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09/03/2018 04:03 PM

To testimony\_boe@notes.k12.hi.us  
cc boe\_hawaii@notes.k12.hi.us,  
catherine\_payne@notes.k12.hi.us  
Subject Testimony on Proposed Hawaii  
Administrative Rules Chapter 89 (HAR  
CH. 89) CIVIL RIGHTS POLICY AND  
COMPLAINT PROCEDURE FOR  
STUDENTS(S) COMPLAINTS  
AGAINST ADULT(S)

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To: Hawaii Board of Education and the Hawaii Department of Education (HIDOE)

From: Dean Hamer, Qwaves Media

Date: September 4, 2018

Subject: Hawaii Board of Education/Department of Education's (HIBOE/HIDOE) Proposed Hawaii Administrative Rules Chapter 89 (HAR CH. 89) CIVIL RIGHTS POLICY AND COMPLAINT PROCEDURE FOR STUDENTS(S) COMPLAINTS AGAINST ADULT(S)

As an investigative journalist and documentary film producer, I have witnessed first hand the harm and pain that prejudiced school employees can inflict on students. I have also documented how incredibly difficult it is for students to even report much less obtain redress for violations of their civil rights.

This is especially true for issues around gender identity and expression and sexual orientation – civil rights which are NOT federally protected, but depend on Hawaii state law for protection.

Therefore, while I support having the strongest possible civil rights for our students, I believe the proposed revision to HAR CH.89 needs additional work. To wit, the chapter should:

Clarify that HIDOE is **primarily** guided in its approach to civil rights enforcement by the broader and more inclusive HIBOE/HIDOE policies and directives that require HIDOE to strictly prohibit discrimination, bullying and harassment by employees, volunteers, and contractors; and that HIDOE is not limited by the narrower and lesser U.S. DOE approach in the rules that should be applied as only a minimum compliance level.

Provide full per se protections for gender identity, gender expression, and sexual orientation from prohibited discrimination, bullying and harassment required by the express enumeration of these bases in HIBOE/HIDOE antidiscrimination, antibullying, and antiharassment policies and directives to employees, volunteers, and contractors and Hawaii law, instead of only the minimal "gender-based" harassment protections now in the rules that follow the narrow approach of U.S. DOE.

Delete the erroneous definitions for gender identity, gender expression and sexual orientation in the rules

and include instead current and correct definitions for these terms. These rules barely address gender identity, gender expression, and sexual orientation discrimination, bullying and harassment in the schools when LGBTQ and GNC students are among the most harmed by these practices.

Clearly state that HDOE is committed to stopping widespread and ongoing discrimination, bullying and harassment in the schools against students, particularly on the basis of gender identity, gender expression, sexual orientation, and disabilities, and taking the steps necessary to make all schools safe, inclusive, respectful and supportive of all students;

Thank you for your consideration,.

Dean Hamer, PhD

Qwaves Media

Haleiwa, Hawaii

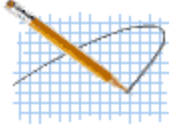
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thaddeus pham <tediousmonkey@gmail.com>

09/04/2018 08:30 AM

To testimony\_boe@notes.k12.hi.us

cc

Subject Testimony - Proposed Hawaii  
Administrative Rules Chapter 89 (HAR  
CH. 89) CIVIL RIGHTS POLICY AND  
COMPLAINT PROCEDURE FOR  
STUDENTS(S) COMPLAINTS  
AGAINST ADULT(S)

Aloha Hawaii Board of Education/Department of Education (HIBOE/HIDOE),

Please see my comments for HAR CH.89 below. As a concerned resident and community member, I hope that these comments will be considered as you move forward.

Mahalo for your time,

Thaddeus Pham

1013 Prospect Street #518

Honolulu, HI 96822

#### **I. OVERVIEW OF AMENDMENTS NEEDED IN HAR CH.89**

##### **HAR CH. 89 must be reconsidered, rewritten, and extensively amended to:**

- 1) state that HIDOE is committed to stopping widespread and ongoing discrimination, bullying and harassment in the schools against students, particularly on the basis of gender identity, gender expression, sexual orientation, and disabilities, and taking the steps necessary to make all schools safe, inclusive, respectful and supportive of all students;
- 2) restate the definition of "systemic discrimination" so that HIDOE can be held accountable for the full extent of HIDOE's responsibilities to address systemic discrimination, bullying and harassment at every level and in every program and service in every school, instead of only the minimal task now included in this definition that HIDOE adopt policies, rules, regulations or procedures that do not discriminate. HIDOE's failure to recognize the problems students face because of discrimination, bullying and harassment in the schools systemwide, failure to act to assure that the needed direction and training, and program changes are made throughout the school system, and the failure of employees systemwide to stop bullying and harassment in their schools is systemic discrimination. HIDOE cannot continue to keep its head in the sand forsaking the wellbeing of the students in its care.
- 3) give a greater focus on "bullying" and include strong and more specific antibullying provisions, requiring actions from the top down to each school, because bullying and discriminatory bullying is a major problem throughout Hawaii's public schools that deprives many students of a safe, respectful, and supportive educational environment every day in school. In particular, it is widely known that LGBTQ and GNC (Lesbian, Gay, Bisexual, Transgender, Queer and Gender Nonconforming) students are widely targeted on the bases of gender identity, gender expression, and sexual orientation, and special needs students are widely targeted on the basis of disability or perceived disability. "Bullying" is barely

addressed in these rules although it is clearly a serious problem of systemic failures, i.e., systemic discrimination, against protected classes that HIDOE can no longer ignore for the sake of the students.

4) make clear and acknowledge that HIDOE is primarily guided in its approach to civil rights enforcement by the broader and more inclusive HIBOE/HIDOE policies and directives that require HIDOE to strictly prohibit discrimination, bullying and harassment by employees, volunteers, and contractors; and that HIDOE is not limited by the narrower and lesser U.S. DOE approach in the rules that should be applied as only a minimum compliance level. In particular, HIDOE needs to rewrite its gateway definitions and other provisions that would drastically limit its enforcement scope, such as definitions for “discrimination”, “bullying” and “harassment”, and to provide provisions acknowledging the broader scope of protections that HIDOE should enforce and provisions to allow strict enforcement regarding adult perpetrators.

5) completely delete the “informal resolution” process that allows HIDOE to suggest to a student complainant that the student negotiate a settlement by itself, directly with the alleged adult perpetrator. It is outrageously inappropriate to even consider this process for K-12 students, or to even suggest such a process to K-12 students, in light of the obvious and great power imbalance between child and alleged adult perpetrator, as well as between the HIDOE adult making this suggestion and the student, that would further frighten and confuse an already fearful student who is trusting the HIDOE for protection, would put the student in a traumatizing situation, and all for no good purpose for the student or HIDOE.

6) delete the provisions now included that are not appropriate for K-12 students who allege discrimination, bullying and harassment by adults, such as requiring HIDOE to offer supportive services equally to both the student and adult perpetrator; and instead include provisions to allow HIDOE to take necessary actions against alleged perpetrators for the safety of the students, and impose strict sanctions on perpetrators when wrongdoing is found.

7) provide full per se protections for gender identity, gender expression, and sexual orientation from prohibited discrimination, bullying and harassment required by the express enumeration of these bases in HIBOE/HIDOE antidiscrimination, antibullying, and antiharassment policies and directives to employees, volunteers, and contractors and Hawaii law, instead of only the minimal “gender-based” harassment protections now in the rules that follow the narrow approach of U.S. DOE; and delete the erroneous definitions for gender identity, gender expression and sexual orientation in the rules and include instead current and correct definitions for these terms. These rules barely address gender identity, gender expression, and sexual orientation discrimination, bullying and harassment in the schools when LGBTQ and GNC students are among the most harmed by these practices.

## **II. SPECIFIC AMENDMENTS NEEDED - BY SECTION IN HAR CH. 89**

**Section 8-89-1 Policy and Purpose (a):** This section should be amended to include in the list of protected bases, “socio-economic status” and “physical appearance and characteristic,” that are p  
rotected classes in HIBOE/HIDOE Policy 305.10. HIDOE must protect students on these bases under these rules because they were specifically included in **HIBOE/HIDOE Policy 305.10** as protected classes, requiring that HIDOE also acknowledge and address in these rules for the protection of HIDOE students that are discriminated against, bullied or harassed because of these reasons.

**Section 8-89-1(e) (list of applicable laws and regulations):** This section should be amended 1) to state that HIDOE shall also comply with “board of education rules, policies, and directives” as stated in Section 8-89-2 Definitions, under the definition of “Complaint”, and 2) to also list: **HIBOE/HIDOE Policy 305.10, HIBOE/HIDOE Guidance on Supports for Transgender Students, and HIBOE/HIDOE Code of Conduct,** as these are primary and guiding policies and directives that strictly prohibit discrimination, bullying, and harassment by HIDOE employees, volunteers, and contractors that HIDOE must enforce, and that guide the broad and inclusive scope and strict enforcement that HIDOE must provide to comply with these

policies, directives, and Hawaii law.

These HIBOE policies and directives, and Hawaii law provide: 1) for explicit and strict compliance with nondiscrimination policy by employees, volunteers, and contractors, 2) explicit direction to HIDOE to also protect students on the bases of gender identity, gender expression, and sexual orientation, and 3) requires explicit inclusion and specific support for transgender students in HIDOE schools, that the listed federal laws do not include.

#### **Section 8-89-2 Definitions.**

**“Complaint”**: The definition of “complaint” should be amended as with Section 8-89-1(e) to also list **HIBOE/HIDOE Policy 305.10, HIBOE/HIDOE Guidance on Supports for Transgender Students, and HIBOE/HIDOE Code of Conduct**. These policies and directives provide: 1) for explicit and strict compliance with nondiscrimination policy by employees, volunteers, and contractors, 2) explicit direction to HIDOE to also protect students on the bases of gender identity, gender expression, and sexual orientation, and 3) requires explicit inclusion and specific support for transgender students in HIDOE schools, that the listed federal laws do not include. See comments on Section 8-89-1(e) above.

**“Bullying”**: This definition must be amended to widely include student complaints on bullying by an adult, instead of limiting the number of complaints by requiring students to prove that they have been harmed to the extent that HIDOE has decided will qualify as bullying by adults. Screening out adult bullying conduct by including greater conditions in this definition is contrary to HIDOE’s mandate to strictly prohibit employees, volunteers, and contractors from bullying under **HIBOE/HIDOE Policy 305.10 and HIBOE/HIDOE Code of Conduct**. Instead of limiting its responsibilities to investigate bullying complaints, HIDOE instead should be trying to fully and immediately informed and to stop *all* bullying by adults of HIDOE students. Bullying by adults who have authority over students in the schools, such as bullying by teachers, are acts of abuse of their power over the students.

A more appropriate definition for adult bullying is: “a pattern of conduct, rooted in a power differential, that threatens, harms, humiliates, induces fear in or causes a student substantial emotional distress” as defined by Teaching Tolerance in addressing teacher bullying of students. This definition appropriately focuses on the various harmful ways an adult abuser of power, particularly teachers, and all other adults in the school system, harms students by bullying conduct in simple straightforward terms, and would allow a broad scope of such abuse of power/bullying complaints to be brought to the attention of HIDOE, investigated, and stopped. *All* bullying behavior by an adult towards a child (K-12 student) should be stopped, not be tolerated by HIDOE, i.e., should be strictly prohibited. The definition of bullying should not arbitrarily screen out some complaints or serve as a barrier to HIDOE’s duty to strictly enforce HIBOE/HIDOE antidiscrimination, antibullying and antiharassment mandates for adults in the schools.

**“Cyberbullying”**: This definition should be amended to fully recognize the problems of “gender identity bullying and harassment”, “gender expression bullying and harassment”, and “sexual orientation bullying and harassment” instead of only including minimal protections for LGBTQ and GNC students by following U.S. DOE in allowing “gender-based harassment.” Gender-based harassment provides narrow protections for LGBTQ and GNC students, only if they can show evidence of sex/gender stereotyping as a form of sex discrimination under federal law. However, HIDOE is required to provide full protections for discrimination, bullying and harassment by gender identity, gender expression, and sexual orientation per se, in itself, and is not limited to minimal federal law protections, because these bases are specifically enumerated in HIBOE/HIDOE policies and directives to HIDOE employees, volunteers, and contractors, and in Hawaii law. See comments below on “gender-based harassment.”

Cyberbullying is a widely publicized problem with dire consequences for LGBTQ and GNC students because of gender identity, gender expression, and sexual orientation as are all other forms of bullying in the schools, and this section and the rest of the rules must specifically and fully address these bases to protect the highly vulnerable and at risk LGBTQNC students in HIDOE schools.

**“Dating violence”**: The definition of “dating violence” should clearly state that “dating” relationships are strictly prohibited under **HIBOE’s Code of Conduct** for employees, contractors, and volunteers, and that any “dating” relationships between these adults and students or “dating violence” are grounds for strict employee sanctions, and would also be referred to the police or other relevant authorities such as Child Welfare.

