



STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

OFFICE OF THE SUPERINTENDENT

August 15, 2019

TO: The Honorable Catherine Payne
Chairperson, Board of Education

FROM: Dr. Christina M. Kishimoto
Superintendent

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SUBJECT: **Board Action on: (1) Repeal of Hawaii Administrative Rules Chapter 41, entitled "Civil Rights Policy and Complaint Procedure"; (2) Adoption of Draft of New Hawaii Administrative Rules Chapter 89, entitled "Civil Rights Policy and Complaint Procedures for Student(s) Complaints Against Adult(s)"; and (3) Public Testimony Received at the July 16, 2019 Public Hearing**

1. RECOMMENDATION

The public hearing on the aforementioned proposed rules was held by Hawaii Department of Education ("HIDOE") on Tuesday, July 16, 2019, at 10 a.m. in the Hawaii Board of Education (the "Board") Board Room, 1390 Miller Street, Room 404, Honolulu, Hawaii, 96813. HIDOE considered all testimony provided at the public hearing and recommends that no changes be made to the proposed rules, and that the Board approve the proposed rules for submission to the Governor for final approval.

2. SUMMARY OF COMMENTS AND TESTIMONIES FROM THE PUBLIC HEARING AND HIDOE'S RESPONSES

No oral testimony was presented at the public hearing. Written testimonies were submitted by two local advocacy organizations, The American Civil Liberties Union – Hawaii ("ACLU Hawaii") and the Special Education Advisory Council ("SEAC"); and four by community advocates, Dr. Robert Bidwell, Josephine Chang, Dean Hamer, and Joe Wilson. Key comments from these written testimonies are summarized in the tables below, along with HIDOE's response to them.

Comments regarding Chapter 89 Only		
Commenter(s)	Comment	HIDOE Response
Robert Bidwell, Josephine Chang, Dean Hamer	It should be mandatory for employees to report any witnessed or known instances of discrimination, harassment, or bullying against a protected class student.	HIDOE agrees with this comment, and under the proposed amendment such mandatory reporting would be required per §8-89-6(c). The HIDOE Code of Conduct and BOE Safe Workplace Policy (305-2) also requires such mandatory reporting.
Robert Bidwell, Josephine Chang, Joe Wilson	The definition of systemic discrimination is too narrow because it is limited to discrimination based on an established policy, rule, regulation, or procedure that discriminates. The definition should be expanded to include “the failure to provide effective policies, procedures, rules, curricula and programs to address discrimination, harassment and bullying within our schools.”	Although the proposed language only addresses the established policies, rules, regulations, or procedures, once the HIDOE becomes aware of an issue that can be construed as systemic discrimination, the HIDOE will immediately engage in appropriate follow-up.
Josephine Chang, Joe Wilson	Currently, Chapter 41 simply prohibits any “reprisal” that occurs because the alleged victim has filed a complaint or participated in any part of a Chapter 41 proceeding. However, proposed Chapter 89 instead would limit complaints of “retaliation” or reprisal only upon a showing that the retaliating action, or “adverse action,” “would dissuade a reasonable person from making or supporting a complaint.” This “dissuade a reasonable person” requirement would make it more unclear and more difficult for a victimized student to complain of reprisals or	The updated definition of retaliation will not place any additional burden of proof placed on students. As with the original definition, to submit a retaliation complaint, the student must only show that they engaged in protected activity. Protected activity includes filing a complaint of discrimination, harassment, or bullying; participating in a complaint or investigation proceeding dealing with discrimination, harassment, or bullying; inquiring about rights under Chapter 89, or otherwise opposing acts covered under Chapter 89. Retaliation is also prohibited by the HIDOE Code of Conduct and BOE Policy 305-10 (Anti-harassment, anti-bullying, and anti-discrimination of student(s) by

Comments regarding Chapter 89 Only		
Commenter(s)	Comment	HIDOE Response
	retaliatory actions by putting a greater burden of proof on the victimized student.	employee(s).
SEAC	SEAC noted that several of its recommendations that it made had been incorporated into the revised draft of Chapter 89, and as such offered their general support of the rule. SEAC noted that successful implementation of the processes described in Chapter 89 would require comprehensive training for staff. SEAC also urged HIDOE to respond proactively when a complaint under Chapter 89 was submitted by a student with disabilities.	HIDOE appreciates SEAC's general support of Chapter 89 and appreciated its input on prior drafts of the proposed rule. HIDOE also agrees with the need to proactively address complaints submitted by students with disabilities.
Josephine Chang	Complaint process would unfairly exclude nonprotected class students from filing complaints against HIDOE employees or other adults for harassment, bullying, or other prohibited behavior.	Students wishing to file complaints against employees may do so at any time. It will then be investigated by the school or complex area unless the complaint is based on a protected class, in which case it will be investigated by the Civil Rights Compliance Branch in accordance with Chapter 89.
Josephine Chang	HIDOE should allow "immediate interventions" only for student complainants, and to require actions be taken regarding the alleged adult respondent as necessary for the safety of student complainant and others.	There are times immediate interventions are appropriate for an adult respondent under Chapter 89, such as when their work assignment is modified so that they will be separated from the complainant pending the investigation.
Robert Bidwell	There should not be an option of having an informal resolution process when a student submits a complaint against an	HIDOE agrees with this comment and in a previous iteration of this proposed amendment removed the option for informal resolution when

Comments regarding Chapter 89 Only		
Commenter(s)	Comment	HIDOE Response
	adult for discrimination, harassment, and/or bullying.	a student submits a complaint against an adult. The proposed Chapter 89 does not allow for an informal resolution process.

Comments regarding Chapters 19 and 89		
Commenter(s)	Comment	HIDOE Response
ACLU Hawaii, Robert Bidwell, Josephine Chang, Joe Wilson	The proposed amendments are overly focused on a complaint process, and instead, HIDOE should develop preventative processes. Discipline policies should be revised to address overall school climate and to focus on preventing harassment and bullying.	This complaint process was required by a resolution agreement made between the federal government and HIDOE. One of the purposes of Chapter 19 is to create proactive procedures to support students and to provide interventions to teach students appropriate behaviors when disciplinary actions are imposed. The proposed amendments are one part of a comprehensive approach by HIDOE to support positive school climate and address bullying and harassment. This approach is grounded in several BOE policies, including Policy 101-1 (Student Code of Conduct), BOE Policy E-101 (Whole Student Development), BOE Policy 101-2 (Character Education), BOE Policy 101-6 (Comprehensive Student Support System), and BOE Policy 101-7 (School Climate and Discipline). This year, HIDOE is implementing the Hawaii Multi-Tiered System of Support to meet the social and emotional needs of all students. HIDOE is also in the second year of rolling out an anti-bullying app and has partnered with organizations across the state for the Youth

Comments regarding Chapters 19 and 89		
Commenter(s)	Comment	HIDOE Response
		Mental Health First Aid program.
Robert Bidwell, Josephine Chang, Dean Hamer, Joe Wilson	The two complaint processes outlined in Chapter 19 and Chapter 89 oversimplify how to respond to discrimination, harassment, and bullying. It is not usually a complaint only against a student. Many times, employees are involved in student to student conduct because they do not stop the discrimination, harassment, and/or bullying, and they are also contributing to a climate where such offenses are tolerated.	Chapter 19 requires that any HIDOE teacher, official, or employee who witnesses or has reasonable cause to believe a class A or class B offense has been or will be committed, shall promptly report the incident to the principal or designee. Employees who are involved in or fail to stop the discrimination, harassment, and/or bullying of students may be in violation of the Code of Conduct or BOE Policy 305-10 (Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees). Therefore, if it is determined that an employee either engaged in or failed to stop the discrimination, harassment, and/or bullying of a student, the employee will be found in violation of these policies and disciplined accordingly.
Robert Bidwell, Josephine Chang, Dean Hamer, Joe Wilson	The definition of discrimination should be expanded to not only prohibit treating students differently on the basis of a protected class, but also to prohibit such treatment if it's based on perceiving (rightly or wrongly) the student to be of a protected class.	Students who are perceived (rightly or wrongly) to be of a protected class will be protected by the definition of discrimination. This will be clarified in the guidance documents and emphasized in training.
Josephine Chang, Dean Hamer, Joe Wilson	The proposed definition of harassment should not be narrowed, and the eight definitions from it should not be deleted.	The definition of harassment has not been narrowed; it has been clarified and updated. The current definition of harassment defines bullying and cyberbullying as harassment. In the proposed amendments, these are considered separate offenses. It is not common

Comments regarding Chapters 19 and 89		
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		form to include so many examples in an administrative rule. Instead, such examples will be included in accompanying guidance for implementing the rule, and these examples will be taught to students and staff as they are educated on these proposed changes.
Robert Bidwell, Josephine Chang	If a lesbian, gay, bisexual, transgender/gender nonbinary and questioning (LGBTQ) student files a complaint, the proposed rule requires that notice will be sent to their parent. This may cause a safety concern for the student if their parent(s) are not aware of their LGBTQ status. There should be an accommodation for these students.	Parents should know about any complaint or investigation that pertains to their child, particularly if the student is a minor. Administrators will be trained on recognizing the sensitivity of each student's individual situation, and how to address it as discreetly as possible. If an LGBTQ student is discouraged from making a complaint, administrators will be trained to provide appropriate support or resources to address the student's needs.
Joe Wilson	The proposed complaint processes would not allow students to submit a complaint against HIDOE employees or other students for harassment or bullying if it is not based on a protected class.	The proposed complaint process in Chapter 19 allows any student to submit a complaint against students for harassment and bullying, regardless of whether or not the harassment or bullying is based on a protected class. Students wishing to file complaints against HIDOE employees may do so at any time. It will then be investigated by the school or complex area unless the complaint is based on a protected class, in which case it will be investigated by the Civil Rights Compliance Branch in accordance with Chapter 89.

3. NEW IMPLICATIONS NOT PREVIOUSLY REPORTED

a. Educational

None.

b. Personnel

None.

c. Facilities

None.

d. Financial

None.

4. OTHER SUPPLEMENTARY INFORMATION

None.

CMK:sm

Attachments: Chapter 8-41, HAR

Chapter 8-89, HAR

Written testimony submitted to the public hearing

c: Cynthia Covell, Assistant Superintendent, Office of Talent Management

Heidi Armstrong, Assistant Superintendent, Office of Student Support Services

Beth Schimmelfennig, Director, Civil Rights Compliance Branch

DEPARTMENT OF EDUCATION

Repeal of Chapter 8-41 and
Adoption of Chapter 8-89
Hawaii Administrative Rules

Date

1. Chapter 8-41, Hawaii Administrative Rules, entitled "Civil Rights Policy and Complaint Procedure," is repealed.

2. Chapter 8-89, Hawaii Administrative Rules, entitled "Civil Rights Policy and Complaint Procedure for Student(s) Complaints Against Adult(s)," is adopted to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 2

EDUCATION

PART 1

PUBLIC SCHOOLS

CHAPTER 89

CIVIL RIGHTS POLICY AND COMPLAINT PROCEDURE FOR
STUDENT(S) COMPLAINTS AGAINST ADULT(S)

§8-89-1	Policy and purpose
§8-89-2	Definitions
§8-89-3	Applicability
§8-89-4	Severability
§8-89-5	Reporting requirements
§8-89-6	Complaint and investigative procedure
§8-89-7	Continued investigation
§8-89-8	Retaliation prohibited
§8-89-9	Right to seek other relief
§8-89-10	Language assistance, writing assistance, or reasonable accommodation
§8-89-11	Student's right to privacy

Historical Note: This chapter is based substantially upon Department of Education "Rule 52, Relating to Civil Rights Complaint Procedure for Students" and Hawaii Administrative Rules, Title 8, Chapter 41, "Civil Rights Complaint Procedure." [Eff 12/9/78; am 7/21/80; R 4/21/86, am and comp 10/28/995]

§8-89-1 Policy and purpose. (a) The department is committed to making all schools, safe, inclusive, respectful, and supportive of all students by eliminating all discrimination, harassment, and bullying and providing a non-discriminatory learning environment that provides equal access to public education for all students and embraces the values of dignity and respect for one another.

