CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

In the matter of	)	DR No. 14-017
	)	
	)	DECISION AND ORDER
	)	
	)	
	)	
Petitioner.	)	
	)	
	)	
	)	

DECISION AND ORDER

This petition for declaratory relief requires the Commission to decide, as a matter of first impression, certain threshold jurisdictional issues presented by a disability discrimination case brought by the parent of a minor child student against a Hawai'i public charter school, which is authorized, funded, and operating under Hawai'i Revised Statutes Chapter 302D. The specific issues presented are:

(1) Is a public charter school a "place of public accommodation" within the meaning of HRS § 489-2, which prohibits, among other things, discrimination based on disability; and

(2) Is a public charter school a "state agency" or a "program or activity receiving state financial assistance" within the meaning of HRS § 368-1.5, which prohibits disability discrimination by these entities?

For the reasons that follow, the Commission decides that, in relation to its students or applicants,[1] a public charter school is not a "place of public accommodation" within the meaning of § 489-2. Therefore, the Hawai'i Civil Rights Commission (HCRC) does not have jurisdiction over Chapter 489 public accommodation discrimination claims brought by students against primary, secondary, or post-secondary educational institutions.

With respect to the second question, we decide that state educational institutions, including traditional public K-12 schools, public charter schools operating under HRS Chapter 302D, and public post-secondary educational institutions operating within the University of Hawai'i system, are "state agencies" within the meaning of HRS § 368-1.5. Therefore, the HCRC has jurisdiction over HRS § 368-1.5 disability discrimination claims brought by applicants or students against public educational institutions, including the claim that gave rise to this petition for declaratory relief.

Even if we are incorrect in viewing public charter schools as "state agencies" within the meaning of § 368-1.5, the same result obtains. Public charter schools such as Respondent Hawaii Technology Academy (HTA) in this case, receive state financial assistance for their educational programs and activities. As such, they are "programs or activities receiving state financial assistance" within the meaning of § 368-1.5, and are therefore prohibited from excluding, denying the benefit of their services to, or otherwise discriminating against applicants, students, and other persons with disabilities. The HCRC has jurisdiction over applicant and

[1] A public charter school or public school may be a "place of public accommodation" in certain other instances where its facilities are open to the general public, such as when the school is used for public meetings or fairs in which the general public is invited.

student claims alleging violations of HRS § 368-1.5, including the claim that gave rise to this Petition for Declaratory Relief.

I.

Factual and Procedural Background

The parties to this petition for declaratory relief do not dispute the facts relevant to the jurisdictional questions now before the Commission. J. E. is a primary school age child who was born with Down Syndrome. In 2013, J. E.'s mother, Petitioner L. E. (L.E.), sought to have J. E. admitted to HTA, a public charter school operating with state funds under HRS Chapter 302D. During the application process, L.E. sought an accommodation from HTA in the form of extra time for J. E., who was otherwise qualified for admission to HTA, to complete a grade-level placement exam. HTA denied the requested accommodation, and because J. E. did not complete the placement assessment in the time provided, HTA denied his application for admission.

L.E. subsequently attempted to file a complaint of discrimination on J. E.'s behalf with the HCRC Enforcement Section. The complaint stated two claims. The first claim alleged disability discrimination under HRS § 489-3, which prohibits discrimination based on race, sex, color, religion, ancestry, or disability by "places of public accommodation." L.E.'s second claim alleged a violation of HRS § 368-1.5, which prohibits disability discrimination by "state agencies" or "under any program or activity receiving state financial assistance."

The HCRC Enforcement Section refused to accept E.'s complaints of discrimination on the grounds that the HCRC does not have jurisdiction over student or applicant claims against educational institutions under either Chapter 489 or Chapter 368. Pursuant to HAR §§ 12-46-61 and 12-46-62, on April 24, 2014, L.E. filed a petition for declaratory relief, asking this Commission to rule that the HCRC does have jurisdiction under HRS Chapters 489 and 368 over

student or applicant complaints of discrimination against Hawai‘i State Department of Education (DOE) charter schools. The petition and an accompanying memorandum of authorities satisfied the formal requirements of HAR §§ 12-46-61 and 12-46-62.

On June 9, 2014, the HCRC Executive Director, the DOE, and the HTA were sent copies of the petition and notified of the opportunity to respond to the petition and the date on which the Petition would be argued. On June 13, 2014, the HCRC Executive Director notified the Commission of other parties to a pending investigation who might be affected by the Commission's decision on the petition. On June 18, 2014, these additional parties were sent copies of the petition and notified of the opportunity to respond to the petition and the date on which the Petition would be argued.

On June 25, 2014, the Executive Director, DOE, and HTA filed memoranda in opposition to the petition for declaratory relief. The Hawai‘i State Board of Education joined in the memorandum submitted by DOE and HTA. Pursuant to H.A.R. § 12-46-69, oral argument on the petition was heard on August 18, 2014.

II.

The HCRC Does Not Have Jurisdiction Over L.E.'s Claim Under HRS § 489-3, Because An Elementary, Secondary, and Post-Secondary Educational Institution Is Not A "Place of Public Accommodation" In Relation To Its Students Within the Meaning of HRS Chapter 489

Hawai‘i Revised Statutes § 489-3 makes it unlawful for "places of public accommodation" to discriminate on the basis of race, sex, color, religion, ancestry, or disability. Under HRS § 489-6, the HCRC has jurisdiction over complaints alleging violations of HRS § 489-3. The first question presented by L.E. turns on whether a publicly funded charter school is a "place of public accommodation" in relation to its applicants or students within the meaning

HRS § 489-2, which defines "place of public accommodation." If a publicly funded charter school is a "place of public accommodation" within the meaning of the statute in this context, the HCRC has § 489-6 jurisdiction over the L.E. claim. If a publicly funded charter school is not a "place of public accommodation" in this context, the HCRC does not have jurisdiction under § 489-6. In choosing between these two outcomes, our task is one of statutory construction, not policy choice.

To construe § 489-2 in accordance with accepted Hawai'i principles of statutory interpretation, we start by considering the language of the statute itself. *Richardson v. City & County of Honolulu*, 76 Hawai'i 46, 63, 868 P.2d 1193, 1210 (1994), *reconsideration denied*, 76 Hawai'i 247, 871 P.2d 795 (1994). If the language of the statute is plain and unambiguous, our only duty is only to give effect to its plain and obvious meaning. *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai'i 408, 424, 32 P. 2d 52, 68 (2001).

Our first task then, is to carefully read § 489-2. In doing so, we are directed by HRS § 1-14 to give its words their most common, general, or ordinary meaning, *Nat'l Union Fire Ins. Co. v. Ferreira*, 71 Haw. 341, 345, 790 P.2d 910, 913 (1990); *State v. Moniz*, 69 Haw. 370, 374, 742 P.2d 373, 376 (1987), as this is the best indicator of the intent of the legislature that employed those words in crafting that statute. *Singleton v. Liquor Comm'n, County of Hawai'i*, 111 Hawai'i 234, 243-44, 140 P.3d 1014, 1023-24 (2006); *In re Taxes, Hawaiian Pineapple Co.*, 45 Haw. 167, 177, 363 P.2d 990, 996 (1961) (stating that when "construing or interpreting any statute, the one and only quest is to ascertain the intent of the legislature" and that "[t]o that end the words of a statute normally are to be taken in their popular sense . . .").