**“Discrimination”**: The definition of “discrimination” should be amended to be simple and clear in generally accepted language, e.g., that discrimination means “unfair or unequal treatment of an individual or groups based on protected characteristics or bases,” instead of narrowing this term by defining it only by certain possible harms that HIBOE deems acceptable. This narrow definition would hamper and prevent HIBOE efforts to enforce antidiscrimination policies broadly and strictly against HIBOE employees, volunteers, and contractors, as required by HIBOE/HIBOE policies and directives. The words, “otherwise treating a student *differently* ” (emphasis added) clause is not specific to the adverse aspect of civil rights discrimination, i.e., unfair or unequal treatment, that should distinguish this term in this context.

**“Gender Identity or expression”**: The definition of “gender identity or expression” must be amended because it incorrectly defines these two different terms of “gender identity” and “gender expression” as a composite term and as interchangeable terms, and the definition does not explain either term correctly. This definition should be amended to define “gender identity” and “gender expression” as two separate terms with different definitions for each, according to current education authorities and authorities in other fields, including medicine, social work, mental health, counseling and others. It is important that these two terms be defined correctly because they provide the basic explanations for these two protected classes. Also, these definitions should be defined consistently with other HIBOE documents that already correctly define these protected classes of students, specifically HIBOE’s **Guidance on Supports for Transgender Students**, where it states that “ ‘Gender expression’ means the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms ,” and that “ ‘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 .” HIBOE’s **Guidance** is based on resources that were provided by U.S. DOE’s Office of Civil Rights specifically for purposes of addressing discrimination in schools.

**“Harassment”**: The definition of “harassment” should be amended to retain the same definition for “harassment” in BOE’s Hawaii Administrative Rules Chapter 41 Civil Rights Policy and Complaints Procedure (**HAR CH. 41**), to allow for the broad and inclusive scope of complaints necessary for HIBOE to strictly prohibit discrimination, bullying and harassment by adults as mandated by HIBOE/HIBOE policies and directives. The definition of “harassment” wrongly narrows the scope of complaints HIBOE would accept for investigation by adding more conditions on the extent of harm that must be shown, and deleting the broad option in HAR CH. 41 that allows harassment that “*otherwise* adversely affect the educational opportunity of a student” (emphasis added). Without this broad option to complain about other unspecified adverse effects, the definition of harassment in HAR CH. 89 would require HIBOE to reject students with complaints of discriminatory harassment by employees, volunteers, contractors and other adults simply because they don’t fit the narrowed and more limited conditions now defining harassment in HAR CH. 89. If HIBOE rejects complaints simply for not fitting the arbitrarily narrowed definition of harassment, HIBOE would fail in its responsibilities under HIBOE/HIBOE policies and directives to broadly and strictly enforce antidiscrimination, antibullying and antiharassment violations by employees, volunteers, or contractors, and would leave students with valid complaints without recourse or support from HIBOE.

**“Sexual harassment”**: The definition of “sexual harassment” includes acts of a “sexual nature,” “sexual advances,” and “sexual misconduct” plus “sexual exploitation,” “sexual assault,” “domestic violence”

and “dating violence”, and should be amended to state that all sexual harassment is strictly prohibited by **HIBOE/HIDOE’s Policy 305.10** and **HIBOE/HIDOE’s Code of Conduct**, and that where any of the above conduct or others included in the definition of “sexual harassment” indicate possible Hawaii law violations, such as child abuse or criminal laws on sexual assault, sex trafficking, relationship violence and others, the complaints would also be referred to appropriate authorities, such as Child Welfare or the police or others.

**“Gender-based harassment”**: Addressing discrimination, bullying, and harassment on the bases of gender identity, gender expression, and sexual orientation *only* as a form of “gender-based harassment” does not provide the recognition appropriate to and necessary to protect students by these bases; as specifically enumerated protected classes under HIBOE/HIDOE policies and directives to employees, volunteers, and contractors, and Hawaii law, gender identity, gender expression, and sexual orientation warrant full protections. It is widely acknowledged that LGBTQ and GNC students experience widespread discrimination, bullying and harassment on the bases of gender identity, gender expression and sexual orientation throughout HIDOE’s schools. The enumeration in HIBOE/HIDOE policies and directives and Hawaii law reflects this situation and indicates the need to strongly address these bases under civil rights protections, and to provide students with the full range of protections from discrimination, bullying and harassment in the schools on the bases of gender identity, gender expression, and sexual orientation. Yet, these rules limit HIDOE’s protection only to situations where “gender-based harassment” can be shown, despite the limited protections allowed as “gender-based harassment” that requires proof of prohibited sex or gender stereotyping as a form of sex discrimination under U.S. DOE’s federal guidance. These rules must be amended to provide full per se protections for LGBTQ and GNC students, from discrimination, bullying and harassment by adults, because of gender identity, gender expression, and sexual orientation as required by enumeration of these bases in **HIBOE/HIDOE Policy 305.10**, **HIBOE/HIDOE Code of Conduct**, and **Hawaii law Act 110, SLH 2018**. These rules should include provisions explaining the protections for gender identity discrimination, bullying and harassment, gender expression discrimination, bullying and harassment, and sexual orientation bullying and harassment, making it clear to HIDOE employees, volunteers, and contractors that these bases are specifically and strongly protected, and informing them on the ways that antidiscrimination, antibullying, and antiharassment policies and directives would be violated, including violations of **HIBOE/HIDOE’s Guidance on Supports for Transgender Students**.

**“Immediate interventions”**: The definition for “immediate interventions” should be amended to clarify that support and safety services would be offered to complainants (students) but **not** equally to the alleged adult perpetrator as currently stated, and that actions would be taken immediately to assure that the alleged adult perpetrator would not be in a position to threaten or harm the complainant or harm other students during the investigation or thereafter. The definition should make clear that HIDOE would take immediate steps to assure the wellbeing, safety, and protection of the student(s), and would monitor the student(s) for well-being, safety, and protection over the long term. This definition wrongly follows USDOE guidelines for student-on-student complaints in post-secondary schools, that are not appropriate for K-12 student complaints against adults. In amending this section, the suggestion that “individualized services” should be offered to the alleged adult perpetrator should be deleted.

**“Protected class/basis”**: This definition should be amended to include “socio-economic status” and “physical appearance and characteristic” that are also protected classes from discrimination, harassment and bullying by HIDOE employees under **HIBOE Policy 305.10**.

**“Remedies”**: The definition of remedies as “individualized services offered at the conclusion of an investigation that preserve the educational experience or ensure the safety of all parties” is repetitious of the definition of “immediate interventions”, wrong in treating adult perpetrators equally with student complainants, and fails to address the most important definition of remedies in civil rights cases as those actions that will be taken to rectify or correct a situation of discrimination, bullying or harassment. This

definition should be rewritten to delete the current definition, address services to students as “immediate interventions” during and following investigations, and to redefine “remedies” as the corrective or remedial actions that would be taken when an adult, or the HIDOE system, is found to be at fault for prohibited discrimination, bullying or harassment, such as imposing employee sanctions up to dismissal, or requiring HIDOE to take specific steps to stop systemic discrimination and prevent it from happening in the future. See comments on “immediate interventions” above. See also comments on “systemic discrimination” below.

**“Sexual orientation”**. This definition is erroneous and offensive by its use of the word, “preference” that is considered to wrongly imply “choice” because sexual orientation is not a choice. According to education authorities and others, such as in the fields of medicine, mental health, social work, and counseling, sexual orientation is an attraction to others, and is not defined by past sexual activity nor by how a person is identified by others, and there are far more than three kinds of sexual orientation. This definition for sexual orientation should be deleted and replaced by a correct definition. USDOE OCR’s webpage on **Resources for LGBTQ Students**, contains some example definitions of “sexual orientation,” e.g., “sexual orientation refers to a person’s emotional and sexual attraction to another person based on the gender of the other person. Common terms used to describe sexual orientation include, but are not limited to, heterosexual, lesbian, gay, and bisexual.”

**“Systemic discrimination.”** This definition wrongly defines “systemic discrimination” as: “when an established policy, rule, regulation or procedure of the DOE has the continuing effect of not violating non-discrimination rights.” That narrow definition allows HIDOE to be held accountable *only* to adopt policies, rules, regulations and procedures that are not discriminatory in effect. This definition should be amended to include all of HIDOE’s responsibilities to assure that its entire system of public schools and all schools are nondiscriminatory, do not allow discrimination, bullying, and harassment in the schools, and that all employees and students are adequately directed, trained, informed, educated, and supported to act appropriately to stop ongoing discrimination, bullying and harassment, and to build inclusive, respectful, safe, and supportive programs, activities, and services for all students; and that failure to fulfill these responsibilities would be systemic discrimination. System-wide or “systemic discrimination” must be a clear and primary focus for HIDOE under these rules because system-wide discrimination is widespread, and without the necessary foundation for eliminating discrimination, bullying and harassment in public schools, enforcement against HIDOE employees and other adults will be more difficult.

For example, it is widely acknowledged that discrimination, bullying and harassment is found throughout HIDOE schools targeting LGBTQ and GNC students on the bases of gender identity, gender expression, and sexual orientation due to widespread failure of schools, administrators, faculty and other adults to stop ongoing discrimination, bullying, and harassment by students, and also due to teachers and other adults participating in criticism of LGBTQ and GNC students for being LGBTQ and GNC, faulting them for being bullied and harassed, ridiculing LGBTQ and GNC students, and other discriminatory acts showing their nonacceptance of the gender identity, gender expression, or sexual orientation of LGBTQ and GNC students. This lack of support from faculty and administrators in HIDOE schools is due to a lack of clear direction and enforcement from the top down to the schools, a systemic failure of large proportion, that HIDOE must address and be held accountable for as “systemic discrimination” for the sake of the students.

The definition of “systemic discrimination” should be amended to include all of HIDOE’s responsibilities for ending discrimination, bullying and harassment in Hawaii’s public schools.

#### **Section 8-89-6 Complaint and Investigative Procedure.**

**Section 8-89-6 (d)(2) and (3) (on informal resolution between student and adult)** These subsections should be deleted entirely as this informal resolution process is wholly inappropriate and dangerous for



the student complainant, as it would allow HIDOE to suggest to a student complainant that the student negotiate a settlement directly with the adult that the student alleges has committed prohibited discrimination, bullying or harassment against the student. It is totally inappropriate for K-12 students in light of the obvious power imbalance between the student complainant and the alleged adult perpetrator, it would subject the student to further trauma, would serve no good purpose for the student. This informal resolution process should not even be available in these rules for HIDOE employees to possibly offer to students, because although it is presented as voluntary, HIDOE would further confuse and frighten an already fearful student by suggesting such a process, and would put the student in the difficult position of either acceding to this frightening suggestion to meet alone and negotiate alone with the alleged adult perpetrator or turning down a suggestion by the HIDOE person in authority, that the student is trusting and relying on for help. Such a confrontation would put the student further at risk of harm to their health and well-being.

It is irrational and irresponsible for HIDOE to include this process of informal resolution for students to be confronted by the accused adult, when this section acknowledges that this process would be inappropriate if “there is an objective and obvious power imbalance between the parties.” It should be clear to HIDOE that there will *always* be an overwhelming power imbalance between K-12 students and any alleged adult perpetrator by any objective measure, whether employee, volunteer, contractor or other, if a K-12 student is put in a situation of having to directly confront an alleged adult perpetrator to negotiate the student’s own resolution of its problems of discrimination, bullying or harassment by the adult. There is always a great power imbalance between a student and an adult at the school, inherent in the disparity in the ages of the students as K-12 students, and their physical and emotional development, maturity, education, and skills levels as children, as compared to the power held by adult persons, having an actual or perceived status of authority inherent in the roles of teachers, administrators, counselors and other school employees, volunteers, or contractors, plus having adult levels of physical development, maturity, education and skills.

There is no justification for HIDOE to even consider suggesting this harmful situation to students. It is even more egregious because the students would already be intimidated and fearful of the alleged perpetrator and unable to handle the situation directly, or they would not have come to HIDOE authorities seeking help and protection, and if a frightened student were to consent to this process because of the pressure inherent in a suggestion made by a HIDOE authority figure, and about to face the same fearful situation that they fled from yet worse for having complained to HIDOE authorities, the student could be driven to desperation feeling there was no place to turn.

Even under current federal guidance, the U.S. DOE does not recommend direct negotiation between parties even at the post-secondary level. **This informal resolution process must be entirely deleted from these rules to prevent it from ever being suggested to a student complainant and further harming the student.**

**Section 8-89-6(e) (on “immediate interventions”)** This section on immediate interventions would wrongly treat both parties as equally eligible to request “immediate interventions” (defined as services), and should be amended to differentiate between the support services that all student complainants would be eligible for and the protective actions HIDOE would be responsible to take regarding the alleged adult perpetrator to assure that the alleged adult perpetrator does not harm the student complainant or other students. This section presents the same problems in the definition of “immediate interventions.” See comments on Section 8-89-2 Definitions. “Immediate interventions” above.