(b) This chapter establishes a procedure in the public school system for filing and resolving complaints of discrimination, harassment (including sexual harassment), and bullying against a student in any program, activity, or service of the department by employees, volunteers, or third parties on the basis of race, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, ancestry, disability, physical appearance and characteristics, socio-economic status, and any retaliation for reporting such conduct. Any student, parent or legal guardian of any student, or employees or volunteers who witness or are otherwise aware of conduct prohibited by this chapter, may file complaints regarding an alleged violation under this chapter. For protected class complaints of student misconduct towards another student, refer to section 8-19-16.

(c) The department shall take immediate and appropriate steps to stop discrimination, harassment (including sexual harassment), or bullying against a student to prevent recurrence and remedy discrimination effects

on the complainant or others, if appropriate.

(d) The department's Civil Rights Compliance Branch shall coordinate the implementation of this chapter. The Civil Rights Compliance Branch shall be responsible for monitoring complaints and conducting investigations of complaints filed under this chapter, disseminating appropriate information about discrimination, harassment (including sexual harassment), and bullying to department students, parents or legal guardians, employees, volunteers, and third parties, and providing training to department students, employees, volunteers, and third parties regarding their rights and responsibilities as it relates to discrimination, harassment (including sexual harassment), or bullying.

(e) No person who is otherwise qualified shall be denied the opportunity to participate in or receive benefits of, or be subjected to disparate treatment in any program, activity, or service of the department based upon one or more of the protected classes defined in section 8-89-2. This chapter applies to conduct that occurs on department property or outside of department property, if the conduct was in connection with a department-sponsored program or activity.

(f) The department shall comply with all applicable state and federal nondiscrimination laws and regulations in administering this chapter, including but not limited to:

- (1) Title VI of the Civil Rights Act of 1964, Public Law 88-352, which prohibits discrimination on the basis of race, color, or national origin;
- (2) Title IX of the Educational Amendments Act of 1972, Public Law 92-318, which prohibits discrimination on the basis of sex;
- (3) Title IV of the Civil Rights Act of 1964, which prohibits discrimination on the basis of religion;
- (4) Section 504 of the Rehabilitation Act of 1973, Public Law 92-112, which prohibits discrimination against persons with disabilities;
- (5) Individuals with Disabilities Education Act, Public Law 101-476, which ensures students with a disability are provided with a free and appropriate public education that is tailored to their individual needs;
- (6) Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination against persons with disabilities in programs, activities, and services;
- (7) Article X, Section 1, Hawaii State Constitution, which prohibits discrimination in public educational institutions because of race, religion, sex or ancestry;

- (8) Age Discrimination Act of 1975, Public Law 94-135;
- (9) Section 302A-461, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in athletics offered by a public high school;
- (10) Section 302A-1001, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in any educational or recreational program or activity receiving state or county financial assistance or utilizing state or county facilities; and
- (11) Section 368D-1, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex, gender identity or expression, or sexual orientation in any state educational program or activity or any educational program or activity that receives state funding.

[Eff. _____] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X §1; HRS §§302A-101, 302A-1001, 302A-1101, 302A-1112, , 368-1, 368D-1; 5 U.S.C. §301, 20 U.S.C. §1681, 29 U.S.C. 706, 794, 42 U.S.C. §12101 et seq., 42 U.S.C. §2000d et seq., 28 C.F.R. §35, 34 C.F.R. §100, 34 C.F.R. §101; 34 C.F.R. §104; 34 C.F.R. §106; 45 C.F.R. §90;)

§8-89-2 Definitions. Whenever used in this chapter, unless the context otherwise requires:

"Bullying" means any written, verbal, graphic, or physical act that hurts, harms, humiliates, or intimidates a student(s), including those with protected class statuses, that is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment.

"Child Welfare Services" means the Child Welfare Services of the State of Hawaii Department of Human Services.

"Complainant" means any student, parent, or legal guardian of any student, employee, volunteer, or member of the community who witnesses or is otherwise aware of conduct prohibited by this chapter who files a complaint regarding an alleged violation under this chapter.

"Complaint" means a charge filed under this chapter, which alleges that a student participating in a program, activity, or service of the department was subjected to discrimination, harassment (including sexual harassment), or bullying by an employee, a volunteer, or a third party in violation of board of education rules, policies and directives, and federal and state regulations and laws, including, but not limited to, the following laws:

- (1) Title VI of the Civil Rights Act of 1964, Public Law 88-352,

which prohibits discrimination on the basis of race, color, or national origin;

- (2) Title IX of the Educational Amendments Act of 1972, Public Law 92-318, which prohibits discrimination on the basis of sex;
- (3) Title IV of the Civil Rights Act of 1964, which prohibits discrimination on the basis of religion;
- (4) Section 504 of the Rehabilitation Act of 1973, Public Law 92-112, which prohibits discrimination against persons with disabilities;
- (5) Individuals with Disabilities Education Act, Public Law 101-476, which ensures students with a disability are provided with free and appropriate public education that is tailored to their individual needs;
- (6) Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination against persons with disabilities in programs, activities, and services;
- (7) Article X, Section 1, Hawaii State Constitution, which prohibits discrimination in public educational institutions because of race, religion, sex, or ancestry;
- (8) Age Discrimination Act of 1975, Public Law 94-135;
- (9) Section 302A-461, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in athletics offered by a public high school;
- (10) Section 302A-1001, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in any educational or recreational program or activity receiving state or county financial assistance or utilizing state or county facilities; and
- (11) Section 368D-1, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex, gender identity or expression, or sexual orientation in any state educational program or activity or any educational program or activity that receives state funding.

“Cyberbullying” means electronically transmitted acts, including but not limited to those transmitted through the Internet, cell phone, or other wireless hand-held device, that an employee, a volunteer, or a third party exhibits toward a student(s), that hurts, harms, humiliates, or intimidates the student(s); and is sufficiently severe, persistent, or pervasive, that it creates an intimidating, threatening, or abusive educational environment. Cyberbullying can occur:

- (1) On campus, or other department premises, on department transportation, or during a department sponsored activity or

- event on or off school property;
- (2) Through a department data system without department authorized communication; or
- (3) Through an off campus computer network, if the conduct impacts the educational environment.

Additionally, cyberbullying may also be based on a person's protected class, including but not limited to, a person's race, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, ancestry, disability, physical appearance and characteristics, and socio-economic status.

"Decision maker" means the administrator with authority to make decisions regarding findings on complaints filed under this chapter.

"Department" means the Department of Education.

"Department employees with supervisory authority" refers to employees with supervisory responsibilities in their position description.

"Director" means the director of the Civil Rights Compliance Branch.

"Discrimination" means excluding the participation in or denying the benefits of the department's administration of its educational programs and activities, or otherwise treating a student differently on the basis of a protected class.

"Employee" means a department employee.

"Gender expression" means the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.

"Gender identity" means a person's internal, deeply-felt sense of being male, female, or other, whether or not that gender-related identity is different from the person's physiology or assigned sex at birth. Everyone has a gender identity.

"Harassment" means any threatening, insulting, or aggressive conduct, which can be written, verbal, or physical, and is directed against a student, including those with protected class status. Harassing conduct must have the effect of:

- (1) Placing a student in reasonable fear of harm to his or her person or damage to his or her property;
- (2) Interfering with a student's educational performance, opportunities, or benefits; or
- (3) Disrupting the orderly operation of a school.

"Immediate interventions" means individualized services offered as soon as possible, but no later than seventy-two hours after receipt of the complaint, to either or both the complainant or respondent involved in a

complaint as appropriate to protect students from possible racial, sexual, or disability harassment. Immediate interventions may be offered prior to an investigation or while an investigation is pending. Immediate interventions for students pending an investigation may include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, leaves of absence, increased security and monitoring of certain areas of campus, or other similar accommodations. Immediate interventions may be put in place by the principal or designee on a case-by-case and temporary basis after the department receives notice of a complaint and before any outcomes – investigatory, disciplinary, or remedial – have been determined. These measures may be instituted to preserve the complainant's educational experience, ensure the safety of all parties and the broader department community, maintain the integrity of the investigative or resolution process, and deter retaliation. Immediate interventions shall be available throughout all phases of an investigation. They may be amended or withdrawn as additional information is gathered.

"Investigator" means an administrator, individual, or group of individuals assigned by the Civil Rights Compliance Branch to investigate complaints made pursuant to this chapter. There may be circumstances that require having an investigator external to the department investigate complaints.

"Legal guardian" means a person who has the legal right and authority to make educational and other decisions for a child under the person's guardianship.

"Parent" means the natural or legal parent, legal guardian, or other legal custodian of a student. For students eighteen years of age or older, all parental rights herein transfer to the student unless the natural or legal parent, legal guardian, or other legal custodian has legally obtained decision making rights for the student.

"Persons with disabilities" means persons who have a physical or mental impairment that substantially limits one or more life activities, have a record of an impairment, or are regarded as having an impairment.

"Protected class/basis" for the purposes of this chapter includes race, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, ancestry, disability, physical appearance and characteristics, and socio-economic status.

"Remedies" are individualized services offered at the conclusion of an investigation that preserve the educational experience or ensure the safety of all students and the broader department community. Remedies

for students may include, but are not limited to, the adjustment of academic schedules and coursework, and the provision of academic, medical, and psychological support services.

"Respondent" means the employee, volunteer, or third party who is identified in the complaint as having allegedly discriminated against, harassed (including sexually harassed), or bullied a student. Respondent also includes the department when a complaint alleges systemic discrimination.

"Retaliation" means an adverse action against an employee, volunteer, or student because they engaged in protected activity. Protected activity includes filing a complaint of discrimination, harassment (including sexual harassment), or bullying; participating in a complaint or investigation proceeding dealing with discrimination, harassment (including sexual harassment), or bullying; inquiring about rights under this chapter; or otherwise opposing acts covered under this chapter. An adverse action is any action that would dissuade a reasonable person from making or supporting a complaint under these rules. Reprisals or retaliation shall be prohibited when there is protected activity that was engaged in good faith.

"School" means all academic and non-college type schools established and maintained by the department in accordance with state law.

"Sexual assault" means the act of committing unwanted physical contact of a sexual nature on a person, whether by an acquaintance or by a stranger. Such contact is unwanted when it occurs without consent of the person, or when the person is incapacitated or otherwise incapable of giving consent. Consent means affirmative, conscious, and voluntary agreement to engage in agreed upon forms of sexual contact. If a student is a subject of sexual assault and is under the age of consent or if the perpetrator of sexual assault is an adult and an employee or volunteer of the department, it shall be deemed that no consent was given. Sexual assault is a form of sexual harassment.

"Sexual exploitation" means the violation of the sexual privacy of another, or taking unjust or abusive sexual advantage of another without consent and when such behavior does not otherwise constitute sexual assault. Consent means affirmative, conscious, and voluntary agreement to engage in agreed upon forms of sexual contact. If a student is a subject of sexual exploitation and is under the age of consent, or if the perpetrator of sexual exploitation is an adult and an employee or volunteer of the department, it shall be deemed that no consent was given. Sexual exploitation is a form of sexual harassment.

“Sexual harassment” means any unwanted, unwelcome, or unsolicited verbal or physical act of a sexual nature directed at an individual because of the individual’s sex. Sexual harassment can include requests for sexual favors or sexual advances when submission to or rejection of the conduct is either an explicit or implicit term or condition of a student’s education or participation in a department program, activity or service; or when submission to or rejection of the conduct is used as a basis in decisions affecting that student’s education or participation in a department program, activity, or service. Sexual harassment also includes, but is not limited to, sexual misconduct, unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. It can include conduct such as touching of a sexual nature, making sexual comments, jokes or gestures, writing graffiti or displaying or distributing sexually explicit drawings, pictures or written materials, calling students sexually charged names, spreading sexual rumors, rating students on sexual activity, or circulating, showing, or creating e-mails or websites of a sexual nature. Sexual exploitation and sexual assault also fall under the definition of sexual harassment.

“Sexual orientation” means a person’s emotional and sexual attraction to another person based on the gender of the other person. Common terms to describe sexual orientation include, but are not limited to, heterosexual, gay, lesbian, and bisexual. Sexual orientation and gender identity are different.

“Stalking” means two or more acts of unwanted behavior, directed at a specific person that is sufficiently serious to cause physical, emotional, or psychological fear or to create a hostile, intimidating, or abusive educational environment.

"Student" means a person who is currently enrolled in a public school, or in any program, service, or activity conducted by the department.

"Systemic discrimination" means discrimination that results when an established policy, rule, regulation or procedure of the department has the continuing effect of violating non-discrimination rights.