HRS § 489-2 is divided into two parts. The first part sets out a general definition of "place of public accommodation." The second part provides a non-exhaustive list of examples of

enterprises that would be considered "places of public accommodation" within the meaning of the statute. We examine these two parts, both individually and as a whole, to determine whether educational institutions are "public accommodations" under Chapter 489.

The first part of § 489-2 provides that:

> "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors.

Certain matters relevant to the interpretive task stand out, narrowing our inquiry. First, it would be unreasonable to characterize an educational institution as a "refreshment," "entertainment," "recreation," or "transportation facility." Moreover, although some educational institutions are now for-profit corporations, they still are not commonly thought of as "businesses" in the ordinary sense. The last remaining descriptor, "accommodation" yields a circular definition: "place of public accommodation" is partially defined as an "accommodation." This provides little guidance.

The definition also refers to the things that public accommodations provide. These include "goods, services, facilities, privileges, advantages, or accommodations." As before, the reference to "accommodations" makes for a circular definition. Schools are not generally thought of as providing "goods." But they do provide "facilities," and their students obtain certain "privileges" while they are students and certain "advantages" when they complete their course of education. But the most logical product schools might provide are "services," "educational services" to be specific, and "services" is not defined. So, the statutory meaning is still unclear.

Third, the definition refers to goods, services, facilities, privileges, advantages, or accommodations as being provided to "customers, clients, or visitors." The term "students" is notably absent from this list. In common parlance, schools don't have "customers, clients, or visitors." They have **students**, and the fact that this word is missing from § 489-2 suggests that the Legislature did not intend to include schools as "places of public accommodation" for its students when it enacted Chapter 489.

In sum, the plain language in the first part of § 489-2 leaves some ambiguity in the meaning of "place of public accommodation," but it leads toward the conclusion that the Legislature did not, by its choice of words in the statute, express an intent to include educational institutions as "places of public accommodations" in relation to their applicants or students

The second part of HRS § 489-2 reinforces that conclusion. This part comprises a list, which while not exhaustive, illustrates the types of enterprises that come within the § 489-2's definition of a "place of public accommodation." That portion of § 489-2 provides:

> By way of example, but not of limitation, place of public accommodation includes facilities of the following types:
>
> (1) A facility providing services relating to travel or transportation;
> (2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;
> (3) A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment;
> (4) A shopping center or any establishment that sells goods or services at retail;
> (5) An establishment licensed under chapter 281 doing business under a class 4, 5, 7, 8, 9, 10, 11, or 12 license, as defined in section 281-31;
> (6) A motion picture theater, other theater, auditorium, convention center, lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
> (7) A barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing or massage salon, or other establishment conducted to serve the health, appearance, or physical condition of persons;
> (8) A park, a campsite, or trailer facility, or other recreation facility;

> (9) A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm;
> (10) A professional office of a health care provider, as defined in section 323D-2, or other similar service establishment;
> (11) A mortuary or undertaking establishment; and
> (12) An establishment that is physically located within the premises of an establishment otherwise covered by this definition, or within the premises of which is physically located a covered establishment, and which holds itself out as serving patrons of the covered establishment.

Notably, none of these examples describe educational institutions, whether primary, secondary, post-secondary, public, or private. They all represent retail providers of goods, non-education related services, restaurants, lodging facilities, establishments holding liquor licenses, health care or self-beautification facilities, theaters, or comfort stations. Educational institutions are of a fundamentally different "kind" than the kinds of establishments listed in these examples. For this reason, the doctrines of *noscitur a sociis* (the thing is known by its associates) and *ejusdem generis* (of the same kind, class, or nature) are highly persuasive in leading us to interpret HRS § 489-2 as ***not*** including educational institutions in its definition of "place of public accommodation."

As the Hawai‘i Supreme Court has stated in relation to the application of *noscitur a sociis* and *ejusdem generis*, the meanings of indeterminate words used in a statute can be discerned by examining the context in which the words appear and by studying other proximate words, phrases, and sentences with which they may be compared. "There is a rule of construction embodying the words *noscitur a sociis* which may be freely translated as 'words of a feather flock together,' that is, the meaning of a word is to be judged by the company it keeps." *State v. Deleon*, 72 Haw. 241, 244, 813 P.2d 1382, 1384 (1991).

The Legislature provided in the second part of § 489-2 a lengthy list of different types of establishments, none of which resembles an educational institution. Under these circumstances,

it would be hard to argue successfully that the Legislature nonetheless intended that K-12 schools, colleges, or universities should be considered "public accommodations" within the meaning of the statute.

Furthermore, the legislative history of HRS Chapter 489 shows that it was modeled after Title II of the Civil Rights Act of 1964. See SCRep. 233-86, 1986 House Journal at 1086-1087; see also *State v. Hoshijo ex rel. White*, 102 Hawai'i 307, 317, 76 P.3d 550, 561 (2003). The definition of a "place of public accommodation" contained in Title II, includes the following types of establishments:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence. (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment and (B) which holds itself out as serving patrons of any such covered establishment.

42 U.S.C. § 2000a(b)(1).

Educational institutions are not included in Title II, just as they are not included in HRS § 489-2. This is no coincidence; it is grounded in civil rights history.

The types of discrimination that led Congress to enact Title II included things like the lunch counter sit-ins by African Americans at stores like H. S. Kress and Woolworths and refusals to rent hotel or motel rooms to racial minorities so widespread across the south that a Black, Latino, or Asian family could travel hundreds of miles without finding a single lodging that would let them stay for the night. Across much of the country, Blacks and other "coloreds" were regularly consigned to separate bathrooms, drinking fountains, bus and train station waiting

rooms, hospitals, and medical clinics, even cemeteries. Title II of the Civil Rights Act made these types of discrimination unlawful, but it did not cover educational institutions. These were covered by Titles VI (race and national origin discrimination) and Title IX (sex discrimination).

Public accommodation statutes in other states were modeled on Title II as well. To our knowledge, no state with a public accommodation statute analogous to Hawaii's – that is, one that does not specifically state that educational institutions are "public accommodations" – has interpreted its public accommodation statute to cover educational institutions.[2]

We therefore conclude that in enacting HRS Chapter 489, and in particular, in enacting § 489-2, the Hawai'i State Legislature did not intend to include educational institutions as "places of public accommodation" within the meaning of § 489-2. Consequently, educational institutions are not covered entities under HRS Chapter 489, and the HCRC lacks jurisdiction

[2] It should be noted that Title III of the federal Americans with Disabilities Act, which was enacted in 1990, ***does*** include educational institutions in its definition of "public accommodations." Specifically, 42 U.S.C. § 12181 provides, in pertinent part:

> "The following private entities are considered public accommodations for purposes of this subsection, if the operation of such entities affect commerce . . .
> . . .
> **(J)** a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education . . .