**Section 8-89-11 Student’s Right to Privacy** – And an **anonymous complaint process** is needed to encourage more students to provide HIDOE information on prohibited discrimination, bullying and harassment in HIDOE schools. An **anonymous and confidential complaint process** (not the same as keeping confidential the records of complaints, investigations, and reports under Section 8-89-11), whereby HIDOE would accept anonymous complaints or would keep a complainant’s identity fully

confidential should be included in this section or in the complaint process Section 8-89-6. It is not uncommon for students to be afraid to file a complaint, not trusting HIDOE authorities, and/or afraid of retaliation by perpetrators should they file a complaint, and to fear negative reactions from other adults and students in the school should others learn of their complaint. LGBTQ students often fear being “outed” in school, fearing harm from other students and also harm from parents who do not accept LGBTQ persons.

The acceptance of anonymous complaints and provision of complete confidentiality are allowed under federal guidelines despite the limits it would put on investigating an alleged adult perpetrator, because it would still allow reluctant students to seek help, and is considered to be beneficial in uncovering underlying systemic problems in a school or in the overall system and possibly other violations or patterns of violations by an individual, thereby allowing these problems to be addressed by the school district. An anonymous complaint process could encourage students to submit complaints and provide HIDOE with greater opportunities to stop discriminatory practices within HIDOE’s schools.

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Joe Wilson <qwavesjoe@yahoo.com>

09/05/2018 11:46 AM

To "testimony\_boe@notes.k12.hi.us"  
<testimony\_boe@notes.k12.hi.us>  
cc "boe\_hawaii@notes.k12.hi.us"  
<boe\_hawaii@notes.k12.hi.us>,  
"catherine\_payne@notes.k12.hi.us"  
Subject Testimony on Proposed Hawaii  
Administrative Rules Chapter 89 (HAR  
CH. 89) CIVIL RIGHTS POLICY AND  
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STUDENTS(S) COMPLAINTS  
AGAINST ADULT(S)

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To: Hawaii Board of Education and the Hawaii Department of Education  
(HIDOE)

From: Joe Wilson, Qwaves Media

Date: September 5, 2018

Subject: Hawaii Board of Education/Department of Education's  
(HIBOE/HIDOE) Proposed Hawaii Administrative Rules Chapter 89 (HAR CH.  
89) CIVIL RIGHTS POLICY AND COMPLAINT PROCEDURE FOR STUDENTS(S)  
COMPLAINTS AGAINST ADULT(S)

As a human rights advocate and filmmaker based on Oahu, I am a keen observer of the challenges faced by gender and sexual minorities in our public schools. In fact, I have witnessed first hand the harm and pain that prejudiced school administrators and employees can inflict on students. I have also documented how incredibly difficult it is for students to even report much less obtain redress for violations of their civil rights.

This is especially true for issues around gender identity and expression and sexual orientation – civil rights which are NOT federally protected, but depend on Hawaii state law for protection.

Therefore, while I support having the strongest possible civil rights for our students, I believe the proposed revision t HAR CH.89 needs additional work. To wit, the chapter should:

Clarify that HIDOE is primarily guided in its approach to civil rights

enforcement by the broader and more inclusive HIBOE/HIDOE policies and directives that require HIDOE to strictly prohibit discrimination, bullying and harassment by employees, volunteers, and contractors; and that HIDOE is not limited by the narrower and lesser U.S. DOE approach in the rules that should be applied as only a minimum compliance level.

Provide full per se protections for gender identity, gender expression, and sexual orientation from prohibited discrimination, bullying and harassment required by the express enumeration of these bases in HIBOE/HIDOE anti-discrimination, anti-bullying, and anti-harassment policies and directives to employees, volunteers, and contractors and Hawaii law, instead of only the minimal "gender-based" harassment protections now in the rules that follow the narrow approach of U.S. DOE.

Delete the erroneous definitions for gender identity, gender expression and sexual orientation in the rules and include instead current and correct definitions for these terms. These rules barely address gender identity, gender expression, and sexual orientation discrimination, bullying and harassment in the schools when LGBTQ and GNC students are among the most harmed by these practices.

Clearly state that HIDOE is committed to stopping widespread and ongoing discrimination, bullying and harassment in the schools against students, particularly on the basis of gender identity, gender expression, sexual orientation, and disabilities, and taking the steps necessary to make all schools safe, inclusive, respectful and supportive of all students.

Thank you for your attention and consideration.

Rest assured that many of us in the community will be watching to ensure that young people in our communities are provided safe, inclusive, and respectful spaces in which to study, learn, and thrive.

Joe Wilson  
Qwaves Media  
Haleiwa, Hawaii

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## **Testimony**

**To:** Hawai`i Board of Education and the Hawai`i Department of Education (HIDOE)

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

**Meeting:** September 6, 2018 General Business Meeting

**Subject:** Hawai`i Board of Education/Department of Education (HIBOE/HIDOE)'s  
Proposed Hawai`i Administrative Rules Chapter 89 (HAR CH. 89) CIVIL RIGHTS  
POLICY AND COMPLAINT PROCEDURE FOR STUDENTS(S) COMPLAINTS AGAINST  
ADULTS.

**Position:** **Recommend revision of proposed Chapter 89**

As a pediatrician and adolescent medicine physician in Hawai`i for the past 37 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 and violence in the school setting. Pediatric research, and my clinical practice, have taught me that children and youth facing personal issues of gender identity, gender expression and sexual orientation 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 26 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.”<sup>1</sup> A follow-up report on Hawai`i’s transgender students will be released in the very near future and I predict it will describe a population of students at even higher risk for violence in the school setting.)

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 most 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 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. 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 endured. 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 youth during my 30+ years of 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, or simply "blown off" the seriousness of this issue, without creating a deep and informed system of support that assures students are safe and affirmed on each and every school campus.

I have reviewed the proposed Chapter 89 related to civil rights and complaint procedures and find that in many ways it does not address the very real experience and needs of those students who often face daily persecution in our schools through discrimination, bullying and harassment. I therefore recommend a significant revision of the present proposal paying special attention to the following issues:

- 1)** The proposed Chapter 89 is much too simplistic and superficial in its approach to addressing civil rights related to discrimination, bullying and

harassment. Simply stating that the DOE “embraces the values of dignity and respect” and “strictly prohibits” discrimination, bullying and harassment followed by the detailed mechanics of a complaint procedure will do little to protect a student such as my patient described above. Instead, the Chapter should also express a clear and sincere commitment to end the widespread and ongoing mistreatment of students accompanied by making a “deep dive” effort to identify and address the underlying pervasive factors such as prejudice, misinformation, hatred and fear that result in discrimination, bullying and harassment. The Chapter specifically should address the need for the DOE, at all levels and in all its many sectors, to provide comprehensive and ongoing training and institute programmatic changes so that all school personnel become experts in the underlying causes and the dynamics of discrimination, bullying and harassment within their particular areas of responsibility and are given the skills to effectively recognize, address and intervene in instances of discrimination, bullying and harassment when they occur. Simply offering a detailed complaint process does not serve to address and end the causative factors underlying these forms of violence.

- 2) Hawai`i has a long and proud tradition of extending civil rights protections to vulnerable populations beyond those protections provided by the Federal Government. Therefore, Chapter 89’s list of “all applicable” state and federal nondiscrimination policies cited in Section 8-89-1(c) should also include the following relevant (ie “applicable”) laws, policies, rules and directives protecting students at risk for discrimination, bullying and harassment: 1) HIBOE/HIDOE Policy 305.10; 2) HIBOE/HIDOE Guidance on Supports for Transgender Students, and 3) HIBOE/HIDOE Code of Conduct.
- 3) I strongly recommend removing the section that calls for an “informal resolution” process to address instances 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 engaged in 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, and 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.

- 4) The definition of “sexual orientation” provided in Chapter 89 should be replaced, and specifically should not make use of the word “preferred,” since this is felt to imply choice and does not convey the depth of attraction inherent in an individual’s sexual orientation. (I believe others have submitted testimony to the BOE that provides an appropriately worded definition.)
- 5) The discussion of sexual harassment that appears in the proposed Chapter 89 makes me very uncomfortable. (No doubt this comes in part from my pediatric responsibility as a mandatory reporter in instances of childhood sexual abuse. It is also influenced by my 30+ years as a pediatric forensic examiner for the Sex Abuse Treatment Center.) The textual treatment of this subject in the proposed Chapter seems to be drawn from literature describing sexual interactions between two adults. In the case of children and youth in the school setting, all variations of sexual interactions between an adult school employee or volunteer and a student should be seen as completely inappropriate and most will require immediate reporting to Child Welfare Services or the police. This should be stated clearly and unequivocally and should be the primary emphasis of this section.

- 6) While proposed Chapter 89 “requires” that students or parents should report any discrimination, bullying, harassment and retaliation to DOE employees with supervisory authority, it then goes on to define “harassment” in a way that is limiting and extremely subjective (“sufficiently severe, persistent or pervasive” – and I have a feeling the severity of a situation will be decided upon by the DOE supervisory employee rather than the targeted student). This will have the effect of limiting the number of complaints allowed to move forward through the complaint process, when in fact the Chapter should be widening the protective net to include all students who experience any measure of discrimination, bullying and harassment in the school setting. What is meant by “sufficiently severe, persistent or pervasive?” And who, other than a student, can truly understand to what degree discrimination, bullying and harassment affects their ability to learn or to feel safe at school? If we limit access to the complaint process to only certain students, how is that decision made? Is it when the harassment occurs monthly? weekly? daily? Is it when it moves from verbal to physical assault? Is it when a child walks home crying or dreads going to school each morning, or altogether stops going to school? Is it only when a parent finally shows up in the school office to express their concerns? Or perhaps it will be only when a student, like my patient described above, is driven to the brink of suicide. I believe that Chapter 89 should be revised to assure that a process of investigation and corrective action is initiated before a situation becomes “severe, persistent or pervasive” and before the child’s learning environment has become significantly “limited” or “intimidating, hostile or offensive,” because by then significant harm has already begun to take place. The goal of Chapter 89 should be to prevent harm in the first place, or to intervene immediately when the potential for harm first comes to the attention of school personnel. The imperative, for both educators and child advocates, should be to widen the protective net of Chapter 89 rather than narrow it to keep the number of referable complaints to a “manageable level.”

In summary, I urge the Hawai`i Department of Education to revisit and substantially revise the proposed Chapter 89 to address the concerns above as well as those presented in testimony by other community child and youth advocates.

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.

To: Hawaii Board of Education and the Hawaii Department of Education (HIDOE), Chairperson Catherine Payne, Brian De Lima, Vice Chairperson, and Members of the Board of Education

From: Josephine (Jo) Chang, Consultant

Date: Submitted on September 5, 2018 for the General Business Meeting of the Board on September 6, 2018, on Approving HAR Ch. 19 and HAR Ch. 89, Agenda Item V, B

Subject: Testimony on Proposed Hawaii Administrative Rule Chapter 89 and on Proposed (Revised) Hawaii Administrative Rule Ch. 19

Position: Opposed as currently written

The basic justification provided by HIDOE for creating a new HAR Ch. 89 and for revising existing HAR Ch. 19 was to comply with the remedial requirements made by the U.S. Department of Education's Office of Civil Rights (U.S. DOE OCR) on HIDOE to address the negative findings by U.S. DOE OCR in its most recent compliance review of HIDOE with regard to federal civil rights laws. The specific negative findings and requirements made by U.S. OCR are set forth in the January 19, 2018 letter to Superintendent Kishimoto from Linda Mangel, Regional Director. Those findings and those requirements are not contradictory to the recommendations made in my testimony below. The HIDOE cites the Resolution Agreement as the guiding document for these rules, but that Agreement only reflects what HIDOE offered as compliance with the remedial requirements and does not contain *only* what was required by U.S. DOE OCR in its letter of findings and requirements, and does not require nor justify all of the content of Ch. 89 or Ch. 19 or the manner in which they have been drafted.

More importantly Hawaii DOE must do more than minimally comply with what HIDOE sees as required by U.S. DOE OCR, but must be committed to fully ending discrimination, bullying and harassment in Hawaii's public schools and to doing all that it takes to make it safe for all students under the broader authority of HIDOE's own rules and policies, and Hawaii law.

My more detailed testimony on HAR Ch. 89 and my comments on HAR Ch. 19 follow, in that order, below.

**Testimony to the Hawaii Board of Education and the Hawaii Department of Education, Chairperson Catherine Payne, Vice -Chair Brian De Lima, and Members of the Hawaii Board of Education on the Hawaii Department of Education's Proposed Hawaii Administrative Rules Chapter 89 (HAR CH. 89) CIVIL RIGHTS POLICY AND COMPLAINT PROCEDURE FOR STUDENTS(S) COMPLAINTS AGAINST ADULT(S) from Josephine Chang**

**I. OVERVIEW OF PROBLEMS AND AMENDMENTS NEEDED IN HAR CH.89**

**HAR CH. 89 must be reconsidered, rewritten, and extensively amended to:**

1) state that HIDOE is committed to stopping widespread and ongoing discrimination, bullying and harassment in the schools against students, particularly on the basis of gender identity, gender expression, sexual orientation, and disabilities, and taking the steps necessary to make all schools safe, inclusive, respectful and supportive of all students;

2) restate the definition of "systemic discrimination" so that HIDOE can be held accountable for the full extent of HIDOE's responsibilities to address systemic discrimination, bullying and harassment at every level and in every program and service in every school, instead of only the minimal task now included in this definition that HIDOE adopt policies, rules, regulations or procedures that do not discriminate. HIDOE's failure to recognize the problems students face because of discrimination, bullying and harassment in the schools systemwide, failure to act to assure that the needed direction and training, and program changes are made throughout the school system, and the failure of employees systemwide to stop bullying and harassment in their schools is systemic discrimination. HIDOE cannot continue to keep its head in the sand forsaking the wellbeing of the students in its care.