“Third party” means any person who is not an employee or volunteer of the department who is on the department’s property with the permission of an employee within the department with authority to grant such permission.

"Volunteer" means any person who has been officially recognized by a department administrator as someone who is authorized to perform work or services for the department without compensation.[Eff

] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X §1; HRS §§302A-101, 302A-1001, 302A-1101, 302A-1112; 5 U.S.C. §301, 20 U.S.C. §1681, 29 U.S.C. §§706, 794, 42 U.S.C. §2000d et seq., 42 U.S.C. §12101 et seq., 28 C.F.R. §35, 34 C.F.R. §100; 34 C.F.R. §101 34 C.F.R. §104, 34 C.F.R. §106, 45 C.F.R. §90)

§8-89-3 Applicability. (a) This chapter shall apply to the conduct of department employees (including full-time, part-time, casual, substitute, and temporary employees), volunteers, or third parties that negatively impacts a protected class student's ability to participate in or to receive benefits, services, or opportunities in the school's program or activities. This chapter applies to conduct that occurs on department property or outside of department property, if the conduct was in connection with a department-sponsored program or activity. Charter schools are excluded from this chapter and are subject to regulations promulgated by the Hawaii State Public Charter School Commission.

(b) With respect to section 504 of the Rehabilitation Act of 1973, this chapter shall apply to complaints concerning disparate treatment under Subpart A, General Provisions, and facilities or program accessibility under subpart C, Program Accessibility, of Title 34 Code of Federal Regulations section 104.

(c) For conduct by students toward other students, refer to Hawaii Administrative Rules, title 8, chapter 19. [Eff _____] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X §1; HRS §§302A-101, 302A-1001, 302A-1101, 302A-1112; 5 U.S.C. §301, 20 U.S.C. §1681, 29 U.S.C. §§706, 794, 42 U.S.C. §2000d et seq., 42 U.S.C. §12101 et seq., 28 C.F.R. §35, 34 C.F.R. §100; 34 C.F.R. §101, 34 C.F.R. §104, 34 C.F.R. §106, 45 C.F.R. §90)

§ 8-89-4 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to this end, the provisions of this chapter are severable. [Eff _____] (Auth: HRS §302A-1112)(Imp: HRS §302A-1112)

§8-89-5 Reporting requirements. Student(s) or their parent(s), or legal guardian(s) should inform any department employee with supervisory authority or the Civil Rights Compliance Branch of any discrimination, harassment (including sexual harassment), bullying, or retaliation engaged in by department employees (including full-time, part-time, casual, substitute, and temporary employees), volunteers, or third parties covered

under this chapter in order to address and prevent further incidents from occurring. [Eff] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

§8-89-6 Complaint and investigative procedure. (a)

Complaints stemming from allegations that fall under this chapter may be filed by:

- (1) Students who experience discrimination, harassment (including sexual harassment), bullying, or retaliation;
- (2) Students who witness discrimination, harassment (including sexual harassment), bullying, or retaliation against another student;
- (3) Parents, legal guardians, educational representatives, or individuals with a power of attorney who know about or witness discrimination, harassment (including sexual harassment), bullying, or retaliation against a student; or
- (4) Employees, staff, or volunteers who witness or know about discrimination, harassment (including sexual harassment), bullying, or retaliation against a student.

(b) Complaints alleging violations of this chapter can be made using the department's Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) Policy Complaint Form. Individuals who do not have access to or prefer not to use the department's Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) Policy Complaint Form can nonetheless make a complaint, either in writing or orally, by providing the department with the following information:

- (1) The name of the respondent or a sufficient description of the respondent so that an identity can be determined;
- (2) The date(s) when the alleged discrimination occurred;
- (3) The protected basis of the complaint and a factual description of how the discrimination allegedly occurred;
- (4) A description of the injury or harm, if any; and
- (5) Attachments, if any, documenting the alleged conduct.

(c) Written complaints may be given to any teacher or staff, principal, vice-principal, complex area superintendent, or the Civil Rights Compliance Branch. Verbal complaints may be made either in person or over the phone to any teacher or staff, principal, vice-principal, complex area superintendent, or the Civil Rights Compliance Branch. All complaints must be forwarded as soon as possible to the Civil Rights Compliance Branch for processing, and failure to report a student's complaint may result in disciplinary action.

(d) When a complaint is received, the Civil Rights Compliance Branch shall promptly assess the situation, will determine if the complaint falls under this chapter, and will investigate in accordance with subsections (f) to (i). Complaints that do not fall under this chapter will be referred to the appropriate office for review.

(e) Both parties may make a request for immediate interventions to the principal, any vice principal, the complex area superintendent, or the Civil Rights Compliance Branch. The principal or designee may institute immediate interventions without a request, if they deem them appropriate. Immediate interventions will be considered by the principal or designee, in consultation with the Civil Rights Compliance Branch, and if it is determined that immediate interventions are necessary, the principal or designee will implement the immediate interventions. The Civil Rights Compliance Branch will ensure that such immediate interventions are taken. Failure to comply with the terms of immediate interventions may be considered a separate violation, which may result in a separate investigation, findings, and determination.

(f) When an investigation is required, the Civil Rights Compliance Branch will assign an impartial investigator to conduct the investigation. At the initiation of an investigation, the parent will be notified.

(g) The complainant and respondent will be allowed to provide the assigned investigator the names of witnesses who they believe have information relevant to the complaint and provide evidence that they believe is relevant to the complaint. Once the investigator has obtained the necessary relevant information and documents, the investigator will analyze and document the available evidence, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence--including inculpatory and exculpatory evidence--and take into account the unique and complex circumstances of each case. Once that is complete, the investigator will prepare a final investigation report, which will include findings of facts and determinations of any violations of rules, policies, or procedures.

(h) The final investigation report shall be forwarded to the decision maker, who shall determine any appropriate action, which may include discipline. If there is a finding of cause, the decision maker shall determine any appropriate discipline to end the discrimination, prevent its recurrence and remedy its effects on the complainant or school. The decision maker, in consultation with the Civil Rights Compliance Branch, shall determine whether any remedies will be provided to students involved in the investigation. If it is determined that remedies will be

provided, the principal or designee will implement the remedies. The complainant will be provided written notification of whether the allegations have been substantiated, the outcome of the investigation, any remedies provided, and any other actions taken by the department that directly relate to the complainant. The respondent will be provided written notification of whether the allegations have been substantiated, the outcome of the investigation, and relevant action taken by the department that directly relate to the respondent.

(i) The investigator shall make a good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution. The investigation will be completed within sixty calendar days of the filing of a complaint or from the report of the suspected violation of this chapter, unless the Civil Rights Compliance Branch determines in its discretion that more time is required to initiate and complete the investigation. If the investigation cannot be completed within the sixty calendar day time frame, the Civil Rights Compliance Branch will notify the complainant and respondent in writing of the status of the investigation and provide an update on status every thirty calendar days thereafter. [Eff. _____] (Auth: HRS §302A-1112) (Imp: HRS §§302A-101, 302A-1001, 302A-1101, 302A-1112; 5 U.S.C. §301, 20 U.S.C. §1681, 29 U.S.C. §§706, 794, 42 U.S.C. §2000d et seq., 42 U.S.C. §12101 et seq., 28 C.F.R. §35, 34 C.F.R. §100, 34 C.F.R. §101, 34 C.F.R. §104, 34 C.F.R. §106, 45 C.F.R. §90)

§8-89-7 Continued investigation. When a complainant makes a complaint against an employee, volunteer, or third party, the investigation shall be completed in the event that the employee resigns before it is finished and shall include a determination of any potential immediate interventions or remedies for complainant(s) and any other students or employees affected by the alleged harassment. Additionally, the Civil Rights Compliance Branch shall investigate allegations of violations of this chapter even absent a filing of a formal complaint or if a complaint has been withdrawn. [Eff. _____] (Auth: HRS §302A-1112) (Imp: HRS §§302A-101, 302A-1001, 302A-1101, 302A-1112; 5 U.S.C. §301, 20 U.S.C. §1681, 29 U.S.C. §§706, 794, 42 U.S.C. §2000d et seq., 42 U.S.C. §12101 et seq., 28 C.F.R. §35, 34 C.F.R. §100; 34 C.F.R. §101, 34 C.F.R. §104, 34 C.F.R. §106, 45 C.F.R. §90)

§8-89-8 Retaliation prohibited. Retaliation and retaliatory harassment is prohibited against any person because the person engaged in a protected activity. [Eff. _____] (Auth: HRS §302A-1112) (Imp: HRS §§302A-101, 302A-1001, 302A-1101, 302A-1112; 5 U.S.C.

§301, 20 U.S.C. §1681, 29 U.S.C. §§706, 794, 42 U.S.C. §2000d et seq., 42 U.S.C. §12101 et seq., 28 C.F.R. §35, 34 C.F.R. §100; 34 C.F.R. §101, 34 C.F.R. §104, 34 C.F.R. §106, 45 C.F.R. §90)

§8-89-9 Right to seek other relief. 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, including law enforcement agencies:

- (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 addressed.

[Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §§302A-1101, 302A-1112, 368-3; 42 U.S.C. §2000d et seq. 34 C.F.R. §100)

§8-89-10 Language assistance, writing assistance, or reasonable accommodation. Any individual making a complaint or participating in an investigation that requires language assistance or writing assistance shall be afforded such assistance by the department. Any individuals with disabilities who require reasonable accommodation(s) to make a complaint or participate in an investigation shall be afforded such assistance by the department. [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

§8-89-11 Student's right to privacy. (a) Information relating to complaints, investigations, and reports shall remain confidential and shall only be shared with appropriate individuals necessary to complete the investigation and decision making process.

(b) Identifiable information regarding a student shall not be disclosed without notice to the student's parent or legal guardian.

(c) Investigation records shall be maintained by the department separate from educational records." [Eff _____] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

3. The repeal of chapter 8-41, Hawaii Administrative Rules and the adoption of chapter 8-89, Hawaii Administrative Rules, shall take effect ten days after filing with the office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules drafted in the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____ and filed with the Office of the Lieutenant Governor.

CATHERINE PAYNE, Chairperson
Board of Education

APPROVED AS TO FORM:

Deputy Attorney General

**TESTIMONY FROM JOSEPHINE L. CHANG IN OPPOSITION TO THE DEPARTMENT OF EDUCATION'S
ADOPTION OF PROPOSED HAR CH. 8-19, REPEAL OF HAR CH. 8-41, AND ADOPTION OF PROPOSED HAR
CH. 8-89 AT PUBLIC HEARING ON JULY 16, 2019**

BOE BOARD ROOM, 1390 Miller Street, Room 404, Honolulu, Hawaii 96813

Submitted via email to crco@notes.k12.hi.us

I. INTRODUCTION

I am a mother, grandmother, and great grandmother of children who attended and attends our public schools. Among them were and are special needs children and LGBTQ children. (I will use the acronym "LGBTQ" to refer to sexual and gender minority children.) I am myself a product of Hawaii public schools, from Liholiho Elementary, Kaimuki Intermediate, and Kaimuki High school. I have always believed in the value of our public schools because of its diversity that represents all of the people in Hawaii. However, there was always a problem of discrimination, harassment, and bullying in my time that sadly continues today, having adversely affected and is affecting my special needs and LGBTQ children in public schools, and all other students in public schools. Discrimination, harassment, and bullying is still entrenched in our public schools, and this problem is not improved by the rules that DOE proposes to adopt today.

I have spent years seeking leadership from DOE and commitment to the hard work needed from the top down to each and every school in DOE's school system, the systemic changes needed to make every one of our public schools safe and nurturing for minority students as well as for those in the majority, from educating all DOE administrators and staff, and all students, on stopping and dispelling discrimination, harassment, and bullying throughout our public schools, and on providing safe, inclusive, respectful, and supportive schools. I have also participated diligently throughout this current rule-making process to raise these needs, and have also provided pro bono consultation to DOE and training to DOE staff trying to improve understanding of the needs and struggles of LGBTQ+ students and others due to discrimination in DOE schools.

Despite the efforts of many of us to inform DOE about the ongoing problems of discrimination, harassment and bullying of students, including protected class students, throughout DOE schools, DOE continues to ignore its responsibilities to comprehensively address discrimination, harassment, and bullying in DOE schools, that is found systemwide. Simply adopting rules or complaint processes does not solve these problems and adopting flawed rules only makes the rules part of the problem.