This may be good public policy. Perhaps, in these days when education is more and more considered a product, and students increasingly expect to be treated as "customers," schools ***should*** be considered public accommodations, particularly if they are operated by private for-profit enterprises. But that policy preference is unsupported by any sound statutory interpretation argument. Congress passed the ADA in 1990, four years after the Hawai'i Legislature enacted Chapter 489, in 1986. Consequently, the ADA's definition of public accommodation, which includes educational institutions, has no bearing on what the Legislature thought about the meaning of "public accommodation" in 1986. So, the ADA's inclusion of schools as public accommodations in Title II cannot soundly alter our analysis.

over Chapter 489 student and applicant discrimination complaints against educational institutions.

III.

The HCRC Does Have Jurisdiction Over L.E.'s Claim Under HRS § 368-1.5, Because State and State-funded Educational Institutions Are Covered Entities Under HRS § 368-1.5.

HRS § 368-1.5 provides in pertinent part:

> (a) No otherwise qualified individual in the State shall, solely be reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by **state agencies**, or under **any program or activity receiving state financial assistance.** (Emphasis added.)

L.E. contends that the HCRC has jurisdiction over her complaint against the DOE and HTA because they allegedly violated HRS § 368-1.5 by discriminating against her minor son because of his disability. She contends that a public charter school such as HTA is either a "state agency" or a "program or activity receiving state financial assistance" within the meaning of HRS § 368-1.5.

Respondents Executive Director, DOE, Board of Education, and HTA contend that public charter schools are neither "state agencies" nor "programs or activities receiving state financial assistance" within the meaning of HRS § 368-1.5, and that the HCRC therefore lacks jurisdiction over L.E.'s claim. Respondents' arguments turn on their contention that, even though the plain language of Chapter 368 appears to do so, the Legislature did not intend to give the HCRC jurisdiction over educational institutions when it enacted § 368-1.5. In essence, they argue that there exists an "extra-texual" or "implied" exception for educational institutions under § 368-1.5.

For the reasons that follow, we find the Respondents' arguments unpersuasive. We decide that:

1) Public charter schools operating under HRS Chapter 302D, like other public educational institutions, are "state agencies" within the meaning of § 368-1.5 and are prohibited by that statute from discriminating on the basis of disability;

2) Even if public charter schools are not "state agencies" within the meaning of § 368-1.5, public charter schools are "programs and activities receiving state financial assistance" within the meaning of HRS § 368-1.5 and are prohibited by that statute from discriminating on the basis of disability; and

(3) HRS Chapter 368 invests the HCRC with the power and the duty to enforce § 368-1.5, which covers, *inter alia*, state and state-funded educational institutions; § 368-1.5 contains no exception for educational institutions.

We base our decision on well-established principles of statutory interpretation embodied in HRS Chapter 1 and in Hawai'i Supreme Court decisions. We do so despite being gravely concerned that the Legislature has not funded the HCRC at a level that will enable it to adequately enforce § 368-1.5, along with the other statutes within its jurisdiction. We are aware that our decision today will place tremendous strains on an already over-stretched HCRC Enforcement staff, and that it will require the Commission to promptly promulgate complex new administrative regulations to guide compliance and enforcement activities for state and state-funded educational institutions. However, it is not our prerogative to write into a statute an exception that cannot be found in its language, purpose, or legislative history. HRS § 368-1.5 contains no exception for public educational institutions, including primary, secondary, post-secondary, trade, professional schools, or private entities receiving state financial assistance.

A. A public charter school is a public school and is, as such, a "state agency" within the meaning of HRS § 368-1.5.

The non-discrimination duty contained in HRS § 368-1.5 applies to "state agencies" and "any program or activity receiving state financial assistance." To be covered by § 368-1.5, an entity need only be one or the other, not both. We first consider whether a public charter school is a "state agency" within the meaning of HRS 368-1.5. We decide that it is.

Under HRS Chapter 302D, which establishes Hawai'i charter schools, a public charter school, such as HTA, is considered a "public school." HRS § 302D-1 states in pertinent part that "a '[c]harter school' or 'public charter school' refers to those ***public schools*** and their respective governing boards, as defined in this section, that are holding current charter contracts to operate as charter schools under this chapter" (emphasis added). Thus, under the plain language of HRS § 302D-1, a public charter school is a public school. This is reinforced by HRS § 302A-101, which defines "public schools" as including "all academic and noncollege type schools established and maintained by the department of education and charter schools governed by chapter 302D." A public charter school therefore is a public school.

Public schools operating under the Hawai'i State Board of Education, the Hawai'i State Charter Schools Commission, or the University of Hawai'i are "state agencies" within the ordinary legal meaning of that term. Granted, the term "state agency" is not specifically defined in Chapter 368. However, when a term is not statutorily defined, an interpreter may consult "legal or other well accepted dictionaries as one way to determine its ordinary meaning." *Seki ex rel. Louie v. Hawaii Gov't Employees Ass'n, AFSCME Local No. 152, AFL-CIO*, 133 Hawai'i 385, 401, 328 P.3d 394, 410 (2014); *State v. Jing*

Hua Xiao, 123 Hawai‘i 251, 259, 231 P.3d 968, 976 (2010). *Black's Law Dictionary* defines a "state agency" as a "governmental body with the authority to implement and administer particular legislation." *Black's Law Dictionary* (9th ed. 2009). All public educational institutions in Hawai‘i come within this definition because they are government bodies and have the authority to implement and administer constitutional and legislative enactments.

Article X § 1 of the Hawai‘i State Constitution provides, in relevant part:

> The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor.

Article X § 2 creates the Hawai‘i State Board of Education, which, under Article X, § 3 has the power to appoint the Superintendent of Education, who is the chief executive officer of the DOE. The various powers and duties of the DOE and the State Board of Education are established throughout the provisions of HRS Chapter 302A and these are, in large measure, implemented by employees of department schools.

Public primary and secondary charter schools operate under the Hawai‘i State Charter Schools Commission, a state agency created and empowered by HRS § 302D-3. The State Charter Schools Commission in turn operates under that Hawai‘i Board of Education, as provided in HRS § 302A-101. Employees and other agents of public charter schools exercise the powers conferred on them by HRS Chapter 302D.

The University of Hawai'i is established in Article X § 5 of the Hawai‘i Constitution, which provides:

> The University of Hawaii is hereby established as the state university and constituted a body corporate. It shall have title to all the real and personal property now or hereafter set aside or conveyed to it, which

> shall be held in public trust for its purposes, to be administered and disposed of as provided by law.

HRS §304A-101 further provides that, "[t]here shall be a University of Hawaii that shall consist of such colleges and departments as may from time to time be established," and HRS § 304A-103 provides, "[t]he University of Hawaii is established as the state university and is constituted as a body corporate." The duties and powers of the University of Hawai'i are established by the Legislature throughout the provisions of HRS Chapter 304A and are exercised by University of Hawai'i employees and other agents.

In sum, a public school -- be it a charter school operating under HRS Chapter 302D, a "department school"[3] operating under HRS Chapter 302A, or a unit of University of Hawai'i System operating under HRS Chapter 304A -- is a "state agency" within the meaning of HRS § 368-1.5. Thus, absent some special exemption not found in the text of the statute, HTA is a "state agency" within the meaning of HRS § 368-1.5.