3) give a greater focus on "bullying" and include strong and more specific antibullying provisions, requiring actions from the top down to each school, because bullying and discriminatory bullying is a major problem throughout Hawaii's public schools that deprives many students of a safe, respectful, and supportive educational environment every day in school. In particular, it is widely known that LGBTQ and GNC (Lesbian, Gay, Bisexual, Transgender, Queer and Gender Nonconforming) students are widely targeted on the bases of gender identity, gender expression, and sexual orientation, and special needs students are widely targeted on the basis of disability or perceived disability. "Bullying" is barely addressed in these rules although it is clearly a serious problem of systemic failures, i.e., systemic discrimination, against protected classes that HIDOE can no longer ignore for the sake of the students.

4) make clear and acknowledge that HIDOE is primarily guided in its approach to civil rights enforcement by the broader and more inclusive HIBOE/HIDOE policies and directives that require HIDOE to strictly prohibit discrimination, bullying and harassment by employees, volunteers, and contractors; and that HIDOE is not limited by the narrower and lesser U.S. DOE approach in the rules that should be applied as only a minimum compliance level. In particular, HIDOE needs to rewrite its gateway definitions and other provisions that would drastically limit its enforcement scope, such as definitions for "discrimination", "bullying" and "harassment", and to provide provisions acknowledging the broader

scope of protections that HIDOE should enforce and provisions to allow strict enforcement regarding adult perpetrators.

5) completely delete the “informal resolution” process that allows HIDOE to suggest to a student complainant that the student negotiate a settlement by itself, directly with the alleged adult perpetrator. It is outrageously inappropriate to even consider this process for K-12 students, or to even suggest such a process to K-12 students, in light of the obvious and great power imbalance between child and alleged adult perpetrator, as well as between the HIDOE adult making this suggestion and the student, that would further frighten and confuse an already fearful student who is trusting the HIDOE for protection, would put the student in a traumatizing situation, and all for no good purpose for the student or HIDOE.

6) delete the provisions now included that are not appropriate for K-12 students who allege discrimination, bullying and harassment by adults, such as requiring HIDOE to offer supportive services equally to both the student and adult perpetrator; and instead include provisions to allow HIDOE to take necessary actions against alleged perpetrators for the safety of the students, and impose strict sanctions on perpetrators when wrongdoing is found.

7) provide full per se protections for gender identity, gender expression, and sexual orientation from prohibited discrimination, bullying and harassment required by the express enumeration of these bases in HIBOE/HIDOE antidiscrimination, antibullying, and antiharassment policies and directives to employees, volunteers, and contractors and Hawaii law, instead of only the minimal “gender-based” harassment protections now in the rules that follow the narrow approach of U.S. DOE; and delete the erroneous definitions for gender identity, gender expression and sexual orientation in the rules and include instead current and correct definitions for these terms. These rules barely address gender identity, gender expression, and sexual orientation discrimination, bullying and harassment in the schools when LGBTQ and GNC students are among the most harmed by these practices.

## **II. SPECIFIC AMENDMENTS NEEDED - BY SECTION IN HAR CH. 89**

**Section 8-89-1 Policy and Purpose (a):** This section should be amended to include in the list of protected bases, “**socio-economic status**” and “**physical appearance and characteristic,**” that are protected classes in **HIBOE/HIDOE Policy 305.10**. HIDOE must protect students on these bases under these rules because they were specifically included in **HIBOE/HIDOE Policy 305.10** as protected classes, requiring that HIDOE also acknowledge and address in these rules for the protection of HIDOE students that are discriminated against, bullied or harassed because of these reasons.

**Section 8-89-1(e) (list of applicable laws and regulations):** This section should be amended 1) to state that HIDOE shall also comply with “board of education rules, policies, and directives” as stated in Section 8-89-2 Definitions, under the definition of “Complaint”, and 2) to also list: **HIBOE/HIDOE Policy 305.10**, **HIBOE/HIDOE Guidance on Supports for Transgender Students**, and **HIBOE/HIDOE Code of Conduct**, as these are primary and guiding policies and directives that strictly prohibit discrimination, bullying, and

harassment by HIDOE employees, volunteers, and contractors that HIDOE must enforce, and that guide the broad and inclusive scope and strict enforcement that HIDOE must provide to comply with these policies, directives, and Hawaii law.

These HIBOE policies and directives, and Hawaii law provide: 1) for explicit and strict compliance with nondiscrimination policy by employees, volunteers, and contractors, 2) explicit direction to HIDOE to also protect students on the bases of gender identity, gender expression, and sexual orientation, and 3) requires explicit inclusion and specific support for transgender students in HIDOE schools, that the listed federal laws do not include.

#### **Section 8-89-2 Definitions.**

**“Complaint”**: The definition of “complaint” should be amended as with Section 8-89-1(e) to also list **HIBOE/HIDOE Policy 305.10, HIBOE/HIDOE Guidance on Supports for Transgender Students, and HIBOE/HIDOE Code of Conduct.** These policies and directives provide: 1) for explicit and strict compliance with nondiscrimination policy by employees, volunteers, and contractors, 2) explicit direction to HIDOE to also protect students on the bases of gender identity, gender expression, and sexual orientation, and 3) requires explicit inclusion and specific support for transgender students in HIDOE schools, that the listed federal laws do not include. See comments on Section 8-89-1(e) above.

**“Bullying”**: This definition must be amended to widely include student complaints on bullying by an adult, instead of limiting the number of complaints by requiring students to prove that they have been harmed to the extent that HIDOE has decided will qualify as bullying by adults. Screening out adult bullying conduct by including greater conditions in this definition is contrary to HIDOE’s mandate to strictly prohibit employees, volunteers, and contractors from bullying under **HIBOE/HIDOE Policy 305.10** and **HIBOE/HIDOE Code of Conduct.** Instead of limiting its responsibilities to investigate bullying complaints, HIDOE instead should be trying to fully and immediately informed and to stop *all* bullying by adults of HIDOE students. Bullying by adults who have authority over students in the schools, such as bullying by teachers, are acts of abuse of their power over the students.

A more appropriate definition for adult bullying is: “a pattern of conduct, rooted in a power differential, that threatens, harms, humiliates, induces fear in or causes a student substantial emotional distress” as defined by Teaching Tolerance in addressing teacher bullying of students. This definition appropriately focuses on the various harmful ways an adult abuser of power, particularly teachers, and all other adults in the school system, harms students by bullying conduct in simple straightforward terms, and would allow a broad scope of such abuse of power/bullying complaints to be brought to the attention of HIDOE, investigated, and stopped. *All* bullying behavior by an adult towards a child (K-12 student) should be stopped, not be tolerated by HIDOE, i.e., should be strictly prohibited. The definition of bullying should not arbitrarily screen out some complaints or serve as a barrier to HIDOE’s duty to strictly enforce HIBOE/HIDOE antidiscrimination, antibullying and antiharassment mandates for adults in the schools.

**“Cyberbullying”**: This definition should be amended to fully recognize the problems of “gender identity bullying and harassment”, “gender expression bullying and harassment”, and “sexual

orientation bullying and harassment” instead of only including minimal protections for LGBTQ and GNC students by following U.S. DOE in allowing “gender-based harassment.” Gender-based harassment provides narrow protections for LGBTQ and GNC students, only if they can show evidence of sex/gender stereotyping as a form of sex discrimination under federal law. However, HIDOE is required to provide full protections for discrimination, bullying and harassment by gender identity, gender expression, and sexual orientation per se, in itself, and is not limited to minimal federal law protections, because these bases are specifically enumerated in HIBOE/HIDOE policies and directives to HIDOE employees, volunteers, and contractors, and in Hawaii law. See comments below on “gender-based harassment.”

Cyberbullying is a widely publicized problem with dire consequences for LGBTQ and GNC students because of gender identity, gender expression, and sexual orientation as are all other forms of bullying in the schools, and this section and the rest of the rules must specifically and fully address these bases to protect the highly vulnerable and at risk LGBTQNC students in HIDOE schools.

**“Dating violence”:** The definition of “dating violence” should clearly state that “dating” relationships are strictly prohibited under **HIBOE’s Code of Conduct** for employees, contractors, and volunteers, and that any “dating” relationships between these adults and students or “dating violence” are grounds for strict employee sanctions, and would also be referred to the police or other relevant authorities such as Child Welfare.

**“Discrimination”:** The definition of “discrimination” should be amended to be simple and clear in generally accepted language, e.g., that discrimination means “unfair or unequal treatment of an individual or groups based on protected characteristics or bases,” instead of narrowing this term by defining it only by certain possible harms that HIDOE deems acceptable. This narrow definition would hamper and prevent HIDOE efforts to enforce antidiscrimination policies broadly and strictly against HIDOE employees, volunteers, and contractors, as required by HIBOE/HIDOE policies and directives. The words, “otherwise treating a student *differently*” (emphasis added) clause is not specific to the adverse aspect of civil rights discrimination, i.e., unfair or unequal treatment, that should distinguish this term in this context.

**“Gender Identity or expression”:** The definition of “gender identity or expression” must be amended because it incorrectly defines these two different terms of “gender identity” and “gender expression” as a composite term and as interchangeable terms, and the definition does not explain either term correctly. This definition should be amended to define “gender identity” and “gender expression” as two separate terms with different definitions for each, according to current education authorities and authorities in other fields, including medicine, social work, mental health, counseling and others. It is important that these two terms be defined correctly because they provide the basic explanations for these two protected classes. Also, these definitions should be defined consistently with other HIDOE documents that already correctly define these protected classes of students, specifically HIDOE’s **Guidance on Supports for Transgender Students**, where it states that “ ‘Gender expression’ means the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms,” and that “ ‘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."* HIDOE's **Guidance** is based on resources that were provided by U.S. DOE's Office of Civil Rights specifically for purposes of addressing discrimination in schools.

**"Harassment"**: The definition of "harassment" should be amended to retain the same definition for "harassment" in BOE's Hawaii Administrative Rules Chapter 41 Civil Rights Policy and Complaints Procedure (**HAR CH. 41**), to allow for the broad and inclusive scope of complaints necessary for HIDOE to strictly prohibit discrimination, bullying and harassment by adults as mandated by HIBOE/HIDOE policies and directives. The definition of "harassment" wrongly narrows the scope of complaints HIDOE would accept for investigation by adding more conditions on the extent of harm that must be shown, and deleting the broad option in HAR CH. 41 that allows harassment that "*otherwise* adversely affect the educational opportunity of a student" (emphasis added). Without this broad option to complain about other unspecified adverse effects, the definition of harassment in HAR CH. 89 would require HIDOE to reject students with complaints of discriminatory harassment by employees, volunteers, contractors and other adults simply because they don't fit the narrowed and more limited conditions now defining harassment in HAR CH. 89. If HIDOE rejects complaints simply for not fitting the arbitrarily narrowed definition of harassment, HIDOE would fail in its responsibilities under HIBOE/HIDOE policies and directives to broadly and strictly enforce antidiscrimination, antibullying and antiharassment violations by employees, volunteers, or contractors, and would leave students with valid complaints without recourse or support from HIDOE.

**"Sexual harassment"**: The definition of "sexual harassment" includes acts of a "sexual nature," "sexual advances," and "sexual misconduct" plus "sexual exploitation", "sexual assault", "domestic violence" and "dating violence", and should be amended to state that all sexual harassment is strictly prohibited by **HIBOE/HIDOE's Policy 305.10** and **HIBOE/HIDOE's Code of Conduct**, and that where any of the above conduct or others included in the definition of "sexual harassment" indicate possible Hawaii law violations, such as child abuse or criminal laws on sexual assault, sex trafficking, relationship violence and others, the complaints would also be referred to appropriate authorities, such as Child Welfare or the police or others.

