
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 Title IX of the
2 Education Amendments of 1972 (20 U.S.C. 1681 et seq.)
3 (Title IX), renamed the Patsy Mink Equal Opportunity in
4 Education Act in 2002, triggered a seismic shift in the
5 education landscape by prohibiting discrimination on the basis
6 of sex by any education program or activity receiving federal
7 funds. The legislature also finds that Hawaii is rightfully
8 proud of Patsy Mink's signature legislation, which has given
9 millions of girls and women educational opportunities that were
10 undreamed of before enactment of Title IX, in the classroom and
11 on the playing fields; in research, teaching, and graduate
12 schools; and in employment, medicine, law, and other
13 professions. The legislature recognizes, however, that Patsy
14 Mink's celebrated legacy has not been fully realized, and that
15 the efficacy of Title IX federal protections against sex
16 discrimination in education has been diminished and eroded. For



1 these reasons, the legislature believes it is time to consider
2 and address the need for a corollary to Title IX in state law.

3 The legislature recognizes that under the federal courts'
4 interpretation of Title IX, a student who is subjected to sexual
5 harassment has no claim for relief under Title IX absent a
6 showing of "deliberate indifference." This is the federal
7 standard applied to the abuse of prisoners, and it is far
8 narrower than the standard applied in sexual harassment cases in
9 an employment setting. In the absence of a state Title IX
10 corollary, a minor student who is the victim of sexual
11 harassment or sexual assault that was perpetrated at school by
12 an adult employee or administrator will have no effective civil
13 rights protection. In contrast, similarly situated teachers,
14 custodians, counselors, office staff, and administrators will be
15 effectively protected under state and federal fair employment
16 laws, specifically, part I of chapter 378, Hawaii Revised
17 Statutes, and Title VII of the Civil Rights Act of 1964 (42
18 U.S.C. 2000e et seq.), respectively. As a result, adult
19 employees are presently protected against sexual harassment in
20 state educational programs, while students, including children,
21 are not.



1 The legislature is further aware that in 2017, the Trump
2 Administration reversed the federal government's previous
3 interpretation of the prohibition against discrimination based
4 on "sex" that included discrimination based on sexual
5 orientation and gender identity and expression. It also issued
6 an interim rule rescinding its guidance on the investigation of
7 campus sex assaults. These rollbacks in federal Title IX
8 protections highlight the need for a state Title IX corollary to
9 protect the students entrusted to our schools from sex
10 discrimination, including sexual harassment and sexual assault.

11 Accordingly, the purpose of this Act is to provide for a
12 state corollary to Title IX that prohibits discrimination on the
13 basis of sex, including gender identity or expression, or sexual
14 orientation, in any state educational program or activity, or in
15 any educational program or activity that receives state
16 financial assistance, without regard to whether the educational
17 program or activity also receives federal funds.

18 It is the intent of the legislature that placement of this
19 new protection in chapter 368, Hawaii Revised Statutes, will
20 provide for enforcement procedures and remedies under that



1 chapter, as well as rulemaking, by the Hawaii civil rights
2 commission.

3 It is the intent of the legislature that this Act be
4 liberally construed. It is the intent of the legislature that
5 this Act be implemented so as to ensure effective mechanisms for
6 the prevention and remediation of sex discrimination in state-
7 funded educational programs and activities.

8 The legislature recognizes that certain provisions of this
9 Act differ from the original text of Title IX, and the
10 legislature therefore recognizes that this Act's provisions may
11 be interpreted differently in some respects than certain
12 interpretations of Title IX by federal courts and federal
13 administrative agencies. To the extent that different
14 interpretations may arise, the legislature assumes any
15 difference will be in accord with Hawai'i's tradition of
16 providing greater protection to civil rights than that afforded
17 by federal law.

18 The legislature further finds that, based on United States
19 Supreme Court holdings, Title IX does not preempt state laws
20 regulating educational activities unless compliance with state
21 and federal law is a physical impossibility or the state law



1 stands as an obstacle to the accomplishment and execution of the
 2 full purposes and objectives of Congress. In enacting Title IX,
 3 Congress did not express an explicit intent to preempt other
 4 laws on the same subject or create a scheme so comprehensive
 5 that Title IX can be said to occupy the field. The legislature
 6 nonetheless recognizes that navigating inconsistent state and
 7 federal mandates on the same subject matter can present thorny
 8 compliance issues for covered entities. Accordingly, it is the
 9 legislature's intent that, in exercising its rulemaking
 10 authority under this Act, the Hawaii civil rights commission
 11 shall thoughtfully consider ways to reduce inconsistencies
 12 between state and federal compliance mandates, to coordinate its
 13 enforcement activities with the Office of Civil Rights of the
 14 United States Department of Education where appropriate, and to
 15 otherwise facilitate compliance by covered entities under state
 16 and federal regulatory schemes.