B. Even if it is not a "state agency," a public charter school funded under Chapter 302D is a "program or activity receiving state financial assistance" within the meaning of HRS § 368-1.5.

In addition to prohibiting disability discrimination by "state agencies," HRS § 368-1.5 prohibits discrimination by "any program or activity receiving state financial assistance." Alternatively, if a public charter school is not a "state agency," it is covered by § 368-1.5 as a "program or activity receiving state financial assistance."

[3] The term "department school" is defined in HRS 302D-1 as "any school that falls within the definition of "public schools" as defined in section 302A-101 and that is not a charter school."

1. Public charter schools are "programs and activities" within the meaning of HRS § 368-1.5.

Because neither the term "program" nor the term "activity" is specifically defined in Chapter 368, we interpret that portion of the statute by giving its words their most common, general or popular meaning. *Singleton* at 243-44, 140 P.3d at 1023-24. The *Online Oxford English Dictionary* (3rd ed., Updated and Current through September 2014) provides, as its fourth definition of the word "program," "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done. Also: a planned series of activities or events; an itinerary." An educational program, such as that conducted at HTA, comprises a planned series of activities and events. It is a "program" within the common understanding of that word.

Similarly, the *Online Oxford English Dictionary* defines "activity," *inter alia*, as "a project, task, or exercise, esp. one set for educational purposes." Public charter schools conduct educational "activities" within the common meaning of that term.

When educational institutions -- private or public, primary, secondary, or post-secondary -- plan, budget for, obtain use of supplies and facilities necessary to conduct, hire teachers and other staff, develop and deliver curricula for, teach students, take them on field trips, assess their learning, promote them from grade to grade, and graduate them, they are conducting educational programs and activities within the ordinary meaning of those terms. Therefore, the HTA is a program or activity within the meaning of HRS § 368-1.5.

2. Public charter schools receive "state financial assistance" within the meaning of HRS § 368-1.5.

HRS § 368-1.5(c) defines "state financial assistance" as follows:

> (c) As used in this section, "state financial assistance" means grants, purchase-of-service contracts, or any other arrangement by which the State provides or

> otherwise makes available assistance in the form of funds to an entity for the purpose of rendering services on behalf of the State. It does not include procurement contracts, state insurance or guaranty contracts, licenses, tax credits, or loan guarantees to private businesses of general concern that do not render services on behalf of the State.

Under HRS Chapter 302D, a public charter school enters into a contract with the state to provide educational services on the state's behalf, assisting the state in satisfying its obligations under Article X, § 1 of the Hawai'i Constitution. Indeed, a "charter," also known as a "charter contract" is defined in Chapter 302D-1 as "fixed-term, bilateral, renewable contract between a public charter school and an authorizer that outlines the roles, powers, responsibilities, and performance expectations for each party to the contract."

Under HRS § 302D-28(c)(4), each year, the Hawai'i Director of Finance transfers a standard per-pupil allotment from the DOE schools account to the account of each chartered school in an amount that equalizes the state's financial contribution to the education of each student, be they enrolled in a charter school or a department school. The transfers of DOE funds to a charter school qualifies as a "transfer of funds to an entity for the purpose of rendering services on behalf of the state" within the meaning of HRS § 368-1.5(c). Consequently, public charter schools receive "state financial assistance" within the meaning of HRS § 368-1.5(c).

C. The HCRC Has Jurisdiction Over L.E.'s HRS § 368-1.5 Claim Because Educational Institutions Are Not Exempt From Coverage Under that Statute.

Respondents maintain that, the plain language of § 368-1.5 notwithstanding, the Legislature did not intend that educational institutions would be covered entities under the statute or that the Hawai'i Civil Rights Commission would have jurisdiction over such claims, even if they were legally cognizable. We reject these arguments for two broad sets of reasons. First, we find that the Legislature's intent not to exempt educational institutions from potential liability

under § 368-1.5 is clear from the plain language of the statute and the context in which it appears. Consequently, there is no need to consider extraneous materials, such as legislative history, to discern the statute's meaning.

However, even if we do consider legislative history materials, those materials do not support the Respondents' position. Rather, the legislative history surrounding the original enactment of and subsequent amendments to Chapter 368 reveal that the Legislature meant exactly what it said in the text of § 368-1.5 – all state agencies and all programs and activities receiving state financial assistance, including educational institutions – are covered by § 368-1.5, and disability discrimination complaints against them fall within the HCRC's jurisdiction.

1. Principles of statutory interpretation

Our starting point for determining whether educational institutions are exempt from coverage under HRS § 368-1.5 is the language of the statute itself, read in the context in which it appears and in light of the legislature's purposes in enacting it. *Grey, supra; Seki ex rel. Louie* at 400, 328 P.3d at 409; *State v. Wheeler*, 121 Hawai'i 383, 390, 219 P.2d 1170, 1177 (2009). If the language of the statute is plain and unambiguous, the interpretive task is complete and our duty is only to "give effect to the law according to its plain and obvious meaning." *Schefke* at 424, 32 P.3d at 68; *Matter of Hawaiian Tel. Co.*, 61 Haw. 572, 577-78, 608 P.2d 383, 387 (1980). In conducting this initial investigation, "we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." *Casumpang v. ILWU Local 142*, 108 Hawai'i 411, 421, 121 P.3d 391, 401 (2005); *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Hawai'i 217, 229-30, 953 P.2d 1315, 1327-28 (1998), and with

any other statues with which § 368-1.5 is *in pari materia.* HRS § 1-16; *Educators Ventures, Inc. v. Bundy*, 3 Haw. App. 435, 441, 652 P.2d 637, 640-41 (1982).

If a statute's language is ambiguous, the meaning of the ambiguous words may be sought by examining the context in which they appear and extrinsic aids, such as legislative history, to ascertain legislative intent. *Wheeler* at 390, 219 P.3d at 1177; *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of the City & County of Honolulu,* 114 Hawai'i 184, 193–94, 159 P.3d 143, 152–53 (2007) (citations omitted).

2. The plain language of § 368-1.5, read in the context of Chapter 368 as a whole, supports the conclusion that state funded schools are covered entities under the statute.

As quoted earlier, subsection (a) of § 368-1.5 states:

> No otherwise qualified individual in the State shall, solely be reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by **state agencies**, or under **any program or activity receiving state financial assistance.** (Emphasis added.)

The plain language of § 368-1.5 provides that **any** program or activity receiving state financial assistance is covered by the statute. The Legislature did not say "any state agency or any program or activity receiving state financial assistance, other than a school," or words to that effect. No exception appears in the statute.