**"Gender-based harassment"**: Addressing discrimination, bullying, and harassment on the bases of gender identity, gender expression, and sexual orientation *only* as a form of "gender-based harassment" does not provide the recognition appropriate to and necessary to protect students by these bases; as specifically enumerated protected classes under HIBOE/HIDOE policies and directives to employees, volunteers, and contractors, and Hawaii law, gender identity, gender expression, and sexual orientation warrant full protections. It is widely acknowledged that LGBTQ and GNC students experience widespread discrimination, bullying and harassment on the bases of gender identity, gender expression and sexual orientation throughout HIDOE's schools. The enumeration in HIBOE/HIDOE policies and directives and Hawaii law reflects this situation and indicates the need to strongly address these bases under civil rights protections, and to provide students with the full range of protections from discrimination, bullying and harassment in the schools on the bases of gender identity, gender expression, and sexual orientation. Yet, these rules limit HIDOE's protection only to situations where "gender-based harassment" can be shown, despite the limited protections allowed as "gender-based

harassment” that requires proof of prohibited sex or gender stereotyping as a form of sex discrimination under U.S. DOE’s federal guidance. These rules must be amended to provide full per se protections for LGBTQ and GNC students, from discrimination, bullying and harassment by adults, because of gender identity, gender expression, and sexual orientation as required by enumeration of these bases in HIBOE/HIDOE Policy 305.10, HIBOE/HIDOE Code of Conduct, and Hawaii law Act 110, SLH 2018. These rules should include provisions explaining the protections for gender identity discrimination, bullying and harassment, gender expression discrimination, bullying and harassment, and sexual orientation bullying and harassment, making it clear to HIDOE employees, volunteers, and contractors that these bases are specifically and strongly protected, and informing them on the ways that antidiscrimination, antibullying, and antiharassment policies and directives would be violated, including violations of **HIBOE/HIDOE’s Guidance on Supports for Transgender Students.**

**“Immediate interventions”:** The definition for “immediate interventions” should be amended to clarify that support and safety services would be offered to complainants (students) but **not** equally to the alleged adult perpetrator as currently stated, and that actions would be taken immediately to assure that the alleged adult perpetrator would not be in a position to threaten or harm the complainant or harm other students during the investigation or thereafter. The definition should make clear that HIDOE would take immediate steps to assure the wellbeing, safety, and protection of the student(s), and would monitor the student(s) for well-being, safety, and protection over the long term. This definition wrongly follows USDOE guidelines for student-on-student complaints in post-secondary schools, that are not appropriate for K-12 student complaints against adults. In amending this section, the suggestion that “individualized services” should be offered to the alleged adult perpetrator should be deleted.

**“Protected class/basis”:** This definition should be amended to include “socio-economic status” and “physical appearance and characteristic” that are also protected classes from discrimination, harassment and bullying by HIDOE employees under **HIBOE Policy 305.10.**

**“Remedies”:** The definition of remedies as “individualized services offered at the conclusion of an investigation that preserve the educational experience or ensure the safety of all parties” is repetitious of the definition of “immediate interventions”, wrong in treating adult perpetrators equally with student complainants, and fails to address the most important definition of remedies in civil rights cases as those actions that will be taken to rectify or correct a situation of discrimination, bullying or harassment. This definition should be rewritten to delete the current definition, address services to students as “immediate interventions” during and following investigations, and to redefine “remedies” as the corrective or remedial actions that would be taken when an adult, or the HIDOE system, is found to be at fault for prohibited discrimination, bullying or harassment, such as imposing employee sanctions up to dismissal, or requiring HIDOE to take specific steps to stop systemic discrimination and prevent it from happening in the future. See comments on “immediate interventions” above. See also comments on “systemic discrimination” below.

**“Sexual orientation”.** This definition is erroneous and offensive by its use of the word, “preference” that is considered to wrongly imply “choice” because sexual orientation is not a choice.

According to education authorities and others, such as in the fields of medicine, mental health, social work, and counseling, sexual orientation is an attraction to others, and is not defined by past sexual activity nor by how a person is identified by others, and there are far more than three kinds of sexual orientation. This definition for sexual orientation should be deleted and replaced by a correct definition. USDOE OCR's webpage on **Resources for LGBTQ Students**, contains some example definitions of "sexual orientation," e.g., "sexual orientation refers to a person's emotional and sexual attraction to another person based on the gender of the other person. Common terms used to describe sexual orientation include, but are not limited to, heterosexual, lesbian, gay, and bisexual."

**"Systemic discrimination."** This definition wrongly defines "systemic discrimination" as: "when an established policy, rule, regulation or procedure of the DOE has the continuing effect of not violating non-discrimination rights." That narrow definition allows HIDOE to be held accountable *only* to adopt policies, rules, regulations and procedures that are not discriminatory in effect. This definition should be amended to include all of HIDOE's responsibilities to assure that its entire system of public schools and all schools are nondiscriminatory, do not allow discrimination, bullying, and harassment in the schools, and that all employees and students are adequately directed, trained, informed, educated, and supported to act appropriately to stop ongoing discrimination, bullying and harassment, and to build inclusive, respectful, safe, and supportive programs, activities, and services for all students; and that failure to fulfill these responsibilities would be systemic discrimination. System-wide or "systemic discrimination" must be a clear and primary focus for HIDOE under these rules because system-wide discrimination is widespread, and without the necessary foundation for eliminating discrimination, bullying and harassment in public schools, enforcement against HIDOE employees and other adults will be more difficult.

For example, it is widely acknowledged that discrimination, bullying and harassment is found throughout HIDOE schools targeting LGBTQ and GNC students on the bases of gender identity, gender expression, and sexual orientation due to widespread failure of schools, administrators, faculty and other adults to stop ongoing discrimination, bullying, and harassment by students, and also due to teachers and other adults participating in criticism of LGBTQ and GNC students for being LGBTQ and GNC, faulting them for being bullied and harassed, ridiculing LGBTQ and GNC students, and other discriminatory acts showing their nonacceptance of the gender identity, gender expression, or sexual orientation of LGBTQ and GNC students. This lack of support from faculty and administrators in HIDOE schools is due to a lack of clear direction and enforcement from the top down to the schools, a systemic failure of large proportion, that HIDOE must address and be held accountable for as "systemic discrimination" for the sake of the students.

The definition of "systemic discrimination" should be amended to include all of HIDOE's responsibilities for ending discrimination, bullying and harassment in Hawaii's public schools.

## **Section 8-89-6 Complaint and Investigative Procedure.**

**Section 8-89-6 (d)(2) and (3) (on informal resolution between student and adult)** These subsections should be deleted entirely as this informal resolution process is wholly inappropriate and dangerous for the student complainant, as it would allow HIDOE to suggest to a student complainant that the student negotiate a settlement directly with the adult that the student alleges has committed prohibited discrimination, bullying or harassment against the student. It is totally inappropriate for K-12 students in light of the obvious power imbalance between the student complainant and the alleged adult perpetrator, it would subject the student to further trauma, would serve no good purpose for the student. This informal resolution process should not even be available in these rules for HIDOE employees to possibly offer to students, because although it is presented as voluntary, HIDOE would further confuse and frighten an already fearful student by suggesting such a process, and would put the student in the difficult position of either acceding to this frightening suggestion to meet alone and negotiate alone with the alleged adult perpetrator or turning down a suggestion by the HIDOE person in authority, that the student is trusting and relying on for help. Such a confrontation would put the student further at risk of harm to their health and well-being.

It is irrational and irresponsible for HIDOE to include this process of informal resolution for K-12 students to be confronted by the accused adult, when this section acknowledges that this process would be inappropriate if “there is an objective and obvious power imbalance between the parties.” It should be clear to HIDOE that there will *always* be an overwhelming power imbalance between K-12 students and any alleged adult perpetrator by any objective measure, whether employee, volunteer, contractor or other, if a K-12 student is put in a situation of having to directly confront an alleged adult perpetrator to negotiate the student’s own resolution of its problems of discrimination, bullying or harassment by the adult. There is always a great power imbalance between a student and an adult at the school, inherent in the disparity in the ages of the students as K-12 students, and their physical and emotional development, maturity, education, and skills levels as children, as compared to the power held by adult persons, having an actual or perceived status of authority inherent in the roles of teachers, administrators, counselors and other school employees, volunteers, or contractors, plus having adult levels of physical development, maturity, education and skills.

There is no justification for HIDOE to even consider suggesting this harmful situation to students. It is even more egregious because the students would already be intimidated and fearful of the alleged perpetrator and unable to handle the situation directly, or they would not have come to HIDOE authorities seeking help and protection, and if a frightened student were to consent to this process because of the pressure inherent in a suggestion made by a HIDOE authority figure, and about to face the same fearful situation that they fled from yet worse for having complained to HIDOE authorities, the student could be driven to desperation feeling there was no place to turn.

Even under current federal guidance, the U.S. DOE does not recommend direct negotiation between parties even at the post-secondary level. **This informal resolution process must be entirely deleted**

**from these rules to prevent it from ever being suggested to a student complainant and further harming the student.**

**Section 8-89-6(e) (on “immediate interventions”)** This section on immediate interventions would wrongly treat both parties as equally eligible to request “immediate interventions” (defined as services), and should be amended to differentiate between the support services that all student complainants would be eligible for and the protective actions HIDOE would be responsible to take regarding the alleged adult perpetrator to assure that the alleged adult perpetrator does not harm the student complainant or other students. This section presents the same problems in the definition of “immediate interventions.” See comments on Section 8-89-2 Definitions. “Immediate interventions” above.

**Section 8-89-11 Student’s Right to Privacy** – There is a need for an **anonymous complaint process** to encourage more students to provide HIDOE information on prohibited discrimination, bullying and harassment in HIDOE schools. An **anonymous and confidential complaint process** (not the same as keeping confidential the records of complaints, investigations, and reports under Section 8-89-11), whereby HIDOE would accept anonymous complaints or would keep a complainant’s identity fully confidential should be included in this section or in the complaint process Section 8-89-6. It is not uncommon for students to be afraid to file a complaint, not trusting HIDOE authorities, and/or afraid of retaliation by perpetrators should they file a complaint, and to fear negative reactions from other adults and students in the school should others learn of their complaint. LGBTQ students often fear being “outed” in school, fearing harm from other students and also harm from parents who do not accept LGBTQ persons.

The acceptance of anonymous complaints and provision of complete confidentiality are allowed under federal guidelines despite the limits it would put on investigating an alleged adult perpetrator, because it would still allow reluctant students to seek help, and is considered to be beneficial in uncovering underlying systemic problems in a school or in the overall system and possibly other violations or patterns of violations by an individual, thereby allowing these problems to be addressed by the school district. An anonymous complaint process could encourage students to submit complaints and provide HIDOE with greater opportunities to stop discriminatory practices within HIDOE’s schools.

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**Testimony to the Hawaii Board of Education and the Hawaii Department of Education, Chairperson Catherine Payne, Vice-Chair Brian De Lima, and Members of the Hawaii Board of Education on the Hawaii Department of Education's Revised Hawaii Administrative Rules Chapter 19 (HAR CH. 19) STUDENT MISCONDUCT, DISCIPLINE, SCHOOL SEARCHES AND SEIZURES, REPORTING OFFENSES, POLICE INTERVIEWS AND ARRESTS, RESTITUTION FOR VANDALISM, AND COMPLAINTS RELATING TO PROTECTED CLASS CONDUCT from Josephine Chang**

The proposed revised version of HAR Ch. 19 was not available to the public prior to the notice of this September 6, 2018 meeting of the Board and that short notice did not allow enough time to do a thorough review. Therefore, my comments here are only brief and will be expanded upon in public hearing should this version of Ch. 19 be adopted by the Hawaii Board of Education.

As noted on the first page of my testimony, HIDOE's justification for the changes it made to HAR Ch. 19 was that these changes were made to comply with U.S. DOE OCR requirements, to remedy the negative findings in U.S. DOE OCR's most recent compliance review of HIDOE with regard to federal law. However, U.S. DOE OCR's requirements did not require all of the specific revisions that HIDOE made to HAR Ch. 19, nor the manner in which they were drafted. (See January, 2018 letter to Superintendent Kishimoto from Linda Mangel, Regional Director, U.S.DOE OCR setting forth findings and requirements.)

**Unequal protections for HIDOE students from bullying and harassment.**

For example, U.S. DOE OCR required HIDOE to reference protected classes in Ch. 19, but did not require the approach that HIDOE took in revising HAR Ch. 19 to create separate definitions and procedures for protected class students alongside of differing definitions and procedures for nonprotected class students with regard to bullying, cyberbullying, and harassment. HIDOE's revisions included definitions for "bullying based on protected class", cyberbullying based on protected class", and "harassment based on protected class" that differ from the definitions for "bullying," "cyberbullying", and "harassment" already in HAR Ch. 19. The resulting side by side but differing definitions wrongly provide unequal protections for protected class students from protections for other students from the same bullying and harassment conduct in HIDOE schools, and make it more confusing and difficult to understand HIDOE's approach to bullying and harassment under Ch. 19 involving student-on-student incidents. HIDOE should use the same basic definitions for bullying, cyberbullying, and harassment in HAR Ch. 19 for all students, protected class and nonprotected class students and simply reference protected classes as required by U.S.DOE OCR.

**Lesser protections for protected class students.**

Also, the revisions to include separate and different definitions and procedures for protected class students in HAR Ch. 19 have the effect of providing *lesser* protections for protected class students, because of the greater conditions on protected class definitions that will screen out some of the conduct that is considered to be bullying, cyberbullying or harassment with respect to nonprotected class students. All of the additional conditions HIDOE put in the definitions of protected class bullying,

protected class cyberbullying, and protected class harassment serve to narrow the scope of complaints that HIDOE will accept from protected class students for bullying, cyberbullying, and harassment. This was not required by U.S.DOE OCR, and is discriminatory in effect.

Also, the definition of “discrimination” is narrow and limiting instead of allowing broadly for complaints for all unfair and unjust disparate treatment by protected classes. It is entirely discretionary that HIDOE chooses a narrow and limited definition instead of a broad definition that would allow HIDOE to fully address the problems of widespread discrimination, and discriminatory bullying and harassment in HIDOE schools.