My testimony below sets forth many of the reasons that the proposed rules are flawed, wholly inadequate, unfair to protected class students and all students, would not keep DOE students safe from discrimination, harassment and bullying, and would deny many students, particularly protected class students, from equal access to an education in our public schools.

Bottom-line: These rules are not ready to be finalized as there are many problems with Ch. 19 and Ch. 89 as proposed.

II. HAR Ch. 8-19 (Ch. 19) and HAR Ch. 8-89 (Ch. 89) ARE SERIOUSLY FLAWED

I present the problems in Ch. 19 and Ch. 89 together because these rules are presented as a package that illustrates DOE's approach to addressing discrimination, harassment and bullying in DOE's school system, and there are many overlaps and similarities in the problems in Ch. 19 and Ch. 89 . I will note where problems are relevant to either or both Ch. 19 and Ch. 89, and will note specific relevant sections in Ch. 19, Ch. 89, and/or HAR Ch. 8-41 (Ch. 41). However, there may be other sections in these rules that are also part of the problems discussed.

A. DOE would continue to deny equal access to public school education to students that suffer from ongoing discrimination, harassment, and bullying in DOE's schools.

Under Ch. 19, in **8-19-1 Philosophy**, DOE commits to providing "safe, caring, nurturing, and orderly teaching and learning environments". Under Ch. 89, 8-89-1 Policy and Purpose the DOE commits to "making all schools, safe, inclusive, respectful, and supportive of all students by eliminating all discrimination, harassment, and bullying and providing a non-discriminatory learning environment that provides equal access to public education for all students and embraces the values of dignity and respect for one another." In other words, DOE acknowledges that if it does not eliminate existing discrimination in the DOE school system, including in each and every school, and if it does not provide non-discriminatory learning environments for all students in each and every school, that protected class students and all students will continue to be harmed from discrimination, harassment, and bullying, to be unsafe in DOE schools as a result, and will continue to be deprived of equal access to public education in DOE schools that is their right.

Yet DOE would continue to do no more than to rely on complaint processes under Ch. 19 and Ch. 89, continue to place the burden on victimized students to seek their own relief by requiring them to file complaints under Ch. 19 and Ch. 89, and continue to limit its own actions to only addressing complaints that are filed. DOE fails to present how the DOE would eliminate discrimination, harassment, and bullying currently in its schools, or how it would make all schools nondiscriminatory, safe, inclusive, respectful, and supportive of all students as it is responsible to do. More than complaint processes are needed and required of DOE.

See: Proposed Ch. 19, Proposed Ch. 89, Proposed Section 8-19-1, Proposed Section 8-89-1

B. DOE's "complaints only" approach in proposed Ch. 19 and Ch. 89 would be the same inadequate approach adopted years ago that has not relieved students, including protected class students, from an environment of discrimination, harassment, and bullying in DOE schools.

DOE's complaint processes in Ch. 19 and Ch. 89, is a scattered and piecemeal approach, that is inherently self-limiting that would address only the tip of the iceberg. Under the proposed complaint processes in Ch. 19 and Ch. 89, DOE will act only when an individual student files a complaint with DOE, yet many students are not likely to file a complaint because the prospect of formally accusing their peers

or an adult is frightening and further intimidating for students, and particularly for victimized students, and does not provide certainty that the actions taken by DOE will actually make victimized students safe at school. Their fear that filing a complaint could further expose them to more discrimination, harassment and bullying from peers and/or DOE employees is likely to deter students, particularly LGBTQ+ students that experience widespread discrimination, harassment, and bullying in DOE schools and for which many, if not most, seek safety from discrimination, harassment and bullying by remaining “in the closet”. By placing the burden on victimized students to complain before DOE will act, DOE purposely limits itself to addressing only the few complaints filed out of desperation, instead of addressing the larger underlying and systemic causes of discrimination, harassment and bullying in the schools. This narrow approach does not fairly or adequately support protected class students, or all other students, as they are all harmed by attending schools in a discriminatory, harassing, and bullying environment allowed to continue by DOE.

See: Proposed Section 8-19-30, Proposed Section 8-89-1, Proposed Section 8-89-6

C. DOE’s bifurcated complaint process obscures and would ignore the problems of staff and systemic failings involved in discrimination, harassment, and bullying in DOE schools.

By presenting situations of discrimination, harassment, and bullying as either only the fault of specific students, or the fault of specific DOE employees or other adults in the schools, DOE fails to address the reality that discrimination, harassment and bullying involving students also involve DOE administrators and staff in the schools, and also implicate DOE’s top administration.

Ch. 19 offers a complaint process only for student offenders, and Ch. 89 offers a separate complaint process only for DOE employees, volunteers or third parties. DOE does not provide the opportunity for complaints to also consider the role that employees or other adults in authority in the schools have in preventing and stopping discrimination, harassment, and bullying in the schools. Where students readily express discriminatory, harassing, and bullying behavior in a school, DOE employees are often involved and part of the problem, such as by not acting to stop such behavior, being a silent bystander, minimizing such offending behavior as “normal teasing”, faulting the victim, or even agreeing with the ridicule and bad treatment of protected class students, particularly LGBTQ+ students. Discrimination, harassment, and bullying are more complicated offenses instead of simple “either or” situations, and the involvement and ineffectiveness of DOE administrators and employees in the schools are indications of widespread systemic failure to adequately protect not only protected class students but also all other students in DOE schools from these offenses. Discrimination and discriminatory harassment and bullying, are entrenched in an institution’s culture, therefore requiring more than a minimal complaint process that excludes consideration of the responsibilities of top administrators’ role, or school administrators’ and school staff’s role in allowing discrimination, harassment, and bullying to continue.

DOE needs to acknowledge and recognize in these rules the interdependence of students, DOE staff, and DOE’s top administration in discrimination, harassment, and bullying situations, and should provide complaint processes that also seek to identify systemic discrimination, and provide for broad consideration of the actions of students, and the actions or inactions of DOE staff and school

administrators, and top administration to stop and prevent discrimination, harassment and bullying in DOE schools, and for consideration of student offenders in conjunction with administrator and staff failings, and systemic failings.

See: Proposed Section 8-19-3, Proposed Section 8-19-30, Proposed Section 8-89-1, Proposed Section 8-89-3, Proposed Section 8-89-6

D. DOE deliberately attempts, in Ch. 89, to limit its responsibilities for systemic discrimination, and discriminatory harassment and bullying.

“Systemic Discrimination” is a term that commonly refers to all practices that are part of an organization that allow discrimination to occur throughout the organization. The word “systemic” by definition refers to a “system” and all of its parts. The DOE is a statewide public school system with many administrative parts and many K-12 schools, that together provide public education throughout the state of Hawaii. DOE’s top administration is responsible for any and all systemwide matters, including the problems of ongoing discrimination, harassment, and bullying in DOE schools. Despite repeated requests from the public to DOE’s top administration to address discrimination, harassment, and bullying in a systemwide manner to root out the causes that continue to allow prohibited discrimination, harassment, and bullying in DOE schools, DOE has failed to do so.

Not only would DOE limit its actions by only responding to complaints, DOE would attempt to limit its systemwide responsibilities for discrimination, harassment and bullying, by adopting a severely limited and narrow definition of “systemic discrimination” in Ch. 89. “Systemic discrimination” in Ch. 89 is defined narrowly as “discrimination that results when an established policy, rule, regulation or procedure of the department has the continuing effect of violating non-discrimination rights.” This definition states that systemic discrimination would be considered by DOE *only* if any of its policies, rules, regulations and procedures are discriminatory. This narrow definition also means that DOE would not consider other aspects of discrimination resulting from system failures such as: when DOE fails to adopt any policies, rules, regulations, and procedures; or other actions or inactions/failure to act by DOE to address ongoing discrimination, harassment and bullying in DOE’s schools, such as DOE’s failure to provide the necessary guidance, support, and training/professional development to all DOE administrators and staff on bias and discrimination, particularly on understanding all protected classes, on how to intervene to stop discrimination, harassment, and bullying, and on how to make schools nondiscriminatory, inclusive, respectful, and supportive of all students, including protected class students; or DOE’s failure to provide all students with the necessary education for them to understand prohibited bias and discrimination, how to be inclusive and mutually respectful. The narrow definition of “systemic discrimination” proposed in Ch. 89 would unfairly and irresponsibly allow DOE to continue to shirk its broad responsibilities to prevent systemic discrimination in DOE schools.

For the safety and well-being of all students, including protected class students, the definition of “systemic discrimination” in Ch. 89 should be broadened to its full reasonable meaning so that it does not provide reason for DOE administrators to limit their efforts to address underlying systemic failures

that allow discrimination, harassment, and bullying to continue in DOE's schools systemwide, and to provide notice that systemic discrimination in its broadest sense is of top priority.

See: Proposed Section 8-89-2 Definitions, "systemic discrimination"

E. DOE's complaint process would unfairly exclude nonprotected class students from filing complaints against DOE employees or other adults for harassment, bullying or other prohibited behavior towards a student under Ch. 89 and Ch. 19.

Ch. 19 only provides a process for complaints against students, and Ch. 89 only provides a process for complaints *by protected class students* against DOE employees, volunteers, and third parties. Together, these rules do not provide a complaint process for *nonprotected class students* to seek relief from offenses by DOE employees, contractors, and volunteers against nonprotected class students. Yet, DOE employees, volunteers and third parties are specifically prohibited from engaging in various conduct with students that includes all students in DOE's Code of Conduct. It is clearly unfair, irresponsible and wrong for DOE to exclude nonprotected class students from filing a complaint against DOE employees, contractors, and volunteers and other adults in these rules, leaving nonprotected class without equal recourse when they experience prohibited offenses by such adults in the schools. All students have a right to safety in DOE schools and protection from DOE employees and other adults in DOE schools.

For the safety of all students, DOE should establish a complaint process that allows nonprotected class students to file complaints against offending DOE employees, contractors and volunteers. DOE should also provide notice to all students and parents of the DOE's Code of Conduct and other ethical requirements for DOE employees with regard to students.

See: Proposed Section 8-19-3, Proposed Section 8-19-30, Proposed Section 8-89-1, Proposed Section 8-89-3, Proposed Section 8-89-6

F. DOE would provide a scattered, inconsistent and uncertain complaint process for discrimination, harassment, and bullying.

Ch. 19 and Ch. 89 sets forth a bifurcated approach to complaints processing by assigning responsibility for handling and deciding on discrimination, harassment, and bullying complaints under Ch. 19 to administrators in each individual school, and then assigning responsibility for handling complaints under Ch. 89 to the DOE's Civil Rights Compliance Branch (CRCB). By assigning responsibilities under Ch. 19 to the administrators of individual schools, the handling and resolution of such complaints would remain open to inconsistencies from school to school, and from those handled and resolved by CRCB. Providing for "consultation" with CRCB staff does not overcome the delegation in Ch. 19 of investigation and final decision-making authority to each school's top administrator. This is basically the problematic process that DOE has had over the past years, and proposed rule changes do not assure equity, consistency, or fairness in DOE's handling of discrimination, harassment, and bullying complaints. DOE now has an increased number of civil rights staff for the express purpose of handling civil rights complaints, yet they would not be assigned responsibility for civil rights complaints under Ch. 19.

DOE needs to assure that its complaint processes are consistent and fair for all students, including protected class students, regardless where a student goes to school, and particularly for alleged civil rights violations, whether involving student and/or adult violations and/or systemic failings.

See: Proposed Section 8-19-30, Proposed Section 8-89-1, Proposed Section 8-89-6

G. DOE's proposal to increase penalties against high school students for "harassment" and "bullying" under Ch. 19 is unfair, unwarranted, and inconsistent and would not fairly support all students, including those that harass and bully.

DOE proposes to re-designate the offenses of bullying and harassment by high school students as class A offenses from their current status as class B offenses in Ch. 19.

However, all students deserve support in public schools to function appropriately and to receive the benefits of public education, including student offenders. It is unfair and unwarranted for DOE to put greater fault on students that bully and harass, while it still neglects its own responsibilities to prioritize and implement a discrimination, bullying and harassment prevention program and to provide the support and education needed by all students on recognizing prohibited bullying and harassment, on recognizing and understanding how prohibited discrimination often motivates bullying and harassing behaviors, on ways to handle their problems without offending, and on conduct that is mutually respectful. DOE needs to take these and other steps warranted to fairly preserve the access of all students to public school education, including those that bully or harass or are at risk for such offenses. DOE has not shown that simply increasing the level of offense would prevent students from expressing harassing and/or bullying behaviors or make targeted students safer. Increasing classification status for harassment and bullying would be unwarranted and unfair without justification or clear rationale.