Numerous courts, both state and federal, have observed that a court or administrative agency may not, under the guise of interpretation, insert exceptions into a statute merely because there appears good reason for adding them. If exceptions are to be written into a statute, they must come from the legislature, not the courts, and most certainly not from the Commission itself, no matter how wise the exception might seem in light of the agencies' limited resources and the enormity of the obligations potentially

imposed. See *United States v. S.E. Underwriters Ass'n.*, 322 U.S. 533, 561, 64 S.Ct. 1162, 1178, 88 L.Ed. 1440 (1944)(stating that exceptions must be added by the legislature, not the courts); *Spear v. Board of Educ. of North Shore School Dist. No. 112*, 291 Ill. App. 3d 117, 683 N.E. 2d 218 (2d Dist. 1997) (stating that courts may not, under the guise of statutory construction, add exceptions, limitations, or conditions, or otherwise change a statute in ways that depart from its plain meaning); *State ex. rel. Kennedy v. Frauwirth*, 167 Conn. 165, 355 A.2d 399 (1974) (same).

Hawai‘i precedents accord with these cases. As the Hawai‘i Supreme Court has stated, "A cardinal canon of statutory construction is that this court cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts." *State v. Walker*, 106 Hawai‘i 1, 8, 100 P.3d 595, 602 (2004) (citations omitted).

The absence of any exception for educational institutions in § 368-1.5 is, as a matter of statutory interpretation, much more significant that the absence of any such exception in HRS § 489-2 regarding the definition of public accommodations. Unlike HRS § 489-2, which contains a long list illustrating the types of entities that constitute "places of public accommodation" within the meaning of that section, § 368-1.5 contains no list of examples of entities that constitute "state agencies" or "programs and activities receiving state financial assistance." Because the statute contains no such list, we cannot properly use the interpretive principles of *noscitur a sociis* or *ejusdem generis* to infer a legislative intent to exclude educational institutions from coverage under § 368-1.5. Were we to do so, we would simply be writing into the statute an exception that the Legislature did not enact.

3. Exempting educational institutions from § 368-1.5 coverage would undermine Chapter 368's stated purpose and result in the creation of an absurdity, to wit, a "remedy without a right."

To interpret HRS § 368-1.5, we must consider not only its language, but also the language of other sections of Chapter 368 with which §368-1.5 is *in pari materia* (on the same subject). We must also consider how all sections of the Chapter work together to fulfill the Legislature's stated purposes.

Hawai'i Revised Statutes § 368-1 sets out the broad purpose underlying HRS Chapter 368:

> The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or **access to services receiving state financial assistance** is against public policy. It is the purpose of this chapter to provide a mechanism that provides for a **uniform procedure** for the enforcement of the State's discrimination laws. It is the legislature's intent to preserve all existing rights and remedies under such laws. (Emphasis added.)

Section 368-1 states that, by establishing and empowering the HCRC, the Legislature intended to provide a uniform mechanism for enforcing the state's antidiscrimination laws. Through the seventeen sections Chapter 368 comprises, the Legislature authorized the filing of discrimination complaints, delineated the HCRC's jurisdiction, and conferred upon it subpoena power. It empowered the HCRC to investigate and attempt to conciliate complaints of discrimination, to determine whether there is reasonable cause to believe that discrimination occurred, to take cases with cause findings to administrative hearing, and to award remedies for established discrimination. The Legislature also established private rights of action for redress of discrimination, procedural pre-requisites to suit, administrative and judicial remedies for civil rights violations, and standards of review on appeal HRS § 368-3 vests the HCRC with its

various powers and functions. Section 386-3(1) accords the HCRC the power: (1) **[t]o receive, investigate, and conciliate** complaints alleging any unlawful discriminatory practice under part I of chapter 489, chapter 515, and part I of chapter 378, and **complaints filed under this chapter**, and conduct proceedings on complaints alleging unlawful practices where conciliatory efforts are inappropriate or unsuccessful . . . (emphasis added). "[C]omplaints filed under this chapter" refers to complaints filed under Chapter 368. Thus, by Chapter 368's explicit terms, a unified set of procedures, rights of action, powers, and remedies apply to discrimination claims arising under HRS Chapter 368 (disability discrimination by state agencies and programs or activities receiving state financial assistance), part I of Chapter 378 (discrimination in employment), part I of Chapter 489 (public accommodations discrimination), and Chapter 515 (discrimination in real estate transactions).

The interpretation proffered by the Respondents, under which the HCRC would be denied jurisdiction over disability discrimination complaints against public and state-funded educational institutions, would utterly defeat the statutory purpose of providing a uniform mechanism the enforcement of the state's antidiscrimination laws. A huge swath of § 368-1.5 claims – all disability discrimination claims against educational institutions – would lie outside the uniform system of redress established by the Legislature.

It is important to note that, in HRS § 368-1, the Legislature grouped discrimination in access to state-funded services the form of discrimination at issue here -- together with discrimination in employment, housing, and public accommodations as violating public policy. The plain language of § 368-1 shows that the Legislature equated all four of these types of discrimination in terms of their importance and of the desirability of grouping them under a uniform set of enforcement procedures.

But if the Respondent's position is accepted, not only will the HCRC be stripped of jurisdiction over a large swath of civil rights complaints, according to the DOE's proffered interpretation, disabled individuals would have no private right of action at all to remedy violations of § 368-1.5 committed by state-supported educational institutions. Such a system would hardly advance the Legislature's equation of discrimination in access to state-financed services with discrimination in housing, employment, and access to public accommodations. Interpreting § 368-1.5 as Respondents would have us do would do violence to the remedial purposes of Chapter 368 as expressed by the Legislature in HRS § 368-1.

Moreover, adopting the interpretation Respondents propose would result in the creation of a legal absurdity: a remedy without a corresponding right. Specifically, HRS § 368-17 identifies the remedies the Commission or a court can order under the authority granted them in Chapter 368. Section 368-17(a)(3) provides:

> (a) The remedies ordered by the commission or the court under this chapter may include compensatory and punitive damages and legal and equitable relief, including, but not limited to:
> * * *
> **(3) Admission of persons to a public accommodation or an educational institution. . .** (emphasis added).

If admission of a person to an educational institution is a remedy available under Chapter 368, then discrimination by an educational institution resulting in a denial of admission must somehow be actionable. It would be absurd for the Legislature to provide a remedy without a corresponding right, and HRS § 1-15 specifically provides that "every construction that leads to an absurdity shall be rejected."

Moreover, we are not permitted to interpret a in a way that would render that part of the statute inoperative. As the Hawai‘i Supreme Court stated in *Richardson v. City & County of Honolulu*, 76 Hawai‘i at 54-55, 868 P.2d at 1201-02, "legislative enactments

are presumptively valid and should be interpreted in such a manner as to give them effect" (citing *State v. Spencer*, 68 Haw. 622, 624, 725 P.2d 799, 800 (1986)). The Executive Director's contention that §368-17(a)(3) is a "remedy without a right" is unsupportable under any sound approach to statutory interpretation.

Were we to exclude public schools from coverage under § 368-1.5, the results would do great damage to the Legislative purposes expressed in § 368-1. Not only would families whose disabled children were excluded from or otherwise discriminated against by public schools be unable to file complaints of discrimination with the HCRC, those families would also have no right of access to the state courts. The only place that provides a state-law, private right of action for violation of § 368-1.5 is found in HRS § 368-12. That statute provides in pertinent part:

> The commission may issue a notice of right to sue upon written request of the complainant. Within ninety days after receipt of a notice of right to sue, the complainant may bring a civil action under this chapter. The commission may intervene in a civil action brought pursuant to this chapter if the case is of general importance.