#### **Where are Complaint Procedures for nonprotected class students?**

HAR Ch. 19 does not provide for a complaint procedure for students or others on their behalf to file or report complaints to authorities. The revisions made now include a new subchapter on complaints related to protected class conduct, but HIDOE also needs to provide a complaint procedure for nonprotected class students. HIDOE should provide complaint procedures that apply fairly to all students.

#### **Need to delete the “informal resolution process” that is dangerous and harmful to students and of no benefit to the students or HIDOE.**

The “informal resolution process” that is now included in HAR Ch. 19 should be entirely deleted as it would not benefit student complainants, would put them in a dangerous situation, would be a frightening proposition, and yet would pressure students to agree if the suggestion were even made. See also my comments in my testimony on HAR Ch. 89 on why this informal resolution process should be deleted from HAR Ch. 89). This process is not required by U.S.DOE OCR and not a recommended process, even for post-secondary students, and there is no real justification for including this process. HIDOE needs to amend its Resolution Agreement to withdraw its offer to include an informal resolution process.

***\*\*SUMMARY CONCLUSIONS: Both HAR Ch. 89 and HAR Ch. 19 have serious deficiencies that require HIDOE to reconsider and amend its approach to complying with federal auditing requirements, to be sure that it makes sense, that it would first and foremost protect students, and more broadly consider how to best effectively address the widespread problems of discrimination, bullying and harassment in HIDOE schools.***



**S E A C**  
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**September 6, 2018**

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RE: II. A. Committee Action on approving for public hearing draft  
amendments to Hawaii Administrative Rules, Chapter 19

Dear Chairs Cox and Uemura and Members of the Committees,

The Special Education Advisory Council (SEAC) appreciates the opportunity to provide testimony on draft amendments to Chapter 19 prior to public hearings. We are supportive of the Department's efforts to provide a more timely and comprehensive response to bullying and harrasment of public school students based on race, sex and disability. These efforts include the hiring of equity specialists, notice to students and their families, enhanced training and written grievance procedures for addressing complaints of discrimination and harrasment filed by students, parents, employees and other parties.

It is well documented that students with disabilities are bullied 2-3 times more than students without disabilities. Research has also shown a connection between certain kinds of emotional disabilities and bullying behavior. Bullying can cause lasting harm to all involved including poor academic achievement, depression and low self-esteem, and negative impacts to future employment and social relationships.

With respect to Chapter 19, we ask for your consideration of the following recommendations to strengthen the protection of students with disabilities:

**RECOMMENDATION 1**

Under §8-19-2 Definitions. Harassment (3) "Disability harassment"

After defining disability harrasment, the following statement is made: "Complaints relating to the denial of free appropriate public education\_(FAPE) are addressed under Hawaii administrative rules





#### RECOMMENDATION 1 (cont.)

§§ 8-60 and 8-61.” While this statement is factually true, SEAC believes this statement is more appropriately included in SUBCHAPTER 8 - COMPLAINTS RELATING TO PROTECTED CLASS CONDUCT, along with a description of the investigative process.

##### SEAC’s rationale:

The investigative process is what determines whether the complaint of disability harassment created a hostile environment for a student with a disability and whether that student’s receipt of appropriate services may have been affected, thereby resulting in a FAPE violation under IDEA or Section 504. Neither Chapter 60 or Chapter 61 includes language about disability harassment, so parents and teachers may not be aware of its effect on the provision of FAPE, or that bullying can be the basis of a written or due complaint under those chapters. The investigative process for complaints related to protected class conduct should make that determination and provide the parent with guidance on how to proceed with a written complaint or due process complaint under the appropriate administrative rule.

#### RECOMMENDATION 2

##### Under §8-19-2 Definitions. “Immediate interventions”

Specify a specific timeline for “immediate” interventions.

##### SEAC’s rationale:

The term “immediate” sets an expectation with parents that information or service offered will occur on the same day as the complaint is filed. When schools fail to notify parents of optional interventions in a timely manner, it creates a basis of mistrust between home and school. Specifying a timeline will create uniform expectations between school officials and parents.

#### RECOMMENDATION 3

##### Under §8-19-2 Definitions. “Parent”

The statement “for students eighteen years of age or older, all parental rights herein transfer to the student” needs to be amended to add “Parents of students with disabilities eighteen years of age or older may continue to act as the educational representative to make educational decisions for their adult student under the provisions of Act 182 (2009).

##### SEAC’s rationale:

Disability advocates helped to pass SB 2879 (Act 182) during the 2008 Legislative Session. It allows alternatives to legal guardianship for retaining the right to act as the decision maker under IDEA for educational decisions pertaining to their adult child when that child lacks decisional capacity or when he or she elects to have his parent(s) appointed as his Power of Attorney for Educational Decisions. (see attached synopsis of Act 182)

#### RECOMMENDATION 4

##### Under SUBCHAPTER 8, §8-19-31 Investigation (a)

The draft language reads “Once an investigation is initiated, the principal or designee shall make



RECOMMENDATION 4 (cont.)

a good faith effort *at the earliest point possible* to inform the parent about the investigation.” This sentence should be amended to specify a timeline (for example, *on the day of the complaint, within 24 hours of a complaint*, etc.) rather than use the vague language “at the earliest point possible.”

SEAC’s rationale:

Having vague timelines reduces accountability and leads to misunderstandings between parents and school personnel. SEAC has asked the Department on several occasions to issue instructions to the field to notify parents of incidents at school **on the same day of the incident**. Children with disabilities often lack the ability to clearly express events that happen at school that may have upset or traumatized them. Parent have a right to timely information so that they can appropriately support and/or advocate for their child.

RECOMMENDATION 5

Under SUBCHAPTER 8, §8-19-31 Investigation (b)

Add the following language to the description of the investigational duties: “When investigating disability harassment, the investigator will consider factors outlined by the Office for Civil Rights to determine whether harassment occurred under Section 504 and whether there was a denial of FAPE under Section 504 or IDEA.” (See attached Office for Civil Rights **Dear Colleague Letter: Responding to Bullying of Students with Disabilities**, dated October 21, 2014).

SEAC rationale:

OCR has outlined a clear process for analyzing complaints involving the bullying of students with disabilities. They also provide a decision tree for how OCR conducts its investigations. It is important for school-level personnel as well as equity specialists to understand their obligations in this respect to avoid findings of discriminatory treatment. While the student who violates Chapter 19 suffers consequences, so, too, do schools who violate their obligations under Section 504.

Thank you for the opportunity to provide recommendations on these important regulations. Should you have questions, we will be happy to provide answers or clarification.

Respectfully,

Martha Guinan  
SEAC Chair

Ivalée Sinclair  
Legislative Committee Chair



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

October 21, 2014

Dear Colleague:

While there is broad consensus that bullying is wrong and cannot be tolerated in our schools, the sad reality is that bullying persists in our schools today, and especially so for students with disabilities.<sup>1</sup> In recent years, the Office for Civil Rights (OCR) in the U.S. Department of Education (Department) has received an ever-increasing number of complaints concerning the bullying of students with disabilities and the effects of that bullying on their education, including on the special education and related services to which they are entitled. This troubling trend highlights the importance of OCR's continuing efforts to protect the rights of students with disabilities through the vigorous enforcement of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). It also underscores the need for schools to fully understand their legal obligations to address and prevent disability discrimination in our schools.

Today's guidance follows a long history of guidance issued by the Department in this critical area of disability discrimination. In 2000, OCR and the Office of Special Education and Rehabilitative Services (OSERS) issued joint guidance informing schools that disability-based harassment may deny a student equal educational opportunities under Section 504 and Title II.<sup>2</sup> The 2000 guidance also noted the responsibilities of schools under Section 504 and the Individuals with Disabilities Education Act (IDEA) to ensure that students receive a free appropriate public education (FAPE),

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<sup>1</sup> These students are bullied or harassed more than their nondisabled peers. See Office of Special Education and Rehabilitative Services (OSERS) 2013 Dear Colleague Letter on Bullying of Students with Disabilities, <http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc>, at page 2 ("Students with disabilities are disproportionately affected by bullying."). That letter explains that, "[b]ullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles." *Id.* Throughout this guidance, the terms "bullying" and "harassment" are used interchangeably to refer to these types of conduct. See Office for Civil Rights (OCR) 2010 Dear Colleague Letter on Harassment and Bullying, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>, at page 3 ("The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications.").

<sup>2</sup> OCR-OSERS 2000 Dear Colleague Letter: Prohibited Disability Harassment, <http://www.ed.gov/ocr/docs/disabharassltr.html>.

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and alerted schools that harassment of a student based on disability may adversely impact the school's provision of FAPE to the student.<sup>3</sup> In 2010, OCR issued a Dear Colleague Letter on Harassment and Bullying that provided further guidance concerning when a school's inappropriate response to bullying or harassment of a student based on disability constitutes a disability-based harassment violation under Section 504 and Title II.<sup>4</sup> In 2013, OSERS issued a Dear Colleague Letter on Bullying of Students with Disabilities that, in turn, provided additional guidance to schools that the bullying of a student with a disability on *any* basis can result in a denial of FAPE under IDEA that must be remedied.<sup>5</sup>

Building on OSERS's 2013 guidance, today's guidance explains that the bullying of a student with a disability on *any* basis can similarly result in a denial of FAPE under Section 504 that must be remedied; it also reiterates schools' obligations to address conduct that may constitute a disability-based harassment violation and explains that a school must also remedy the denial of FAPE resulting from disability-based harassment. Following an overview of the federal protections for students with disabilities in schools, the guidance elaborates on the elements of a disability-based harassment violation and a FAPE violation, discusses how OCR generally analyzes complaints involving bullying of students with disabilities on each of these bases, and then concludes with a series of hypothetical examples that illustrate varying circumstances when conduct may constitute both a disability-based harassment violation and FAPE violation, a FAPE violation, or neither. Although by no means exhaustive, in the context of this discussion, the guidance also offers some insight into what OCR might require of a school to remedy instances of bullying upon a finding of disability discrimination. OCR urges schools to consider these hypothetical resolution agreement provisions in proactively working to ensure a safe school environment, free from discrimination, for all students.<sup>6</sup>

## **I. Overview of Federal Protections for Students with Disabilities in Schools**

OCR enforces Section 504 and Title II, both of which prohibit disability discrimination. Section 504 prohibits disability discrimination by recipients of Federal financial assistance.<sup>7</sup> OCR enforces Section 504 against entities that receive Federal financial assistance from the Department, including all public schools and school districts as well as all public charter schools and magnet schools. Under Section 504, recipients that operate a public elementary or secondary education program must

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<sup>3</sup> The terms "school" and "school district" are used interchangeably in this letter and refer to public elementary and secondary schools that receive financial assistance from the Department.

<sup>4</sup> OCR 2010 Dear Colleague Letter on Harassment and Bullying, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>.

<sup>5</sup> OSERS 2013 Dear Colleague Letter on Bullying of Students with Disabilities, <http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc>.

<sup>6</sup> This guidance addresses only student-on-student bullying and harassment. Under Section 504 and Title II, students with disabilities are also protected from bullying by teachers, other school employees, and third parties. Such bullying can trigger a school's obligation to address disability-based harassment, remedy a denial of FAPE, or both. See 34 C.F.R. §§ 104.4, 104.33; 28 C.F.R. pt. 35. OCR recommends that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying that involve school personnel.

<sup>7</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104.



provide students with disabilities equal educational opportunities. Among other things, this means they must ensure that students with disabilities receive FAPE, defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that satisfy certain requirements concerning educational setting, evaluation, placement, and procedural safeguards.<sup>8</sup> Schools also have an obligation under Section 504 to evaluate students who need or are believed to need special education or related services. Further, schools have an obligation to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.<sup>9</sup> Schools often document these services in written plans, sometimes referred to as Section 504 plans, or, if the child is receiving IDEA FAPE services, through the required individualized education program (IEP).<sup>10</sup>

Title II prohibits disability discrimination by public entities, including all public schools and school districts, as well as all public charter schools and magnet schools, regardless of whether they receive Federal financial assistance.<sup>11</sup> OCR, along with the U.S. Department of Justice (DOJ), enforces Title II in public elementary and secondary schools. Title II is generally construed to provide no less protection than Section 504. Therefore, violations of Section 504, including the failure to provide needed regular or special education and related aids and services to students with disabilities, also constitute violations of Title II.<sup>12</sup>

IDEA is another key Federal law addressing the needs of students with disabilities. OSERS, not OCR or DOJ, administers IDEA.<sup>13</sup> OCR, however, enforces the Section 504 and Title II rights of IDEA-eligible students.<sup>14</sup> Under Part B of IDEA, the Department provides Federal funds to State educational agencies and through them to local educational agencies (school districts), to assist

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<sup>8</sup> For Section 504 and Title II, the term “disability” means a physical or mental impairment that substantially limits one or more major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B); 42 U.S.C. § 12102. The Americans with Disabilities Act Amendments Act (Amendments Act), Pub. Law No. 110-325, amended the disability definition for Section 504 and Title II. Most notably, the Amendments Act required that “disability” under these statutes be interpreted broadly. More information about the Amendments Act is available from OCR’s website at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html> and <http://www.ed.gov/ocr/docs/dcl-504faq-201109.html>.