Moreover, DOE would confusingly designate "discrimination" as a Class B offense making it unclear how decision-makers should consider discriminatory harassment and discriminatory bullying conduct. Yet, DOE acknowledges the interrelatedness of discrimination, harassment, and bullying by providing a specific complaint process for these three offenses in Ch. 19.

DOE should *not* change the designation of "harassment" and "bullying" from class B to class A offenses.

See: Current Section 8-19-6, Proposed Section 8-19-6

H. DOE would unfairly lessen protections for students from harassment and bullying under Ch. 19 by narrowing the conditions for accepting complaints, and deleting clear notice of offending conduct.

DOE proposes to delete the broad meaning of "harassment" currently in the definition of "harassment" in Ch. 19 that focuses on the harmful impacts felt by students from harassing conduct, and proposes to replace it with a less student centered definition including impacts that place a greater burden on victimized students, including protected class students.

Ch. 19 currently states that “harassment” means “harassing, bullying, including cyberbullying, annoying, or alarming another person by engaging in the following conduct that includes but is not limited to” and then lists eight paragraphs that describe the kinds of conduct and impacts that are prohibited. The current definition of “harassment” is in plain language that is readily understood by students, parents, DOE staff and other adults in the schools. DOE would replace this broad meaning and clear examples of prohibited conduct by reducing this definition to one paragraph that narrows the meaning of “harassment” and provides less opportunity for students to complain of “harassment” or “bullying”, and that increases the burden of proof on student victims before they would be able to file a Ch. 19 complaint of “harassment”. As a result, these amendments would put up barriers for victimized students to file complaints under Ch. 19 that do not currently exist, and further deter the filing of Ch. 19 complaints.

DOE would also forego the benefits to all students, parents, and employees of clear notice of prohibited harassing behaviors now provided by the current plain language and listing of specific kinds of prohibited conduct. DOE would delete eight paragraphs that describe prohibited conduct currently in Ch. 19 and reduce them to one statement that does not clearly include all conduct currently prohibited as “harassment” under Ch. 19. Moreover, the wholesale deletion of the paragraphs that describe specific kinds of harassing conduct, results in the complete deletion of any reference to “(7) Causing fear as to prevent others from gaining legitimate access to or use of school building, facilities, services, or grounds such as, but is not limited to restroom facilities”, that is an important problem for protected class students, particularly LGBTQ+ students, such as transgender and gender non-conforming students, that are widely discriminated against, harassed and bullied when trying to access restrooms and other facilities consistent with their gender identity. Deleting the plain language descriptions of prohibited conduct currently included as “harassment” in Ch. 19 will make it less clear and therefore more difficult for DOE to determine harassment against protected class and other students, and to enforce access to facilities required by DOE in DOE’s Guidance on Supports for Transgender Students. DOE fails to provide good reason that warrants these changes in the definition of “harassment.”

Also, despite the detrimental effect on students’ access to Ch. 19 complaint process, DOE proposes to also use this proposed amended definition of “harassment” in Ch. 89 that would make it also more difficult for a student to complain of “harassment” by DOE employees, volunteers and others under Ch. 89 than is currently available under the definition of “harassment” in Ch. 41, further disadvantaging protected class students.

For the safety of all students, DOE should retain the current broad definition and kinds of conduct currently listed in the Ch. 19 definition of “harassment” to broadly allow students that are harassed to file a Ch. 19 complaint, and should retain a listing of prohibited conduct in plain language to make the offense of “harassment” readily understandable and to retain the clear notice to students, parents, DOE employees and other adults now provided in Ch. 19. DOE should similarly include in Ch. 89 a broad definition of “harassment” that is readily understood and that broadly allows protected class students to file a Ch. 89 complaint.

See: Current Section 8-19-2 Definitions, “harassment”, and Proposed Section 8-19-2 Definitions, “harassment”

I. DOE would unfairly put up more barriers for students to file a complaint of “retaliation”.

Currently, Ch. 41 simply prohibits any “reprisal” that occurs because the alleged victim has filed a complaint or participated in any part of a Ch. 41 proceeding. However, proposed Ch. 89 instead would limit complaints of “retaliation” or reprisal only upon a showing that the retaliating action, or “adverse action”, “would dissuade a reasonable person from making or supporting a complaint.” This “dissuade a reasonable person” requirement would make it more unclear and more difficult for a victimized student to complain of reprisals or retaliatory actions by putting a greater burden of proof on the victimized student. The purpose of allowing a complaint for reprisal or retaliation is to dissuade and/or penalize any action that is retaliatory or in reprisal for a student seeking relief under these rules, and should not be used to dissuade student victims from filing such complaints. This new definition of “retaliation” would make filing a complaint for “retaliation” under Ch. 89 more difficult than is now available under Ch. 41. DOE provides no good reason that warrants this more burdensome definition of “retaliation” and for lessening protection from reprisals or retaliation by adding this “dissuade a reasonable person” requirement.

Also, DOE proposes to also use this more demanding definition of “retaliation” in Ch. 19, making relief from reprisals or retaliation less available for protected class students under Ch. 19 than was available to them under Ch. 41 for complaints of discrimination, harassment, or bullying, and for other students that file or support a complaint of discrimination, harassment, or bullying.

For the safety of all students, DOE should delete the proposed “dissuade a reasonable person test” requirement in the definition of “retaliation” and retain a broad definition that would continue to make reprisals or retaliation complaints broadly available to all students under Ch. 19 and under Ch. 89.

See: Current Section 8-41-15, Proposed Section 8-89-2 Definitions, “Retaliation”, Proposed Section 8-89-8, Current Section 8-19-2 Definitions, “Retaliation”, Proposed Section 8-19-34

J. DOE would put victimized student at increased risk by suggesting an “informal resolution” process between parties when students file a complaint of discrimination, harassment or bullying under Ch. 19.

Informal resolution between parties is not considered appropriate for complaints of discrimination, harassment or bullying at any age because of the already harmed condition of the complainant/victim from conduct of the alleged perpetrator, such a process would put the complainant/victim at further risk of harm, and would put an overwhelming burden on K-12 students by even the suggestion that they undertake an informal resolution process. These already fearful students would be further disadvantaged and put at risk because of the additional stress and fear of the prospect of further communication and contact with the alleged perpetrator or perpetrators, and from being asked to participate by a DOE employee in a position of authority. And should the student accede to the pressure of a suggestion of informal resolution from a DOE authority, the student would be in real risk of further

trauma and other harm from an alleged perpetrator. If student complainant/victims were able to informally negotiate the situation of resolution of discrimination, harassment, or bullying would not have come to DOE authorities for help. An informal resolution process is not in the best interests of students, particularly for students that already suffer from discrimination, harassment and bullying, and is completely inappropriate in Ch. 19 complaint proceedings. Allowing various investigators to exercise discretion as to the appropriateness of an informal resolution process would still allow these complainant/victims to be subjected to the risks and burdens of an informal resolution process that is dangerous to even offer. DOE does not provide any justification for including an informal resolution process in the Ch. 19 complaint process despite the risk of further harm to complainant/victims.

For the safety of all students, including protected class students, DOE should delete entirely the informal resolution process proposed for Ch. 19 for students that file complaints alleging discrimination, harassment, and bullying.

See: Proposed Section 8-19-30 (f)

K. DOE would wrongly make “immediate interventions” available to alleged adult perpetrators of discrimination, harassment or bullying under Ch. 89.

“Immediate interventions” are appropriate for complainant/victims under Ch. 19 and Ch. 89, and alleged student offenders under Ch. 19, but are not appropriate for alleged adult perpetrators under Ch. 89. Instead, DOE should make consideration of the safety and wellbeing of student victims its primary concern when an adult is the alleged perpetrator, and should require in these rules that DOE take all actions necessary regarding the alleged adult perpetrator for the safety of complainant/victims, other students and other adults in the schools, such as suspension from school while the complaint is being resolved.

For the safety of all students, DOE should amend the provision in Ch. 89 that would allow both parties to request “immediate interventions” in the definition of “immediate interventions” and in the complaint and investigative process in Ch. 89 that provides for DOE to offer “immediate interventions” to the alleged perpetrator/respondent as well as to the student that files a complaint under Ch. 89. DOE should instead allow “immediate interventions” only for complainant/victims, and to require actions be taken regarding the alleged perpetrator/respondent as necessary for the safety of complainant/victims and other persons in the school.

Also, DOE should delete the phrase in Ch. 19 under the definition of “immediate interventions” that states “including racial, sexual or disability discrimination,” and in Ch. 89 that states “to protect students from racial, sexual, or disability discrimination” as both of these phrases are wrongly limited or inappropriate.

See: Proposed Section 8-19-2 Definitions, “immediate interventions”, Proposed Section 8-89-2 Definitions, “immediate Interventions”, Proposed Section 8-89-6

L. DOE would put LGBTQ students further at risk by automatically informing parents when complaints are filed for discrimination, harassment or bullying under Ch. 19 and Ch. 89.

Discrimination is still widespread in the community as well as in the schools, and LGBTQ students face an inordinate amount of ignorance, lack of understanding, and rejection based on discriminatory views, not only from adults and students in the schools, but also from their own parents or caregivers. It is critical that DOE recognize the risk of further harm to LGBTQ+ student complainant/victims if parents or caregivers are automatically informed of a student's involvement in a protected class complaint proceeding. LGBTQ+ students that are not "out" to others in the school or to their parents, and other students that do not have parent support for their protected class status, must be protected by confidentiality when they decide to file a complaint. The Privacy provisions are not sufficient as they would also expose LGBTQ+ students and other students to nonaccepting parents or caregivers. Without complete confidentiality, LGBTQ+ students would be further deterred from filing a complaint.

For the safety of LGBTQ+ students and other students at risk from disclosure, including to their parents, it is critically necessary that DOE provide confidentiality throughout Ch. 19 and Ch.89 complaint processes and thereafter. See for example, provisions for confidentiality, including from parents, in DOE's "Guidance on Supports for Transgender Students."

See: Proposed Section 8-19-4.1, Proposed Section 8-19-30, Proposed Section 8-19-31, Proposed Section 8-89-6, Proposed Section 8-89-11

M. DOE would unfairly and irresponsibly exempt its own employees from reporting discrimination, harassment, and bullying of protected class students by other DOE employees, volunteers, or third parties under Ch. 89.

DOE would require students and parents to report discrimination, harassment, and bullying against a protected class student by a DOE employee, volunteer, or third party under Ch. 89, but would not require DOE employees that witness or know of such offenses against a protected class student to also report the offending DOE employee, volunteer, or third party to DOE authorities.

On the other hand, DOE makes it mandatory under Ch. 19 for DOE employees to report class A and class B offenses (that would include offenses of discrimination, harassment, and bullying) to school authorities that an employee witnesses or believes was or will be committed. DOE provides indemnity for employees' reporting such offenses and also penalties for failure to report.

For the safety of all of its students, particularly protected class students, DOE should make it mandatory under Ch. 89 that DOE employees report incidents of discrimination, harassment, bullying or retaliation against a protected class student by a DOE employee, volunteer, or third party, that an employee witnesses or has knowledge of. Such offenses are even more egregious when committed by an adult against a protected class student.

See: Proposed Section 8-89-5, Proposed Section 8-89-6 (a)(4), Proposed Section 8-19-19, Proposed Section 8-19-20, Proposed Section 8-19-21

N. DOE would unfairly allow students to be charged with “fighting”, including protected class students, when facing discrimination, harassment, or bullying, and physical contact was instigated and provoked by another student.

The problem is in the definition of “fighting” as “instigating or provoking physical contact involving anger or hostility, “ but also includes in the definition: “(3) Retaliating physically for teasing, harassing, threatening, or intimidating behavior”, that allows DOE to fault the targeted student, including protected class students, even when the provoking student is motivated by discriminatory views and the target is a protected class student. This is a particular problem for protected class students, and particularly for LGBTQ students, who are frequently targeted for discrimination, harassment, and bullying, and provoked to defend themselves. Frequently targeted protected class students, such as LGBTQ students, are often faulted and labeled as “troublemakers” for their involvement in such incidents, despite an underlying discriminatory motivation, provoking, instigating, and threatening actions by other students that they often face when attending school. Being unfairly faulted for fighting can put a student unfairly at risk of juvenile justice involvement and failure in school.