If the HCRC does not have jurisdiction over §368-1.5 cases against state-funded schools, it cannot accept a person's complaint alleging that her disabled was unlawfully excluded from admission by a charter school because of the child's disability. If the HCRC cannot accept the complaint, it cannot issue a right to sue letter to the child's person. If the person cannot get a right to sue letter, she cannot file suit in state court – or in any court – to obtain the very remedies provided in HRS § 368-17 for the discriminatory exclusion.

In conclusion, the plain language of HRS § 368-1.5, considered alone, considered in in conjunction with the rest of Chapter 368, and considered in light of the purposes of

Chapter 368 articulated by the Legislature in § 368-1, shows that HRS § 368-1.5 does not exempt public schools or educational programs or activities receiving state financial assistance from the duty not to discriminate against students on the basis of disability, and does not deprive the HCRC of jurisdiction over such claims.

D. The Relevant Legislative History Supports the Conclusion that, Under Chapter 368, the HCRC has Jurisdiction Over Claims of Disability Discrimination by State and State-Funded Educational Programs and Activities.

Out of respect for the Respondents, we also examine that legislative history and consider Respondents' arguments that the Legislature did not intend for § 368-1.5 to cover educational institutions. Our examination of the legislative history, however, reinforces the plain language of the statute and leads us to conclude that the statute contains no exception for educational institutions that are "state agencies" or that are "programs or activities receiving state financial assistance" within the meaning of HRS § 368-1.5.

1. The modeling of Act 387 on § 504 of the federal Rehabilitation Act of 1973 supports the conclusion that the Legislature intended to include educational institutions as "state agencies or "programs or activities receiving state financial assistance" under HRS § 368.1-5.

The Executive Director acknowledges that the Legislature modeled Act 387 L. 1989 (which became HRS § 368-1.5), on § 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 791), which prohibits disability discrimination in programs or activities that receive federal financial assistance.[4] However, the Executive Director argues that,

[4] Sections 501 and 505 of the Rehabilitation Act of 1973, as amended (29 USCA § 791 and 795) prohibit disability discrimination by agencies of the federal government.

because § 504 contains a definition of "program or activity" that explicitly **includes** educational institutions, while Act 387 did not define "program or activity" at all, it follows that the Legislature intended to **exclude** educational institutions from coverage under Act 387. In support of this argument, the Executive Director draws on the statutory interpretation principle of *expressio unius est exclusio alterius* -- the expression of one thing implies the exclusion of others.

The Executive Director's argument is logically flawed. For the principle of *expressio unius est exclusio alterius* to apply, something would have to be expressed: the Legislature would have had to define "program or activity" in some way that implied the exclusion of others. But Act 387 did not include *any* definition of "program or activity." With nothing expressed, there is nothing to exclude.

In this situation, another principle of statutory interpretation provides a better fit. Under the "borrowed statute rule," when a legislature borrows language from another jurisdiction's statute on the same subject matter, the interpreter should assume, absent clear indication to the contrary, that the borrowing legislature meant to adopt the meaning of the statutory language being borrowed, as it had theretofore been interpreted. *Shannon v. United States*, 512 U.S. 573, 581 (1994); *Territory v. Ota*, 36 Haw. 80 (1942); *Carter v. Gear*, 16 Haw. 242 (1904), *aff'd*, 197 U.S. 348 (1905); *In re Sawyer*, 41 Haw. 270, 273 (1956); 2B Sutherland Statutory Construction § 52:2 (7th ed.). While a legislature may indicate that, by borrowing language from another jurisdiction's statute, it does **not** intend to incorporate its prior interpretation, there is nothing in the legislative history of Act 387 that suggests that the Legislature did not intend to replicate § 504's definition of

"program or activity." Therefore, we should assume that, in using the phrase "program or activity," which was taken verbatim from § 504, the Legislature intended that the § 504's definition of "program or activity," would be incorporated into Hawai'i law.

The Executive Director's argument is further undermined by the fact that the original version of § 504 -- like HRS § 368-1.5 -- included no definition of "program or activity." The part of § 504 that explicitly mentions educational institutions was not added until 1988. Congress added a comprehensive definition of "program or activity" to both § 504 and Title IX in 1988 to counteract certain limiting Supreme Court decisions on a different definitional issue. *See, Consolidated Rail Corp. v. Darrone*, 104 S.Ct. 1248 (1983) (limiting § 504 coverage to the precise program receiving the federal funding rather than extending it to the entire entity under which the program operated); and *Grove City College v. Bell*, 104 S. Ct. 1211 (1984) (limiting Title IX coverage in the same manner). Long before the 1988 amendment to § 504, the statute had been consistently interpreted to cover educational institutions. See, e.g., *Southeastern Community College v. Davis*, 422 U.S. 397 (1979) (concerning discrimination against a deaf applicant in admission to community college nursing program).

In 1989, legislators considering H.B. 932, which became Act 387, would have known that § 504 of the Rehabilitation Act of 1973 covered public and private schools, colleges, and universities that received federal financial assistance. They would have also known that to model a Hawai'i statute on § 504 meant including educational institutions, unless those institutions were explicitly excluded, because in 1989 the common meaning of "program or activity" for § 504 purposes unquestionably included educational institutions. As of 1989, many of the best-known § 504 cases involved

discrimination in publicly funded educational programs. Perhaps the best known was the 1979 case of *Southeastern Community College v. Davis, Id*. This case and *Kohl by Kohl v. Woodhaven Learning Center*, 672 F.Supp 1226 (W.D.Mo. 1987, *rev'd on other grounds*, 865 F.2d 930 (8th Cir. 1989) were specifically discussed in testimony provided by the American Civil Liberties Union of Hawai'i to the Senate Judiciary Committee on H.B. 932 House Draft 2.

In addition, as reflected in the Executive Director's Memorandum (Appendix F-10 to F-12 and F-17 to F-18), the Governor's Committee On AIDS submitted testimony to the House Judiciary and House Health and Human Services Committees on HB 932 that discussed discrimination complaints by people with HIV/AIDS in the areas of employment, housing, **education**, access to services, and public accommodations. The Governor's Committee also identified the Governor's Office, the Department of Human Services, the Department of Labor and Industrial Relations, the Department of Health, and the **Department of Education** as "lead agencies" on the legislation that became HRS § 368-1.5.

The House Judiciary Committee took this testimony into account in passing HB 932. In its Report, the Committee wrote, in pertinent part:

> **Your Committee received favorable testimony from the Governor's Committee on AIDS,** the State Planning Council on Developmental Disabilities, the Hawaii Center for Independent Living, the Department of Health and the Commission on the Handicapped.
>
> Your Committee finds that Section 504 of the Federal Rehabilitation Act prohibits discrimination under **any** program or activity receiving federal financial assistance. This measure is intended to extend the protection provided by Section 504 to State financed programs and establishes investigation and enforcement mechanisms within the State Civil Rights Commission.

SCRep. 819, 1989 House Journal at 1140 (emphasis added).[5] Thus the House Judiciary Committee understood that disability discrimination in state-funded educational programs and activities would be covered by the bill, just as it was covered by § 504 of the Rehabilitation Act of 1973.