<sup>9</sup> In this letter, the term “Section 504 FAPE services” is used to refer to the regular or special education and related aids and services provided to students with disabilities as specified in 34 C.F.R. § 104.33(b). The term “IDEA FAPE services” is used in this letter to refer to the special education and related services provided to students with disabilities that meet the requirements of 34 C.F.R. pt. 300, as specified in 34 C.F.R. §§ 300.17 (FAPE), 300.39 (special education), and 300.34 (related services).

<sup>10</sup> Students with disabilities who are IDEA-eligible also have rights under Section 504 and Title II. The Department’s Section 504 regulations provide that implementation of an IEP developed in accordance with IDEA is one means of providing Section 504 FAPE services. 34 C.F.R. § 104.33(b)(2).

<sup>11</sup> 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

<sup>12</sup> 42 U.S.C. § 12201(a). To the extent that Title II provides greater protection than Section 504, covered entities must comply with Title II’s requirements.

<sup>13</sup> For more information about OSERS, please visit <http://www.ed.gov/osers>.

<sup>14</sup> This letter only addresses Federal law; other State or local laws and policies may apply.

school districts in providing FAPE to eligible children with disabilities through the provision of special education and related services.<sup>15</sup> School districts must ensure that IDEA FAPE services in the least restrictive environment are made available to all eligible children with disabilities through a properly developed IEP that provides a meaningful educational benefit to the student. In addition, school districts must locate, identify, and evaluate children suspected of having disabilities who may need special education and related services.

## **II. Schools' Obligations to Address Disability-Based Harassment**

Bullying of a student on the basis of his or her disability may result in a disability-based harassment violation under Section 504 and Title II.<sup>16</sup> As explained in OCR's 2010 Dear Colleague Letter on Harassment and Bullying, when a school knows or should know of bullying conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred.<sup>17</sup> If a school's investigation reveals that bullying based on disability created a hostile environment—i.e., the conduct was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school—the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Therefore, OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.<sup>18</sup>

As explained in Section III, below, for the student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services, a school's investigation should include determining whether

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<sup>15</sup> 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. IDEA establishes 13 disability categories: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment. 34 C.F.R. § 300.8(c).

<sup>16</sup> These legal protections extend to all students with disabilities, including students who are regarded as having a disability or who have a record of a disability and students with disabilities who are not receiving services under Section 504 or IDEA. In addition to being protected from harassment on the basis of disability, students with disabilities, like all students, are entitled to protection from harassment on the basis of race, color, national origin, sex (including sexual violence), and age under the Federal civil rights laws that OCR enforces. For more information about other types of discriminatory harassment, see [OCR's 2010 Dear Colleague Letter](#) referenced in note 4.

<sup>17</sup> Schools know or should know about disability-based harassment when, for example, a teacher or other responsible employee of the school witnesses the conduct. For more information about how to determine when knowledge of such conduct will be imputed to schools, refer to the OCR 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, <http://www.ed.gov/ocr/docs/shguide.pdf> at page 13; and [OCR 2010 Dear Colleague Letter on Harassment and Bullying](#), at page 3 and note 11.

<sup>18</sup> This is the standard for administrative enforcement of Section 504 and in court cases where plaintiffs are seeking injunctive relief. It is different from the standard in private lawsuits for money damages, which, many courts have held, requires proof of a school's actual knowledge and deliberate indifference. See *Long v. Murray Cnty. Sch. Dist.*, 522 Fed. Appx. 576, 577 & n. 1 (11th Cir. 2013) (applying the test enunciated in *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643 (1999)).

that student's receipt of appropriate services may have been affected by the bullying.<sup>19</sup> If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's IDEA FAPE services or Section 504 FAPE services may have been affected by the bullying, the school has an obligation to remedy those effects on the student's receipt of FAPE.<sup>20</sup> Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services.

### **III. Bullying and the Denial of a Free Appropriate Public Education**

The bullying on *any* basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied under Section 504. The OSERS 2013 Dear Colleague Letter clarified that, under IDEA, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team<sup>21</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide a meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP team must determine the extent to which additional or different IDEA FAPE services are needed to address the student's individualized needs and then revise the IEP accordingly. Any decisions made by the IEP team must be consistent with the IDEA provisions addressing parental participation and should keep the student with a disability in the original placement or setting (e.g., the same school and classroom) unless the student can no longer receive FAPE in that placement or setting. Under IDEA, schools have an ongoing obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE in accordance with his or her IEP—an obligation that exists whether the student is being bullied based on his or her disability or is being bullied based on other reasons.

Similarly, under Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives IDEA FAPE services or Section 504 FAPE services and who is the target of bullying continues to receive FAPE—an obligation that exists regardless of why the student

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<sup>19</sup> As stated in [OCR 2010 Dear Colleague Letter on Harassment and Bullying](#) at page 2, "The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors." When a student with a disability who receives Section 504 FAPE services is being bullied, an appropriate "other factor" is whether that student's receipt of services has been affected by the bullying.

<sup>20</sup> When a student with a disability has engaged in misconduct that is caused by his or her disability, the student's own misconduct would not relieve the school of its legal obligation to determine whether that student's civil rights were violated by the bullying conduct of the other student. For example, if a student, for reasons related to his disability, hits another student and other students then call him "crazy" on a daily basis, the school should, of course, address the conduct of the student with a disability. Nonetheless, the school must also consider whether the student with a disability is being bullied on the basis of disability under Section 504 and Title II.

<sup>21</sup> The IEP team is the group of persons specified in IDEA that determines the appropriate IDEA FAPE services for an IDEA-eligible student. 34 C.F.R. § 300.321(a).



is being bullied.<sup>22</sup> Accordingly, under Section 504, as part of a school's appropriate response to bullying on *any* basis, the school should convene the IEP team or the Section 504 team<sup>23</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed,<sup>24</sup> ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.<sup>25</sup> In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.

Although there are no hard and fast rules regarding how much of a change in academic performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient.<sup>26</sup> By contrast, one low grade for an otherwise straight-A student who shows no other changes in academic progress or behavior will generally not, standing alone, trigger the school's obligation to determine whether the student's needs are still being met. Nonetheless, in addition to addressing the bullying under the school's anti-bullying policies, schools should promptly convene the IEP team or Section 504 team to determine whether FAPE is being provided

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<sup>22</sup> At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under State law to provide elementary and secondary educational services to students with disabilities; or a student to whom a State is required to provide FAPE under IDEA. 34 C.F.R. § 104.3(f). In addition to the provision of regular or special education and related aids and services pursuant to 34 C.F.R. § 104.33, FAPE protections extend to educational setting, evaluation and placement, and procedural safeguards. 34 C.F.R. §§ 104.34-.36.

<sup>23</sup> The Section 504 team is the group of knowledgeable persons that determines the appropriate Section 504 FAPE services for a qualified student with a disability under Section 504.

<sup>24</sup> A reevaluation would not be needed unless there is a reason to believe the student's underlying disability or disabilities have changed or the student has an additional disability.

<sup>25</sup> OCR would expect that schools address bullying behavior to ensure that the burden does not fall on the student with a disability. Along these lines, and consistent with the OSERS 2013 Dear Colleague Letter, schools should exercise caution when considering a change in placement, or the location of services (including classroom) provided to the student with a disability who is the target of bullying and should keep the student in the original placement unless the student can no longer receive Section 504 FAPE in that placement. OCR also urges schools to allow for parental participation when considering any change in placement or location of services (including classroom). See 34 C.F.R. pt. 104, app. A (discussion of Subpart D).

<sup>26</sup> In light of schools' ongoing obligation to ensure that students with disabilities are receiving FAPE, adverse changes in the academic performance or behavior of a student receiving FAPE services could trigger the school's obligation to convene the IEP team or Section 504 team regardless of the school's knowledge of the bullying conduct. See, e.g., Section V, Hypothetical Example B, below. As a best practice, schools should train all staff to report bullying to an administrator or school official who can promptly convene a meeting of knowledgeable people (e.g., the student's Section 504 team or IEP team) to ensure that the student is receiving FAPE and, as necessary, address whether the student's FAPE needs have changed.



to a student with a disability who has been bullied and who is experiencing any adverse changes in academic performance or behavior.

When bullying results in a disability-based harassment violation, it will not always result in a denial of FAPE. Although all students with disabilities are protected from disability-based harassment, the requirement to provide FAPE applies only to those students with disabilities who need or may need FAPE services because of their disability.<sup>27</sup> This means that if a student is the target of bullying resulting in a disability-based harassment violation, but that student is not eligible to receive IDEA or Section 504 FAPE services, there could be no FAPE violation.

When a student who receives IDEA FAPE services or Section 504 FAPE services has experienced bullying resulting in a disability-based harassment violation, however, there is a strong likelihood that the student was denied FAPE. This is because when bullying is sufficiently serious to create a hostile environment and the school fails to respond appropriately, there is a strong likelihood both that the effects of the bullying included an impact on the student's receipt of FAPE and that the school's failure to remedy the effects of the bullying included its failure to address these FAPE-related concerns.

Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: (1) the student's educational needs have changed; (2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and (3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly. By doing so, the school will be in the best position to ensure the student's ongoing receipt of FAPE.

#### **IV. How OCR Analyzes Complaints Involving Bullying of Students with Disabilities**

When OCR evaluates complaints involving bullying and students with disabilities, OCR may open an investigation to determine whether there has been a disability-based harassment violation, a FAPE violation, both, or neither, depending on the facts and circumstances of a given complaint.

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<sup>27</sup> The FAPE requirement to evaluate applies to all students who are known or believed to need special education or related services, regardless of the nature or severity of the disability. 34 C.F.R. §§ 104.33, -.35. For a student who is suspected of having a disability but who is not yet receiving IDEA or Section 504 services, OCR may consider whether the school met its obligation to evaluate the student. 34 C.F.R. § 104.35. For example, if a student suspected of having a disability was missing school to avoid bullying, OCR may consider whether the student's evaluation was unduly delayed (e.g., if the school knew or should have known of the bullying and failed to act) in determining whether there was a denial of FAPE under the circumstances.

**When investigating disability-based harassment, OCR considers several factors, including, but not limited to:**

- Was a student with a disability bullied by one or more students based on the student's disability?
- Was the bullying conduct sufficiently serious to create a hostile environment?
- Did the school know or should it have known of the conduct?
- Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?

*If the answer to each of these questions is "yes," then OCR would find a disability-based harassment violation under Section 504 and, if the student was receiving IDEA FAPE or Section 504 FAPE services, OCR would have a basis for investigating whether there was also a denial of FAPE under Section 504.*

*Even if the answers to one or more of these questions is "no," for a student who was receiving IDEA FAPE or Section 504 FAPE services, OCR may still consider whether the bullying resulted in a denial of FAPE under Section 504 that must be remedied.*

**When investigating whether a student receiving IDEA FAPE or Section 504 FAPE services who was bullied was denied FAPE under Section 504, OCR considers several factors, including, but not limited to:**

- Did the school know or should it have known that the effects of the bullying may have affected the student's receipt of IDEA FAPE services or Section 504 FAPE services? For example, did the school know or should it have known about adverse changes in the student's academic performance or behavior indicating that the student may not be receiving FAPE?

*If the answer is "no," there would be no FAPE violation.<sup>28</sup> If the answer is "yes," OCR would then consider:*

- Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student's educational needs were still being met, and if not, making changes, as necessary, to his or her IEP or Section 504 plan?

*If the answer is "no," and the student was not receiving FAPE, OCR would find that the school violated its obligation to provide FAPE.*

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<sup>28</sup> Where a student is suspected of having a disability but is not yet receiving IDEA FAPE services or Section 504 FAPE services, OCR could consider whether the student's evaluation was unduly delayed in determining whether there was a denial of FAPE under the circumstances. See fn. 27, above.

## **V. Hypothetical Examples**

The following hypothetical examples illustrate how OCR would analyze a complaint involving allegations of the bullying of a student with a disability who only receives Section 504 FAPE services.

### **A. Disability-Based Harassment Violation and FAPE Violation**

At the start of the school year, a ten-year-old student with Attention Deficit Hyperactivity Disorder (ADHD) and a speech disability is fully participating in the classroom, interacting with his peers at lunch and recess, and regularly attending speech therapy twice a week. In addition to providing for speech services, the student's Section 504 plan also provides for behavior supports that call for all his teachers and other trained staff to supervise him during transition times, provide constructive feedback, and help him use preventative strategies to anticipate and address problems with peers.