For the safety of all students, including protected class students, this definition of “fighting” should be amended so that students that are targeted and provoked into physical contact are not unfairly charged with “fighting” and that the rules provide for consideration of “fighting” incidents as discrimination, harassment and/or bullying offenses.

See: Proposed Section 8-19-2 Definitions, “Fighting”

O. DOE needs to also protect students *perceived* to have protected class status and targeted for discrimination.

DOE’s definition of “discrimination” in Ch. 19 and Ch. 89 would only address “treating a student differently on the basis of a protected class” that is, students with a protected class status.

To protect all students from “discrimination”, the definition of “discrimination” in Ch. 19 and Ch. 89 should state, “on the basis of *actual or perceived* protected class status”.

See: Proposed Section 8-19-2 Definitions, “Discrimination”, Proposed Section 8-89-2 Definitions, “Discrimination”

Testimony

To: Department of Education (HIDOE) Public Hearing

From: Robert J. Bidwell, M.D., Pediatrician/Adolescent Medicine

Meeting: July 16, 2019 Public Hearing

Subject: Public hearing on: 1) Amending HAR Chapter 8-19

2) Adoption of Proposed HAR Chapter 8-89

3) Repeal of HAR Chapter 8-41

Position: Deep reservations re: **Proposed Chapters 19 (amended) and 89.**

As a pediatrician and adolescent medicine physician in Hawai`i for the past 38 years, I have had the privilege of providing care and counseling to children and adolescents who have spent a significant portion of their lives passing through our public school system. Among these have been hundreds of immigrant youth, youth with disabilities, and those with other personal characteristics that place them at increased risk for discrimination, harassment and bullying. The most recent focus of my pediatric practice over the past 6 years has been providing care and counseling to children and youth facing personal issues of gender identity, gender expression and sexual orientation, who are among the most likely to experience discrimination, bullying and harassment in our schools.

From 1991-1992 I served as Chair of the Hawai`i Gay and Lesbian Teen Task Force, which was requested through a joint resolution of the Hawai`i State Legislature to conduct a survey of the experience and needs of Hawai`i's lesbian, gay, bisexual and transgender (LGBT) youth. In its 1992 final report to the legislature the Task Force presented among its conclusions the following:

“Hawai`i’s schools, both public and private, are dangerous places for youths perceived to be lesbian, gay or transgender. These students face a daily threat of ridicule, physical violence and sexual assault on our school campuses. At times teachers have quietly condoned or actively participated in the harassment. With little protection or supportive counseling, many sexual minority youths have dropped out of school rather than contend with continuing fear and abuse.”

Unfortunately, as a pediatrician providing care to LGBT children and youths, as well as other vulnerable young people, from the 1980s to the present, the above statement from the Task Force report is, for many students, as true today as it was 27 years ago. (This assertion is supported by the Hawai`i-specific Youth Risk Behavior Survey data on bullying and harassment experienced by lesbian, gay and bisexual students which was presented in the 2017 Hawai`i Department of Health (DOH) publication “Hawai`i Sexual & Gender Minority Health Report”¹ and a companion DOH report the following year on the experience of school violence by Hawai`i’s transgender youth: “Hawai`i Sexual and Gender Minority Health Report 2018: A Focus on Transgender Youth.”²

To put a human face on the issue of discrimination, bullying and harassment in our schools and how our school system often fails our students who are subjected to these forms of violence, I will briefly present the experience of one of my recent patients, in very general terms to protect this student’s confidentiality. This young adolescent child was referred to me because the child had recently been at the brink of suicide. This child had known since a very early age that their inner gender identity differed from the gender assigned to them at birth. In elementary school, as this child began to more openly express their inner gender through clothing and hairstyle, harassment and bullying by peers in the school setting began but was never addressed by teachers or other school staff. The violence escalated at the beginning of Middle School, with daily name-calling, ridicule and physical violence from multiple students across all grade levels. This occurred in classrooms, while walking between school buildings, and on the school bus to and from school. This violence was witnessed by school staff but no one intervened to end the violence. Furthermore, the violence no longer came

only from students but teachers began joining in, for example, leading classrooms in laughter when it was noticed that this child presented in appearance in a gendered way that seemed to contradict the student's name as it appeared on the student rolls. At a certain point, this student gathered the courage to report the bullying and harassment by peers and teachers to the school counselor and administration. No corrective or supportive action was taken and the child reports feeling blamed for the daily violence and ridicule they continued to endure, feeling as if they were being given the message by school personnel, "If you weren't 'that way,' this wouldn't be happening to you." Finally, one day in class, it was suggested to this child by other students to consider suicide "because nobody likes you." Fortunately, the child's parents learned of this incident and immediately provided protection and support. Again, the school provided no corrective, remedial or other protective measures, other than to concur with the parents' decision to remove their child from the school and initiate home-schooling. I found this child's story to be profoundly sad, as the support and love that this child had received from the family was undermined by a school setting that tolerated mistreatment of this child to the point where suicide seemed the only option. This is only one story of many related to the experience of LGBT and other vulnerable youth during my 30+ years of pediatric practice. Discrimination, bullying and harassment are very real issues for many students, but too often schools have looked the other way, blamed the victimized child, simply "blown off" the seriousness of this issue, or thrown up their collective hands saying, "What do you expect us to do?! After all, we do have policies and a complaint process!" The answer, of course, is that we as parents and as a community expect our educational system to have a deep and informed system of support that assures that each and every student feels safe and affirmed on each and every school campus.

I have reviewed the proposed Chapters 89 and 19 related to civil rights and complaint procedures and find that in many ways they do not address the very real experience and needs of most students who often face daily violence in our schools through discrimination, bullying and harassment. As I record my specific concerns below I have kept in mind my patient described above, examining

whether the proposed amendments to Chapter 19 and the newly proposed Chapter 89 would make any difference in this child's daily experience of harassment, bullying or discrimination at their school. I have concluded they would not result in any meaningful change since the root causes of the violence they experience are not addressed by these Chapters. My patient's safety does not reside in a detailed complaint process or the severity of punishments prescribed for various harassing or discriminating behaviors by other students or DOE employees and volunteers. The violence that many students face daily grows out of a pervasive school culture of nonacceptance and tolerance of violence that allows bullying, harassment and discrimination to thrive unchecked, and that current and proposed policies, procedures, rules and programs continue to ignore or address only in the most reactive and superficial ways.

My specific concerns include the following:

- 1) I am deeply concerned that complaints-based policies such as Chapter 89 and Chapter 19 are completely reactive in nature and will address the safety needs of only a tiny smattering of students across the state.

These policies passively place the onus of reporting discrimination, harassment and bullying on the individual student which, besides being mean-spirited, also means that the vast majority of incidents of violence and discrimination against students will go unreported. This, in fact, what has been the state of affairs in our schools through decades past into the present. In fact, because we are talking about the safety and well-being of children, the DOE has the primary responsibility to assure, through the implementation of comprehensive, informed, creative, effective and enthusiastically embraced policies, that each and every student in each and every school comes feels affirmed and safe. This can be accomplished only by developing proactive "deep-dive" civil rights and student conduct/safety policies that are preventive, not reactive, in focus and work system-wide to transform an underlying school culture that has allowed discrimination, harassment and bullying to flourish into a system-wide school culture of acceptance and respect. Chapters 89 and 19, as presented at this hearing, may perhaps allow the

DOE to feel it is “at least doing something,” through what I consider a sort of “whack-a-mole” approach to student safety (ie a discriminatory incident reported in Kapolei – *whack!* A harassment incident in Kapa`a – *whack!* A bullying encounter in Kaunakakai – *whack!*) And these individual responses are necessary. But the “moles” keep coming because the underlying reasons for their popping up are never addressed. The discrimination, harassment and bullying that occur each and every day on each and every campus across the state are symptoms of a deeper malaise that call for a much different and deeper policy approach than that offered by either Chapters 89 or 19.

- 2) I am concerned that Chapters 89 and 19 create two separate processes for addressing student complaints of discrimination, harassment and bullying: one process if the mistreatment is perceived as coming from DOE employees and volunteers, and another process if the mistreatment is perceived as coming from another student. In fact, such perceptions, particularly those related to student-on-student violence, are often simplistic and incorrect. As the experience of my patient described above illustrates, school administration and teachers were deeply implicated not just in their directly perpetrating discrimination and harassment against this child, but just as importantly by creating a climate on campus that tolerated, even encouraged, the violence perpetrated upon my patient by other students. Only policies that recognize and address discrimination, harassment and bullying ‘as of one piece,’ growing out of an underlying culture of nonacceptance and violence in our schools, by instituting “deep-dive” system-wide policies, procedures, rules, curricula and programs that are aimed specifically at creating a culture of acceptance and respect, will protect and nurture our children in a meaningful way.
- 3) I am concerned that Chapter 89 provides for protections against acts of discrimination, harassment and bullying only for students having “protected class status.” This seems inappropriate and unfair since the DOE Code of Conduct specifically prohibits harassment and other

harmful conduct by DOE employees and volunteers against all students, not just those within a protected class. Over the years I have provided care and counseling to a number of “nonprotected class” students of the DOE who have reported to me behavior by a teacher, security or other staff who “had it in for them” that certainly appeared to be harassing in nature. They should have the same rights as other students to report and expect appropriate resolution of such incidents.

- 4) I am concerned that the DOE in Chapter 89 has adopted a definition of “systemic discrimination” that says it is only deemed to have occurred when “an established policy” has the effect of violating the nondiscrimination rights of a student. I would argue that the nondiscrimination rights of my patient described above were violated, and that severe life-threatening harm was caused, by the DOE’s failure to establish a system-wide response of meaningful policies and programs 1) to address the pervasive culture of nonacceptance and violence at this child’s school and 2) to bring about a system-wide culture of acceptance and respect. Specifically, the DOE has failed to provide the guidance, support, training and professional development to DOE administration and staff on the nature of bias, its harmful effects, and the skills needed to address incidents of bias in the school setting. It also has failed to provide a clear message from DOE leadership in the form of memoranda and creative “deep-dive” policies and programs that this is of the highest priority within the DOE. Similarly, it has failed system-wide to effectively provide students themselves a deeper understanding of the nature and harmful effects of bias and discrimination and how they can help create a school community of acceptance and respect.

I recommend that the DOE adopt a broader definition of “systemic discrimination” that includes the failure to provide effective policies, procedures, rules, curricula and programs to address discrimination, harassment and bullying within our schools. This would have given my

patient greater recourse in what clearly was an example of systemic discrimination that brought this child to the brink of suicide.

- 5) I am concerned that in the amended Chapter 19 the DOE has increased the penalties for harassment and bullying from Class B to Class A offenses. First, it is highly unlikely that this will have any effect on the incidence of harassment and bullying in our schools, although it may allow the DOE, in the absence of any more creative and effective ways to create a culture of respect throughout our school system, to say, “Well, at least we’re doing *something*!” regardless of whether that *something* has any meaningful impact on student safety across the school system. Furthermore, it strikes me as incomprehensible, even perverse, to increase the severity of penalties on students when the DOE has instituted no comprehensive and systematic discrimination, harassment and bullying prevention policies or programs that would be of benefit to all students, including those who, with the appropriate education and attending a school having a culture of respect, might be much less likely to perpetrate violence against their fellow students.
- 6) Both Chapters 89 and 19 should expand the definition of “discrimination” to read “on the basis of actual *or perceived* protected class status.” I have had patients who were perceived to have protected class status (most often a youth perceived to be gay, but others as well) and were targeted for discrimination, harassment and/or bullying based on that perception.
- 7) In Chapter 89, it should be mandatory for DOE employees to report to DOE authorities any witnessed or known instances of discrimination, harassment or bullying perpetrated against a protected class student by a DOE employee or volunteer. Too often I have had patients report such instances occurring at school with DOE staff were present as bystanders but did nothing to protect the student from the witnessed harmful treatment by other staff.