17 SECTION 2. Chapter 368, Hawaii Revised Statutes, is
 18 amended by adding a new section to part I to be appropriately
 19 designated and to read as follows:

20 "§368- State educational programs and activities;
 21 discrimination prohibited. (a) No person in the State, on the



1 basis of sex, including gender identity or expression as defined
2 in section 489-2, or sexual orientation as defined in section
3 489-2, shall be excluded from participation in, be denied the
4 benefits of, or be subjected to discrimination under:

- 5 (1) Any state educational program or activity; or
- 6 (2) Any educational program or activity that receives
7 state financial assistance.

8 (b) Subsection (a) notwithstanding, a state educational
9 program or activity may allow sex-specific housing assignments,
10 social club memberships, and athletic team participation,
11 subject to rules adopted pursuant to chapter 91.

12 (c) Section 368-17 notwithstanding, relief for violations
13 of this section shall be limited to equitable remedies,
14 including individual and structural injunctions, and to
15 reasonable attorneys' fees and costs of legal action, which may
16 include expert witness and special master fees.

17 (d) Nothing in this section shall be interpreted as
18 preempting or precluding civil legal actions arising out of
19 similar facts seeking redress for violations of other statutory
20 or common law duties. The civil legal actions may seek awards
21 of compensatory and punitive damages. Upon determining that a



1 civil suit alleging facts similar to the allegations of a
2 complaint filed with the commission by the suit's plaintiff has
3 been filed, the commission may issue a right to sue letter and
4 dismiss the case, or may intervene as a party plaintiff.

5 (e) Section 368-11(c) notwithstanding, a complaint
6 alleging a violation of this section may be filed at any time
7 within two years of the date of the alleged unlawful
8 discrimination. In cases involving continuing courses of
9 conduct constituting a violation, the two-year period commences
10 from the date of the last occurrence of the conduct.

11 (f) As used in this section:

12 "Commission" means the Hawaii civil rights commission.

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

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



1 SECTION 3. Section 368-11, Hawaii Revised Statutes, is
2 amended as follows:

3 1. By amending subsection (a) to read:

4 "(a) The commission shall have jurisdiction over the
5 subject of discriminatory practices made unlawful by part I of
6 chapter 489, chapter 515, part I of chapter 378, and complaints
7 filed under sections 368-1.5 and 368- of this chapter. Any
8 individual claiming to be aggrieved by an alleged unlawful
9 discriminatory practice may file with the commission's executive
10 director a complaint in writing that shall state the name and
11 address of the person or party alleged to have committed the
12 unlawful discriminatory practice complained of, set forth the
13 particulars thereof, and contain other information as may be
14 required by the commission. The attorney general, or the
15 commission upon its own initiative may, in like manner, make and
16 file a complaint."

17 2. By amending subsection (c) to read:

18 "(c) [~~Ne~~] Except as provided in section 368- (e), no
19 complaint shall be filed after the expiration of one hundred
20 eighty days after the date:



- 1 (1) Upon which the alleged unlawful discriminatory
- 2 practice occurred; or
- 3 (2) Of the last occurrence in a pattern of ongoing
- 4 discriminatory practice."

5 SECTION 4. The Hawaii civil rights commission shall submit
6 a report containing:

- 7 (1) The commission's proposed rules to implement this Act;
- 8 (2) Any public outreach activities it has performed or
- 9 plans to perform concerning its duties under this Act;
- 10 and
- 11 (3) Any proposed legislation,

12 to the legislature no later than twenty days prior to the
13 convening of the regular sessions of 2019 and 2020.

14 SECTION 5. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 6. This Act shall take effect on January 1, 2020;
17 provided that:

- 18 (1) Section 4 shall take effect on July 1, 2018; and
- 19 (2) The Hawai'i civil rights commission shall have
- 20 authority on July 1, 2018, to commence and conduct



1 rulemaking activities under chapter 91, Hawaii Revised
2 Statutes, to implement this Act.

3



Report Title:

Education; Civil Rights; Discrimination; Sex; Sexual Orientation; Gender Identity; Gender Expression

Description:

Prohibits discrimination on the basis of sex, including gender identity or expression, or sexual orientation, in any state educational program or activity, or in any educational program or activity that receives state financial assistance. Requires the Hawaii civil rights commission to report to the legislature. Takes effect on 1/1/2020. (SD2)

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