2. The fact that HRS § 368-1.5 is less statutorily complex or administratively elaborated than the current text of § 504 and its accompanying regulations does not support an inference that the Legislature did not intend to cover educational institutions under § 368-1.5.

The Executive Director also argues that because the legislative history underlying § 368-1.5 makes no mention of education, this distinguishes § 368-1.5 from § 504 of the Rehabilitation Act, and demonstrates the Legislature's intent to exclude education from § 368-1.5 coverage.

There are two problems with this argument. First, the legislative history underlying § 368-1.5 **does** mention education, as stated above. Second, § 504 of the Rehabilitation Act of 1973 had almost no legislative history at all. See, *Alexander v. Choate*, 469 U.S. 287, 395 n. 13 (1985) (noting paucity of legislative history regarding § 504); Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 Cath. U.L. Rev. 323, 334 (1999)(observing that neither committee nor conference reports, nor floor debates on the Rehabilitation Act of 1973 paid much attention to or raised any questions about § 504).

The Executive Director also argues that HRS § 368-1.5 stands in stark contrast to § 504 because "in enacting Section 504 Congress created an entire regulatory scheme" that was not adopted by Hawai'i (Memorandum at p. 16). This argument is flawed because it is ahistorical.[6]

[5] A copy of this report is in the Executive Director's Submission, at Appendix G-1.
[6] For historical background on the disability rights movement in general and the long struggle to implement § 504, see: Claire H. Liachowitz, *Disability as a Social Construct: Legislative Roots* (1988); Stephen L. Percy, *Disability, Civil Rights, and Public Policy: The Politics of Implementation* (1989); Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New*

As originally enacted in 1973, the Rehabilitation Act provided no administrative mechanism for interpreting or enforcing § 504. Federal agencies, including the Department of Health, Education and Welfare, dragged their heels even after disability rights activists in 1976 obtained an injunction from a federal district court requiring that regulations be issued without further delay. *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976). In fact, no § 504 regulations were promulgated until 1977, in response to a well-publicized sit-in by disabled activists in San Francisco, who occupied the HEW offices there for twenty-five days. Adam Milani, *Living in the World*, 48 Cath. U. L. Rev. at 336.

The detailed regulatory guidance now accompanying § 504 did not spring fully formed from the statute's passage in 1973. That statute originally had no legislative history, no conferral of regulatory authority, no definition of discrimination, no expressed duty of reasonable accommodation, and no elaborated defenses. The now elaborate statutory scheme of § 504 resulted from eight amendments subsequent to its initial passage, most of those occurring **after** the Legislature passed what is now § 368-1.5. Therefore, one cannot infer from the present regulatory and jurisprudential elaboration of § 504 any intent on the part of the 1989 Legislature to exclude educational institutions from coverage under § 368-1.5.

Civil Rights Movement (1993); and Richard Bryant Treanor, *We Overcame: The Story of Civil Rights for Disabled People* (1993);

3. The legislative evolution of Chapter 368 supports L.E.'s contention that HCRC has jurisdiction over student complaints of disability discrimination by state and state-funded educational institutions.

As the Executive Director describes in his Memorandum (see pp. 20-21 and Appendix J), efforts to create the HCRC began in 1988, with the introduction of HB 3408, which passed into law as Act 219. As originally introduced, HB 3408 declared the purposes and intent of the legislation, established the HCRC, vested it with powers and functions, established reporting requirements for covered entities and penalties for persons interfering with the HCRC's performance of its duties. The Legislature amended HB 3408 to defer its effective date to July 1, 1989 and to add provisions directing and funding the Legislative Auditor to conduct a review of all state discrimination laws and enforcement procedures and to make recommendations to the Legislature prior to the 1989 Regular Session. (Memorandum, Appendix J-3).

Had Act 219 gone into effect as it was originally written in 1988, it would have covered only discrimination in employment, housing, and public accommodations. As the Executive Director's Memorandum observes, Section 1 of Act 219 provided, in pertinent part, "[t]he legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, marital status, national origin, ancestry, handicapped status, or medical condition in **employment, housing, or public accommodations** is against public policy. (Memorandum, Appendix J-2)(emphasis added).

In addition, also as the Executive Director observes, the Legislative Auditor's Report (Memorandum, Appendix K-21to K-23) focuses on discrimination in employment, housing, and public accommodations, and recommends that the HCRC be given jurisdiction over disputes arising under HRS Chapter 378 (employment practices), Chapter 489 (public accommodation),

and Chapter 515 (real property transactions). (Memorandum, Appendix K-27). Very little attention was paid in the report to disability discrimination in general, or to disability discrimination in the provision of state operated or state-funded programs and activities. In fact, **§ 504 of the Rehabilitation Act of 1973 is not even mentioned in the Legislative Auditor's Report.** Between the opening of the 1988 legislative session and the opening of the 1989 legislative session, discrimination against people with disabilities by government agencies or by entities receiving financial assistance from the government was evidently not "on the radar screen."

However, that changed after the opening of the 1989 legislative session, as activists opposed to disability discrimination by state agencies and entities providing state-funded services changed the content of what had been Act 219 into what would be the content of HB 932, eventually enacted as Act 387. That bill changed the "Purposes and Intent" section of the previous year's Act 219, declaring that discrimination in access to services receiving state financial assistance was as great a public policy problem as employment, housing, or public accommodations discrimination. This fundamental turn becomes clear when one compares the relevant language in HRS § 368-1 from Act 219 to the corresponding language of Act 387: (in the following text material added in 1989 is underlined, material deleted from Act 219 from 1988 is in brackets):

> **§368-1 Purpose and intent**. [a] The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, marital status, national origin, ancestry, <u>or</u> handicapped status [, or medical condition] in employment, housing, [or] public accommodations<u>, or access to services receiving state financial assistance</u> is against public policy.

Act 387 (HB 932, Memorandum Appendix E-1)

Additionally, during the 1989 legislative session the Legislature passed what was to become HRS § 368-1.5:

> **Programs and activities receiving state financial assistance**. No otherwise qualified individual in the state shall, solely be reason of his or her handicapped status, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by State agencies or under any program or activity receiving State financial assistance.

Act 387 (HB 932, Memorandum, Appendix E-1)

As HB 932 worked its way through the Legislature in 1989, it went through a number of changes, including three separate House Drafts, two separate Senate drafts and a Conference Committee draft. Additionally, at some point in the legislative process, the language of HRS § 368-17 was changed, adding "admission to an educational institution" as a remedy for discrimination.

We can conclude three things from these developments during the 1989 legislative session. First, we can conclude that neither the language of Act 219 nor the 1988 Legislative Auditor's Report should shape our sense of the intent of the 1989 Legislature underlying § 368-1.5. Second, we can also conclude that, in enacting § 368-1.5, the Legislature intended to replicate at the state level the rights provided people with disabilities through § 504 of the Rehabilitation Act of 1973. This is made clear by the report of the House Judiciary Committee on HB 932 which stated:

> Your Committee finds that Section 504 of the Federal Rehabilitation Act prohibits discrimination under any program or activity receiving federal financial assistance. This measure is intended to extend the protection provide by Section 504 to State-financed programs, and establishes investigation and enforcement mechanisms within the State Civil Rights Commission.