- 8) I strongly recommend removing the section that calls for an “informal resolution” process to address instances of discrimination, bullying or harassing behavior perpetrated by a school employee against a student. The ‘power differential’ between an adult teacher or other DOE staff or volunteer and a minor child is inherently unequal. “Informal resolution” was what was encouraged by school administration when addressing the violence faced daily by my patient presented above. The attempts to informally resolve what was happening to my patient were feeble, and “clueless” in many ways about the nature and underlying causes of discrimination and harassment. They seemed to show a lack of understanding of child development in their not perceiving the great disadvantage (and fear!) faced by a child when confronting an adult assailant or “the system” in a process of attempted “informal resolution.” Informal resolution may be an appropriate strategy to resolve conflicts in some cases between two adults of equal power and status, but it is never appropriate in resolving a conflict between a child or youth and an adult authority figure, particularly when the conflict involves an assertion of child mistreatment.
- 9) I recommend that the definition of “fighting” in Chapter 19 be amended so that students who are provoked into fighting due to harassment or bullying by other students, especially those who have protected class status and therefore are at increased risk for being targeted for violence by other students, are protected from being unfairly charged with fighting. This is particularly important in the absence of any DOE policy that seeks to establish a system-wide culture of acceptance and respect.
- 10) I am concerned for the safety of some students, most often LGBTQ (lesbian, gay, bisexual, transgender/gender nonbinary and questioning) students, if parents are automatically informed of incidents of harassment and bullying when a complaint is filed. Many LGBTQ students are not “out” to their parents, and many parents are not

supportive of their LGBTQ children and may respond to their child in a rejecting or violent way. Knowing a parent will automatically be notified also will make it much less likely that these youth will report their mistreatment by DOE employees or their fellow students to DOE authorities, putting them at risk for further harm. Therefore, these policies should make accommodation for students lacking parental support related to their protected class status by respecting their need for confidentiality and allowing for flexibility around the issue of parental notification throughout the complaint process, taking into account the circumstances of a particular student and whether parental notification could result in further harm to the child.

In summary, given my concerns above related to the limited benefit of Chapters 89 and 19 to assure the safety and well-being of most students under the care of DOE, I urge the Hawai'i Department of Education to develop more proactive "deep-dive" policies that address the underlying culture in our schools that has allowed discrimination, harassment and bullying to find fertile ground in which to grow and thrive. These policies would encourage the development of comprehensive system-wide practices, curricula and programs that would create a new culture of respect that would go a long way toward decreasing the incidence of discrimination harassment and bullying in our schools.

Thank you so much for your consideration of my testimony above.

Respectfully,

Robert J. Bidwell, M.D.

1. Holmes JR, Ching LK et al for the Hawai'i Sexual and Gender Minority Work Group. 2017. Hawai'i Sexual and Gender Minority Health Report. Honolulu: Hawai'i State Department of Health, Chronic Disease Prevention and Health Promotion Division.

2. Ching LK, Holmes JR, Pham T, Tomita KK, Chosy EJ, Kapua C, Starr RR for the Hawai'i Sexual and Gender Minority Work Group. 2018. Hawai'i Sexual and Gender Minority Health Report: A Focus on Transgender Youth. Honolulu: Hawai'i State Department of Health, Chronic Disease Prevention and Health Promotion Division.



Agency: Department of Education
Date/Time: Tuesday, July 16, 2019, 10 a.m
Place: 1390 Miller Street, Honolulu, HI, Room 404
Re: Testimony of the ACLU of Hawai'i with Comments on Draft
Amendments to Chapters 19 and 89

Dear Board of Education members and Department of Education officials:

The ACLU of Hawai'i ("ACLU") writes to testify with comments on the Department of Education's proposed revisions to Chapter 19 and replacement of Chapter 41 with Chapter 89 to update the definitions of bullying and harassment on the basis of protected class within the school disciplinary code. At this public hearing, the ACLU of Hawai'i wishes to reiterate the severity of recategorizing these offenses from Class B to Class A for ninth through twelfth grade students. While the purpose of these amendments is to address the vulnerabilities of students in protected classes, we wish to highlight that students engaging in bullying behavior may be suffering from trauma or belong to a protected class themselves.

Beyond addressing incidents of bullying and harassment, we urge HIDOE to revise its disciplinary policies and practices to address overall school climate. A school's primary response to misconduct requires a broader consideration of evidence-based options and alternatives to punitive measures, particularly in the bullying and harassment context, where school or system-level problems may be contributing to the bullying and harassment. The way forward is to make school a more welcoming, inclusive place for all. Moving cyberbullying, bullying, and sexual harassment to Class A violations for older students continues down the path of over-penalizing student behavior that can be more effectively corrected in less punitive ways.

Additionally, we recommend moving away from suspending students for long periods of time as a penalty for bad behavior. Many school districts have eliminated suspensions altogether from lower grades. Other jurisdictions have set limits on how long suspensions can be, setting maximums of seven days for older children, and five days for younger children in the same class of violations. This is much shorter, more reasonable, and more effective than denying a student an education for up to ninety-two days as it is currently contemplated in Chapter 19.

We also recommend the Department collect and maintain publicly available records on student discipline indicators, including demographic information, including protected class status, of students who are deemed to be in violation of any class of offenses, and their resulting suspensions (if applicable).

Testimony of the ACLU of Hawai'i
July 16, 2019
Page 2 of 2

Thank you in advance for your time and attention to this matter. If you have any questions or comments, please feel free to contact me at 380-5422 or rshih@acluhawaii.org.

Sincerely,

/s/ Rae Shih
Rae Shih
Legal Fellow
ACLU of Hawai'i

Aloha,

I am writing to submit testimony in opposition to the Hawaii Department of Education's proposals regarding Title 8, Hawaii Administrative Rules, Chapter 8-19, Chapter 8-41, and Chapter 8-89.

I am a longtime human rights advocate on Oahu and a producer of educational films for public television.

Following are some of the problems I see with the proposed rules changes:

- DOE would continue to deny equal access to a public school education to students that suffer from ongoing discrimination, harassment, and bullying in DOE schools.
- DOE's "complaints only" approach that echoes the same approach adopted years ago, is wholly inadequate to provide real relief to students suffering from discrimination, harassment, and bullying in DOE schools.
- DOE's bifurcated complaint process obscures much of the problem of discrimination, harassment, and bullying in DOE schools, particularly the fact that DOE employees are often involved and/or part of the problem.
- DOE's complaint process would unfairly exclude non-protected class students from filing complaints against DOE employees or other adults for harassment, bullying or other prohibited behavior towards a student under Ch. 89 and Ch. 19.
- DOE deliberately attempts to limit its responsibilities for systemwide discrimination, harassment and bullying in Ch. 89.
- DOE would provide a scattered, inconsistent and uncertain complaint process for discrimination, harassment, and bullying.
- DOE's proposal to increase penalties against high school students for harassment and bullying under Ch. 19 is unfair, unwarranted, and inconsistent and would not fairly support all students, including those that harass and bully.
- DOE would unfairly lessen protections for students from harassment and bullying under Ch. 19 by narrowing the conditions for accepting complaints, and deleting clear notice of offending conduct.
- DOE would unfairly put up more barriers for students to complaint of retaliation.
- DOE needs to also protect students perceived to have protected class status and targeted for discrimination.

- DOE would put victimized students at increased risk by suggesting an "informal resolution" process between parties when students file a complaint of discrimination, harassment or bullying under Ch. 19.

- DOE would unfairly exempt its own employees from reporting discrimination, harassment, and bullying by other DOE's employees, volunteers, or third parties.

DOE would wrongly make "immediate interventions" available to alleged adult perpetrators of discrimination, harassment or bullying under Ch. 89.

- DOE would unfairly put LGBTQ students further at risk by automatically informing parents when complaints are filed for discrimination, harassment or bullying under Ch. 19 and Ch. 89.

Thanks for your attention and consideration.

Looking forward to a more informed and enlightened approach to these issues on behalf of all of Hawaii's youth and families.

Joe Wilson
Director - [Qwaves](#)
58-125 Iwila Place
Haleiwa, HI 96712

*Copied directly from Director Wilson's email to CRCO@notes.k12.hi.us, received 7/15/19 at 2042 hours.

Aloha,

I am submitting the following testimony concerning the proposed changes to Title 8 Chapter 19, 41, and 89. While I greatly appreciate the DOE's ongoing efforts to insure the rights of all students, I am concerned that some of the proposed revisions and eliminations may have the opposite effect.

As an advocate for sexual and gender minority students, and a media observer of the challenges these students have and continue to face, I feel it's especially important to get these changes "just right," and to make sure that the voices of our community members are heard.

My specific concerns are as follows:

First, DOE's bifurcated complaint process obscures and would ignore the problems of staff and systemic failings involved in discrimination, harassment, and bullying in DOE schools. Ch. 19 offers a complaint process only for student offenders, and Ch. 89 offers a separate complaint process only for DOE employees, volunteers or third parties. DOE does not provide the opportunity for complaints to also consider the role that employees or other adults in authority in the schools have in preventing and stopping discrimination, harassment, and bullying in the schools. Where students readily express discriminatory, harassing, and bullying behavior in a school, DOE employees are often involved and part of the problem, such as by not acting to stop such behavior, being a silent bystander, minimizing such offending behavior as "normal teasing", faulting the victim, or even agreeing with the ridicule and bad treatment of protected class students, particularly LGBTQ+ students. Discrimination, harassment, and bullying are more complicated offenses instead of simple "either or" situations, and the involvement and ineffectiveness of DOE administrators and employees in the schools are indications of widespread systemic failure to adequately protect not only protected class students but also all other students in DOE schools from these offenses.

Second, DOE would unfairly lessen protections for students from harassment and bullying under Ch. 19 by narrowing the conditions for accepting complaints, and deleting clear notice of offending conduct. DOE proposes to delete the broad meaning of "harassment" currently in the definition of "harassment" in Ch. 19 that focuses on the harmful impacts felt by students from harassing conduct, and proposes to replace it with a less student centered definition including impacts that place a greater burden on victimized students, including protected class students. Ch. 19 currently states that "harassment" means "harassing, bullying, including cyberbullying, annoying, or alarming another person by engaging in the following conduct that includes but is not limited to" and then lists eight paragraphs that describe the kinds of conduct and impacts that are prohibited. The current definition of "harassment" is in plain language that is readily understood by students, parents, DOE staff and other adults in the schools. DOE would replace this broad meaning and clear examples of prohibited conduct by reducing this definition to one paragraph that narrows the meaning of "harassment" and provides less opportunity for students to complain of "harassment" or "bullying", and that increases the burden of proof on student victims before they would be able to file a Ch. 19 complaint of "harassment". As a result, these amendments would put up barriers for victimized students to file complaints under Ch. 19 that do not currently exist, and further deter the filing of Ch. 19 complaints.

DOE would also forego the benefits to all students, parents, and employees of clear notice of prohibited harassing behaviors now provided by the current plain language and listing of specific kinds of prohibited conduct. DOE would delete eight paragraphs that describe prohibited conduct currently in Ch. 19 and reduce them to one statement that does not clearly include all conduct currently prohibited as “harassment” under Ch. 19. Moreover, the wholesale deletion of the paragraphs that describe specific kinds of harassing conduct, results in the complete deletion of any reference to “(7) Causing fear as to prevent others from gaining legitimate access to or use of school building, facilities, services, or grounds such as, but is not limited to restroom facilities”, that is an important problem for protected class students, particularly LGBTQ+ students, such as transgender and gender non-conforming students, that are widely discriminated against, harassed and bullied when trying to access restrooms and other facilities consistent with their gender identity. Deleting the plain language descriptions of prohibited conduct currently included as “harassment” in Ch. 19 will make it less clear and therefore more difficult for DOE to determine harassment against protected class and other students, and to enforce access to facilities required by DOE in DOE’s Guidance on Supports for Transgender Students. DOE fails to provide good reason that warrants these changes in the definition of “harassment.”

Third, DOE would put LGBTQ students further at risk by automatically informing parents when complaints are filed for discrimination, harassment or bullying under Ch. 19 and Ch.

89. Discrimination is still widespread in the community as well as in the schools, and LGBTQ students face an inordinate amount of ignorance, lack of understanding, and rejection based on discriminatory views, not only from adults and students in the schools, but also from their own parents or caregivers. It is critical that DOE recognize the risk of further harm to LGBTQ+ student complainant/victims if parents or caregivers are automatically informed of a student’s involvement in a protected class complaint proceeding. LGBTQ+ students that are not “out” to others in the school or to their parents, and other students that do not have parent support for their protected class status, must be protected by confidentiality when they decide to file a complaint. The Privacy provisions are not sufficient as they would also expose LGBTQ+ students and other students to nonaccepting parents or caregivers. Without complete confidentiality, LGBTQ+ students would be further deterred from filing a complaint.

