which:
- 15 (i) An investigation was commenced but a
16 decision has not yet been rendered;
 - 17 (ii) An investigation was completed and a
18 decision was rendered; and
 - 19 (iii) A party has filed an appeal, and the appeal
20 is pending;



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



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- 1 (i) The number of complaints received at each
2 department of education complex area or
3 public charter school, as applicable; and
4 (ii) The types of complaints, including but not
5 limited to sexual harassment, [~~gender-based~~
6 sex-based harassment, sexual assault,
7 domestic violence, or stalking;
- 8 (B) Of the total number of complaints reported under
9 subparagraph (A) for each department of education
10 complex area or public charter school, as
11 applicable, the number of complaints involving:
- 12 (i) A student complainant and a student
13 respondent;
- 14 (ii) A student complainant and an employee
15 respondent;
- 16 (iii) An employee complainant and an employee
17 respondent; and
- 18 (iv) An employee complainant and a student
19 respondent;
- 20 (C) Of the total number of complaints reported under
21 subparagraph (A) for each department of education



1 complex area or public charter school, as
2 applicable, the number of complaints in which:
3 (i) An investigation was commenced but a
4 decision has not yet been rendered;
5 (ii) An investigation was completed and a
6 decision was rendered; and
7 (iii) A party has filed an appeal, and the appeal
8 is pending; and
9 (D) For the department of education or a public
10 charter school, the percentage of teachers,
11 counselors, principals, and vice-principals,
12 disaggregated by complex area or public charter
13 school, as applicable, who have completed a
14 training course on the department or public
15 charter school's Title IX policies and
16 procedures, and on any other policies and
17 procedures adopted by the department or public
18 charter school in accordance with this chapter;
19 provided that all public charter schools shall submit
20 the information required under this section to the
21 state public charter school commission, in a form



1 prescribed by the commission, no later than August 1
2 of each year."

3 SECTION 7. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 8. This Act shall take effect upon its approval.

6

INTRODUCED BY:

A handwritten signature in black ink, appearing to be 'Alan', written over a horizontal line.

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Report Title:

Sex-Based Harassment; Sex Discrimination; Retaliation; Title IX; Protections

Description:

Clarifies and strengthens the State's protections against sex-based harassment, sex discrimination, and retaliation that occur in public schools, public charter schools, or at the University of Hawaii, including discrimination based on gender identity or expression, sexual orientation, pregnancy, and pregnancy-related conditions. Establishes procedures for investigations and decision-making. Requires mandatory reporting by certain employees.

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