SCRep. No. 819, 1989 House Journal at 1140.

Third, from its positive reference to testimony of the Governor's Committee on AIDS, we can conclude that this critical committee was aware that § 504 covered educational institutions and that the DOE should be considered a "lead agency" in connection with the consideration of Act 387.

Finally, in 1991, SB 1539, which became Act 252, added four new sections to Chapter 368[7] that clearly gave the HCRC jurisdiction over and powers to remedy violations of HRS

[7] In pertinent part, 368-3 was changed to provide as follows (new material underlined, deleted material in brackets):

> **HRS§ 368-3** Powers and functions of commission. The commission shall have the following powers and functions:
> (1) To receive, investigate, and conciliate complaints alleging any unlawful discriminatory practice under chapters 489, [and] 515, [and] part I of chapter 378 and complaints filed under this chapter . . .

In pertinent part, § 368-11 on jurisdiction was changed to provide as follows (new material underlined, deleted material in brackets):

> **HRS § 368-11** Complaint against unlawful discrimination. (a) The commission shall have jurisdiction over the subject of discriminatory practices made unlawful by chapters 489, [and] 515, [and] part I of chapter 378 and this chapter.

Correspondingly, § 368-13 on investigation and conciliation of complaints was amended to provide (new material underlined, deleted material in brackets):

> **HRS § 368-13** Investigation and conciliation of complaint. (a) After the filing of (any) a complaint or whenever it appears to the commission that an unlawful discriminatory practice may have been committed, the [commission] commission's executive director shall make an investigation in connection therewith. At any time after the filing of a complaint but prior to the issuance of a determination as to whether there is or is not reasonable cause to believe that chapter 489, 515, [or] part I of chapter 378, or this chapter has been violated, the parties may agree to resolve the complaint through a predetermination settlement.

Finally, Act 252 amended HRS § 368-17 on remedies, changing that portion of the statute that relates to awards of damages as follows (new material underlined, deleted material in brackets):

> **HRS §368-17** (a) The remedies ordered by the commission or the court under this chapter may include compensatory and punitive damages and legal and equitable relief, including, but not limited to:
> . . .

§368-1.5. These amendments irrefutably reflect the Legislature's intent to vest the Commission with enforcement authority over all cases under HRS § 368-1.5, Hawaii's § 504 analog.

E. Charter Schools are Not Exempt Under HRS Chapter 302D From Potential Liability Under HRS § 368-1.5, Nor Are They Excluded From the HCRC's Regulatory Authority Under Chapter 368.

During the hearing on this Petition, the State Respondents' counsel contended that charter schools, which operate under HRS Chapter 302D, are exempt from the requirements of HRS § 368-1.5. With respect, we find this contention unpersuasive.

It is true that Hawai‘i charter schools operate under HRS Chapter 302D and that charter schools and their governing boards are exempt from some state statutes that regulate other public schools and related government agencies. For example, charter school governing boards are exempt from HRS Chapters 91 (Administrative Procedures) and 92 (Sunshine Law). HRS § 302D-25(a). They are also qualifiedly exempt from HRS Chapter 103D (Procurement Requirements). Subject to certain exceptions, none of which are directly applicable here, charter schools are also exempt from "all other state laws that conflict with this chapter." *Id.*

However, nothing in HRS Chapter 302D conflicts with HRS § 368-1.5, or with the enforcement provisions of HRS Chapter 368 generally. In fact, the two sets of laws, along with the administrative rules associated with Chapter 302D, harmonize well.

> (8) Payment to the complainant of damages for an injury or loss caused by a violation of chapters 489, [and] 515, (and) part I of chapter 378, or this chapter, including a reasonable attorney's fee.[7]

As, or perhaps even more significantly, in 1991, in enacting Act 252 the Legislature left undisturbed subsection (a)(3) of HRS §368-17, which provides that remedies for violation of Chapter 368 may include "[a]dmission of persons to a public accommodation or an educational institution."

HRS § 302D-34, which regulates the enrollment of students in charter schools, provides, in pertinent part:

> (a) A public charter school shall not discriminate against any student or limit admission based on . . . disability, level of proficiency in the English language, need for special education services, or academic or athletic ability.

As this excerpt shows, the HRS § 302D-34 duty not to discriminate against students or applicants with disabilities parallels an equivalent duty not to discriminate contained in HRS § 368-1.5. The two statutes do not conflict.

Nor do their enforcement procedures conflict. HAR § 8-41-6, under which persons claiming to have been discriminated against by charter schools may file complaints with DOE, provides in pertinent part:

> (a) Nothing in this chapter shall be construed to limit or waive the right of the complainant to seek other relief as provided under federal and state laws. A complainant has the right to file a discrimination complaint with the federal or state government:
>
> (1) without filing a complaint under this chapter;
> (2) at the same time a complaint is filed under this chapter;
> (3) at any time during the pendency of a complaint filed under this chapter; or
> (4) after a complaint filed under this chapter has been adjudicated.

HAR § 8-41-2(a) defines the term "complaint" to **include complaints filed under HRS § 368-1.5.** The import of these provisions is clear. Applicants and students enrolled in charter schools are protected from disability discrimination under both HRS § 302D-34(a) and HRS § 368-1.5. The first can be enforced through the complaint procedures set out in HAR Chapter 41, and the latter can be enforced through administrative and/or civil litigation procedures provided in HRS Chapter 368. The two remedial options are non-conflicting and non-exclusive. They both exist because some complainants may prefer the more informal internal grievance mechanism provided in HAR Chapter 41, and some may prefer the more independent and formal

approach taken by the HCRC or the circuit court, which a § 368-1.5 complainant can access after receiving a right to sue letter from the HCRC.

IV.

CONCLUSION

For the reasons discussed above, we decide that the Commission has jurisdiction over Elento's claim against Hawai'i Technology Academy under HRS § 368-1.5. This decision is based on our conclusion that HRS § 368-1.5 contains no exception for educational institutions. Public educational institutions, including public charter schools, department of education schools, and units of the University of Hawai'i are "state agencies" within the meaning of HRS § 368-1.5. Alternatively, if a public charter school, such as HTA, is not a "state agency" within the meaning of § 368-1.5, it is a "program or activity receiving state financial assistance," and is subject to potential liability under that section. Private educational institutions that are "programs or activities receiving state financial assistance" may also be covered by § 368-1.5. We therefore direct the Executive Director to accept and process Elento's claim, and all other like claims pursuant to the relevant provisions of HRS Chapter 368.

Dated: Honolulu, Hawai'i October 28, 2014.

Linda Hamilton Krieger

LINDA HAMILTON KRIEGER, CHAIR

– excused –

RAYMUND LIONGSON, COMMISSIONER

Kim C. Iwamoto

KIM COCO IWAMOTO, COMMISSIONER

Wallace Fukunaga

WALLACE FUKUNAGA, COMMISSIONER

Artemio C. Baxa

ARTEMIO BAXA, COMMISIONER