For the safety of LGBTQ+ students and other students at risk from disclosure, including to their parents, it is critically necessary that DOE provide confidentiality throughout Ch. 19 and Ch. 89 complaint processes and thereafter. See for example, provisions for confidentiality, including from parents, in DOE’s “Guidance on Supports for Transgender Students.”

Fourth, DOE would unfairly and irresponsibly exempt its own employees from reporting discrimination, harassment, and bullying of protected class students by other DOE employees, volunteers, or third parties under Ch. 89. DOE would require students and parents to report discrimination, harassment, and bullying against a protected class student by a DOE employee, volunteer, or third party under Ch. 89, but would not require DOE employees that witness or know of such offenses against a protected class student to also report the offending DOE employee, volunteer, or third party to DOE authorities.

On the other hand, DOE makes it mandatory under Ch. 19 for DOE employees to report class A and class B offenses (that would include offenses of discrimination, harassment, and bullying) to

school authorities that an employee witnesses or believes was or will be committed. DOE provides indemnity for employees' reporting such offenses and also penalties for failure to report.

For the safety of all of its students, particularly protected class students, DOE should make it mandatory under Ch. 89 that DOE employees report incidents of discrimination, harassment, bullying or retaliation against a protected class student by a DOE employee, volunteer, or third party, that an employee witnesses or has knowledge of. Such offenses are even more egregious when committed by an adult against a protected class student.

Fifth, DOE would unfairly allow students to be charged with "fighting", including protected class students, when facing discrimination, harassment, or bullying, and physical contact was instigated and provoked by another student. The problem is in the definition of "fighting" as "instigating or provoking physical contact involving anger or hostility, " but also includes in the definition: "(3) Retaliating physically for teasing, harassing, threatening, or intimidating behavior", that allows DOE to fault the targeted student, including protected class students, even when the provoking student is motivated by discriminatory views and the target is a protected class student. This is a particular problem for protected class students, and particularly for LGBTQ students, who are frequently targeted for discrimination, harassment, and bullying, and provoked to defend themselves. Frequently targeted protected class students, such as LGBTQ students, are often faulted and labeled as "troublemakers" for their involvement in such incidents, despite an underlying discriminatory motivation, provoking, instigating, and threatening actions by other students that they often face when attending school. Being unfairly faulted for fighting can put a student unfairly at risk of juvenile justice involvement and failure in school.

For the safety of all students, including protected class students, this definition of "fighting" should be amended so that students that are targeted and provoked into physical contact are not unfairly charged with "fighting" and that the rules provide for consideration of "fighting" incidents as discrimination, harassment and/or bullying offenses.

Lastly, DOE needs to also protect students perceived to have protected class status and targeted for discrimination. DOE's definition of "discrimination" in Ch. 19 and Ch. 89 would only address "treating a student differently on the basis of a protected class" that is, students with a protected class status. To protect all students from "discrimination", the definition of "discrimination" in Ch. 19 and Ch. 89 should state, "on the basis of actual or perceived protected class status". I hope these suggestions are useful. Thank you for your concern.

Sincerely,

Dean H Hamer, PhD

Qwaves.com

*Copied directly from Dr. Hamer's email to CRCO@notes.k12.hi.us, received 7/15/19 at 2028 hours.



S E A C
Special Education Advisory Council
1010 Richards Street, Room 118 Honolulu, HI 96813
Phone: 586-8126 Fax: 586-8129
email: spin@doh.hawaii.gov

July 16, 2019

**Special Education
Advisory Council**

Ms. Martha Guinan, *Chair*
Ms. Dale Matsuura, *Vice Chair*
Dr. Patricia Sheehey, *Vice
Chair*
Ms. Ivalee Sinclair, *Vice Chair*

Ms. Brendelyn Ancheta
Ms. Virginia Beringer
Ms. Deborah Cheeseman
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Mr. Motu Finau
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Mr. Francis Taele
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Ms. Jasmine Williams
Ms. Susan Wood

Mr. Drew Saranillio, *liaison
to the Superintendent*
Dr. Robert Campbell, *liaison
to the military*

Amanda Kaahanui, Staff
Susan Rocco, Staff

Beth Schemmelfennig, Director
Civil Rights Compliance Branch
Department of Education
1390 Miller Street, Room 416
Honolulu, HI 96813


RE: The Adoption of Proposed New Chapter 8-89--Civil Rights
Policy and Complaint Procedure for Student(s) Complaints
Against Adult(s)

Dear Director Schemmelfennig,

The Special Education Advisory Council (SEAC) provided numerous testimonies to the Board of Education on the above new administrative rule, Chapter 8-89, culminating in the Board's approval on February 7, 2019 of final language with which to proceed to public hearing. This language reflected many of SEAC's recommendations, and we therefore offer our general support of the rule.

The successful implementation of this new process for filing and resolving complaints of discrimination, harassment, and bullying against students in protected classes by Department personnel, volunteers, or adult third parties will require comprehensive training for the equity specialists as well as all school personnel. Students with disabilities have additional protections under the Individuals with Disabilities Education Act (IDEA). Therefore SEAC recommends highly that Chapter 8-89 as well as Chapter 8-19 related training includes the Office for Civil Rights (OCR) recommended proactive steps when a complaint of bullying involving a student with a disability is received. These include convening the IEP/504 Team to determine whether and to what extent: 1) the student's educational needs have changed; 2) the harassment/bullying/discrimination impacted the student's receipt of free appropriate public education (FAPE) services, and 3) whether additional or different services are needed and provided in a timely manner.

Sincerely,


Martha Guinan
Chair


Ivalee Sinclair
Legislative Committee Chair



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1390 Miller Street, Room 416
Honolulu, HI 96813

RE: The Proposal to Amend Chapter 8-19 to Make It Consistent with
the U.S. DOE Office for Civil Rights Agreement with the
Department and Its Current Policies and Practices

Dear Director Schemmelfennig,

The Special Education Advisory Council (SEAC) provided testimony to the Board of Education on each revision to the proposed amendments to Chapter 19 culminating in the Board's approval on February 7, 2019 of final language with which to proceed to public hearing. This language reflected many of SEAC's recommendations, and we therefore offered our general support of the amendments.

However, in light of new data shared at the June 6th ACLU Panel "Doing Right by Our Youth: Moving Beyond Punitive School Discipline" SEAC is now reconsidering the appropriateness of making bullying and harassment a Class A offense for high school students. SEAC was alarmed to learn that according to the Office for Civil Rights' own findings for SY 2015-16:

- Hawaii students with disabilities lost the **most** instructional days to suspensions--95 days per 100 students enrolled--than any other state in the nation;
- Lost instructional time was more than **two times greater** for special education students compared to students without disabilities; and
- Arrest rates for Hawaii students with disabilities were the **highest** per capita rate in the nation.

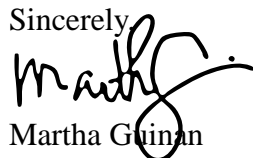
A June 14th article in the *Staradvertiser* also cited information from the Department's Data Governance Section that harassment is one of the two most common offenses leading to suspensions. While students



with disabilities are often the victims of bullying and harassment, research has also confirmed that students with learning disabilities and emotional disabilities are more likely to perpetuate bullying than students without disabilities, thereby putting them at a greater risk of being suspended for that behavior.

The alarming statistics highlighted at the ACLU panel and in the 2018 report “11 Million Days Lost: Race, Discipline and Safety at U.S. Public Schools” (which was based on the Office for Civil Rights’ suspension and expulsion data), reveal the probable harm caused to Hawaii students with disabilities in terms of poor academic performance, future risk of dropping out and negative post school employment outcomes. Given that this data was collected before the proposed amendments to Chapter 8-19, SEAC asks that the Department rethink the benefit vs. potential harm of recategorizing bullying and harassment as Class A offenses. SEAC acknowledges that principals have the discretion to apply discipline that avoids lost instructional time. However, history has shown that the most serious offenses generally result in the more punitive disciplinary measures.

Thank you for this opportunity to provide testimony on the proposed amendments to Chapter 8-19. Should you have any questions regarding this testimony, please contact me or Ivalee Sinclair, our Legislative Committee Chair.

Sincerely,

Martha Guinan
Chair


Ivalee Sinclair
Legislative Committee Chair

Board of Education

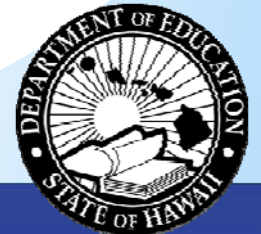
Board Action on: (1) Repeal of Hawaii Administrative Rules Chapter 41, entitled “Civil Rights Policy and Complaint Procedure”; (2) Adoption of Draft of New Hawaii Administrative Rules Chapter 89, entitled “Civil Rights Policy and Complaint Procedures for Student(s) Complaints Against Adult(s)”; and (3) Public Testimony Received at the July 16, 2019 Public Hearing

Board Action on: (1) Adoption of Draft amendments to Hawaii Administrative Rules Chapter 19, entitled “Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, and Restitution for Vandalism,” and (2) Public Testimony Received at the July 16, 2019 Public Hearing

Heidi Armstrong, Assistant Superintendent, Office of Student Support Services

Cynthia Covell, Assistant Superintendent, Office of Talent Management

August 15, 2019



Comprehensive Supports Approach

- BOE policies
- Multi-Tiered System of Support
- Nā Hopena A'o
- Youth Mental Health First Aid
- Anti-Bullying App



Timeline of Rule Update Process

DEC. 20, 2017

HIDOE entered into resolution agreement with the U.S. Department of Education

SEPT. 2018

Surveys administered to community stakeholders and all DOE employees

OCT. 4, 2018

Proposed rules presented to Board

FEB. 7, 2019

Updated proposed rules presented to Board, which voted to send the rules to a public hearing

APR/MAY 2018

11 community engagement sessions to notify public that the rules were being updated, and to seek initial input on updates

SEPT. 6, 2018

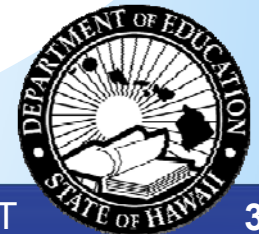
Joint hearing held by the Committee of Finance and Infrastructure and Student Achievement Committee

NOV/DEC. 2018

11 school administrator engagement sessions and 11 community engagement sessions

JULY 16, 2019

Public Hearing on proposed rules



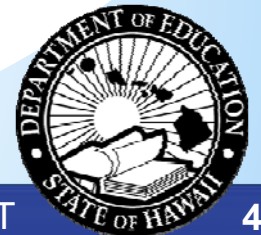
Overview of Proposed Updates

CHAPTER 19

- Updated definitions
- Complaint process
- Reclassified offenses

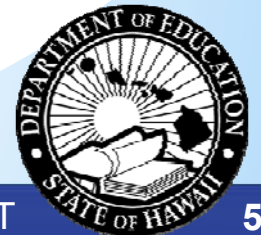
CHAPTER 89

- Complaint process



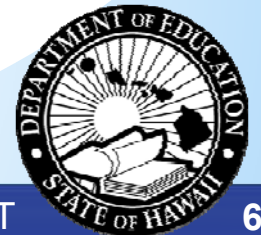
Comments Regarding Chapter 19

- Reclassification of offenses
- Fighting
- Inconsistent implementation
- Informal resolution



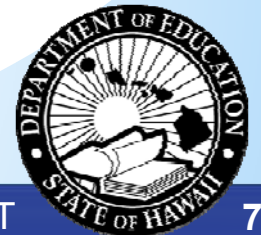
Comments Regarding Chapter 89

- Mandatory reporting
- Systemic discrimination
- Retaliation
- Immediate interventions
- Informal resolution



Comments - Chapter 19 and 89

- Overly focused on complaint process
- Holding employees responsible
- Definition of discrimination
- Definition of harassment
- LGBTQ students
- Non-protected class complaints



Next Steps

- Final sign off by Attorney General
- Review and Consideration by Governor
- Development of implementing guidelines
- HIDOE employee training