Because of the student's disabilities, he makes impulsive remarks, speaks in a high-pitched voice, and has difficulty reading social cues. Three months into the school year, students in his P.E. class begin to repeatedly taunt him by speaking in an exaggerated, high-pitched tone, calling him names such as "weirdo" and "gay," and setting him up for social embarrassment by directing him to ask other students inappropriate personal questions. The P.E. teacher witnesses the taunting, but neither reports the conduct to the appropriate school official, nor applies the student's behavior supports specified in his 504 plan. Instead, she pulls the student aside and tells him that he needs to start focusing less on what kids have to say and more on getting his head in the game. As the taunting intensifies, the student begins to withdraw from interacting with other kids in P.E. and avoids other students at lunch and recess. As the student continues to withdraw over the course of a few weeks, he misses multiple sessions of speech therapy, but the speech therapist does not report his absences to the Section 504 team or another appropriate school official.

In this example, OCR would find a disability-based harassment violation. The student's peers were making fun of him because of behaviors related to his disability. For OCR's enforcement purposes, the taunting the student experienced, including other students impersonating him and calling him "weirdo" and "gay," was therefore based on his disability.<sup>29</sup> The school knew about the bullying because the P.E. teacher witnessed the conduct.<sup>30</sup> Yet upon witnessing the taunting, the P.E. teacher not only failed to provide the student behavior supports as required in the student's 504 plan, but also failed to report the conduct to an appropriate school official. Had she taken this step, the school could have conducted an investigation and found that the conduct created a hostile environment because it interfered with the student's ability to benefit from the speech therapy services that he

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<sup>29</sup> OCR would have also investigated whether a school's inappropriate response to the use of the word "gay" in this context constituted a gender-based harassment violation under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; 34 C.F.R. pt. 106, which prohibits discrimination on the basis of sex. For a discussion of gender-based harassment, see [OCR 2010 Dear Colleague Letter on Harassment and Bullying](#), at pages 7-8.

<sup>30</sup> The P.E. teacher in this example is a responsible employee. See fn. 17, above.

should have been receiving and negatively affected his ability to participate fully in P.E., lunch, and recess. The school's failure to appropriately respond to the bullying violated Section 504.

OCR would also find FAPE violations under Section 504. First, when the P.E. teacher failed to implement the behavior supports in the student's Section 504 plan, the school denied the student FAPE under Section 504. In addition, and independent of the failure to provide behavior supports, because the bullying impacted the student's receipt of Section 504 FAPE, the school should have addressed the student's changed needs; by failing to do so, the student was denied Section 504 FAPE. The school should have known about the missed Section 504 services and related changes in behavior. The P.E. teacher knew about the bullying but did nothing to report the student's behavioral changes (e.g., the student's increasing efforts to isolate himself from other students) to the Section 504 team members or other appropriate school official. Similarly, the speech therapist knew that the student was missing speech therapy but did not report this to the 504 team or to an appropriate school official. By failing to address the adverse effects of the bullying on FAPE, the school did not make necessary changes to ensure the student was provided FAPE under Section 504. If, upon concluding its investigation, OCR and the district were to enter into a resolution agreement, OCR could require, for example, that the district (1) ensure that FAPE is provided to the student by convening the Section 504 team to determine if the student needs different or additional services (including compensatory services) and, if so, providing them; (2) offer counseling to the student to remedy the harm that the school allowed to persist; (3) monitor whether bullying persists for the student and take corrective action to ensure the bullying ceases; (4) develop and implement a school-wide bullying prevention strategy based on positive behavior supports; (5) devise a voluntary school climate survey for students and parents to assess the presence and effect of bullying based on disability and to respond to issues that arise in the survey; (6) revise the district's anti-bullying policies to develop staff protocols in order to improve the district's response to bullying; (7) train staff and parent volunteers, such as those who monitor lunch and recess or chaperone field trips, on the district's anti-bullying policies, including how to recognize and report instances of bullying on any basis; and (8) provide continuing education to students on the district's anti-bullying policies, including where to get help if a student either witnesses or experiences bullying conduct of any kind.

#### **B. FAPE Violation, No Disability-Based Harassment Violation**

A thirteen-year-old student with depression and Post-Traumatic Stress Disorder (PTSD) who receives counseling as part of her Section 504 services is often mocked by her peers for being poor and living in a homeless shelter. Having maintained an A average for the first half of the academic year, she is now getting Bs and Cs, neglecting to turn in her assignments, and regularly missing counseling sessions. When asked by her counselor why she is no longer attending scheduled sessions, she says that she feels that nothing is helping and that no one cares about her. The student tells the counselor that she no longer wants to attend counseling services and misses her next two scheduled sessions. The counselor informs the principal that the student has missed several counseling sessions and that the student feels the sessions are not helping. Around the same time, the student's teachers inform the principal that she has begun to struggle academically. The

principal asks the teachers and counselor to keep her apprised if the student's academic performance worsens, but does not schedule a Section 504 meeting.

In this example, whether or not the school knew or should have known about the bullying, OCR would not find a disability-based harassment violation under Section 504 because the bullying incidents were based on the student's socio-economic status, not her disability.

Independent of the basis for the bullying and regardless of whether school officials knew or should have known about the bullying, the school district still had an ongoing obligation under Section 504 to ensure that this student with a disability was receiving an education appropriate to her needs. Here, the student's sudden decline in grades, coupled with changes in her behavior (missing counseling sessions), should have indicated to the school that her needs were not being met. In this example, OCR would find that these adverse changes were sufficient to put the school on notice of its obligation to promptly convene the Section 504 team to determine the extent of the FAPE-related problems and to make any necessary changes to her services, or, if necessary, reevaluate her, in order to ensure that she continues to receive FAPE. By failing to do more than keep track of the student's academic performance, the school failed to meet this obligation, which violated Section 504.<sup>31</sup>

### **C. No Disability-Based Harassment Violation, No FAPE Violation**

A seven-year-old student with a food allergy to peanuts has a Section 504 plan that provides for meal accommodations, the administration of epinephrine if the student is exposed to peanuts, access to a peanut-free table in the cafeteria, and the prohibition of peanut products in the student's classroom. In advance of the upcoming Halloween party, the teacher reminds the class that candy with peanuts is prohibited in the classroom at all times, including Halloween. That afternoon, while on the bus, a classmate grabs the student's water bottle out of the student's backpack, drinks from it, and says, "I had a peanut butter sandwich for lunch today, and I just finished it." The following day, while having lunch at the peanut-free table in the lunchroom with some friends, a classmate who had been sitting at another table sneaks up behind her and waves an open candy bar with peanuts in front of her face, yelling, "Time to eat peanuts!" Though the candy bar does not touch her, a few other classmates nearby begin chanting, "Time to eat peanuts," and the student leaves the lunchroom crying. When the student goes back to her classroom and tells her teacher what happened at lunch and on the bus, the teacher asks her whether she came into contact with the candy bar and what happened to the water bottle. The student confirms that the candy bar did not touch her and that she never got the water bottle back from the classmate who took it, but says that she is scared to go back into the lunchroom and to ride the bus. The teacher promptly informs the principal of the incidents, and the peers who taunted the student on the bus and in the lunchroom are removed from the lunchroom, interviewed by the assistant principal, and required to meet with the counselor during

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<sup>31</sup> If OCR and the district were to enter into a resolution agreement in this case, such an agreement could include, for example, any of the provisions specified in Hypothetical Example A, above.

recess to discuss the seriousness of their conduct. That same week, the school holds a Section 504 meeting to address whether any changes were needed to the student's services in light of the bullying. The principal also meets with the school counselor, and they decide that a segment on the bullying of students with disabilities, including students with food allergies, would be added to the counselor's presentation to students on the school's anti-bullying policy scheduled in the next two weeks. Furthermore, in light of the young age of the students, the counselor offers to incorporate a puppet show into the segment to help illustrate principles that might otherwise be too abstract for such a young audience. In the weeks that follow, the student shows no adverse changes in academic performance or behavior, and when asked by her teacher and the school counselor about how she is doing, she indicates that the bullying has stopped.

In this example, based on the school's appropriate response to the incidents of bullying, OCR would not find a disability-based harassment violation under Section 504. The bullying of the student on account of her food allergy to peanuts was based on the student's disability. Moreover, the physically threatening and humiliating conduct directed at her was sufficiently serious to create a hostile environment by limiting her ability to participate in and benefit from the school's education program when she was near the classmates who bullied her in the lunchroom and on the bus. School personnel, however, did not tolerate the conduct and acted quickly to investigate the incidents, address the behavior of the classmates involved in the conduct, ensure that there were no residual effects on the student, and coordinate to promote greater awareness among students about the school's anti-bullying policy. By taking prompt and reasonable steps to address the hostile environment, eliminate its effects, and prevent it from recurring, the school met its obligations under Section 504.

OCR also would not find a FAPE violation under Section 504 on these facts. Once the school became aware that the student feared attending lunch and riding the bus as a result of the bullying she was experiencing, the school was on notice that the effects of the bullying may have affected her receipt of FAPE. This was sufficient to trigger the school's additional obligation to determine whether, and to what extent, the bullying affected the student's access to FAPE and take any actions, including addressing the bullying and providing new or different services, required to ensure the student continued receiving FAPE. By promptly holding a Section 504 meeting to assess whether the school should consider any changes to the student's services in light of the bullying, the school met its independent legal obligation to provide FAPE under Section 504.

## **VI. Conclusion**

OCR is committed to working with schools, students, families, community and advocacy organizations, and others to ensure that schools understand and meet their legal obligations under Section 504 and Title II to appropriately address disability-based harassment and to ensure that students with disabilities who are bullied continue to receive FAPE.

OCR also encourages States and school districts to reevaluate their policies and practices in light of this letter, as well as OCR's and OSERS's prior guidance. If you would like to request technical assistance or file a complaint alleging discrimination, please contact the OCR enforcement office that serves your area. Contact information is posted on OCR's website at:

<http://www.ed.gov/ocr/complaintintro.html> or please contact OCR's customer service team at 1-800-421-3481 (TDD 1-800-877-8339).

I look forward to continuing our work together to address and reduce incidents of bullying in our schools so that no student is limited in his or her ability to participate in and benefit from all that our educational programs have to offer.

Sincerely,

/s/

Catherine E. Lhamon  
Assistant Secretary for Civil Rights

The following question and answer sheet was developed by the State Special Education Section after the passage of Act 182:

**TRANSFER OF RIGHTS FOR AN ADULT STUDENT WITH A DISABILITY  
ENROLLED IN A PUBLIC SCHOOL  
Questions and Answers**

**AGE OF MAJORITY**

**What does the phrase “age of majority” or “adult student” mean?**

According to Hawaii Revised Statutes (HRS) §577-1, the “age of majority” is when all persons residing in the State, who have attained the age of eighteen years, shall be regarded as of legal age and their period of minority to have ceased. An “adult student” is a student who has reached the age of majority.

**What is the significance of a student with a disability reaching the age of majority?**

When a student with a disability reaches the age of majority, the educational rights to make decisions accorded to the parent, under *Part B of the Individuals with Disabilities Education Improvement*

*Act of 2004 (IDEA) and Chapter 56, currently being revised as Chapter 60*, transfer to the adult student, except for a student with a disability who has been determined to be incompetent/lacking decisional capacity under state law.

**ACT 182 – TRANSFER OF RIGHTS**

**What is the purpose of Act 182, the Transfer of Rights, of the Hawaii Revised Statutes?**

Effective July 1, 2008, the purpose of Act 182 is to provide educational decision making options to an adult student with a disability, enrolled in a public school.

**What are the educational decision making options for an adult student mentioned in Act 182?**

There are three educational decision making options available to an adult student:

- Appointment of an agent through a (limited) power of attorney for special education (POA SPED) to make educational decisions on behalf of an adult student;
- Appointment of an educational representative for an adult student who lacks decisional making capacity to make educational decisions for him/herself; or
- Appointment of a guardian, established through court, for an adult student who lacks decisional capacity to make educational decisions for him/herself.

***Presumption: An adult student is presumed to have decisional capacity to make educational decisions for him/herself. No documentation is required.***

**DECISIONAL CAPACITY**



**What does having “decisional capacity” mean?**

Having decisional capacity refers to an adult student being able to understand, reason and act on his/her own behalf. An adult student who has decisional capacity is able to provide informed consent with respect to educational decisions or program.

**What does “lack of decisional capacity” mean?**

As noted in Act 182, the adult student has an inability to:

- Understand the nature, extent and probable consequences of a proposed educational program or option, on a continuing or consistent basis;
- Make a rational evaluation of the benefits or disadvantages of a proposed educational decisions or programs as compared with the benefits or disadvantages of another proposed educational decisions or programs, on a continuing or consistent basis; or
- Communicate understanding in any meaningful way.

**Who determines if an adult student has a lack of decisional capacity to provide informed consent?**

The determination that an adult student has a lack of decisional capacity, as noted in Act 182, shall be made by a qualified professional, such as the student’s primary physician, psychologist, psychiatrist or by the Hawaii Department of Health - Developmental Disabilities Division.

**Why is it important to know if an adult student has a lack of decisional capacity?**

The decisional capacity of the adult student will help determine which of the three transfer of rights option(s) may be appropriate for consideration. Remember, the adult student is presumed to be capable of making his/her own educational decisions unless there is documentation supporting otherwise.

**Can an adult student, who has decisional capacity, make educational decisions for him/herself?**

Yes, an adult student is presumed to make educational decisions for him/herself. An adult student can also opt to appoint an agent to make educational decisions on his/her behalf by completing a POA SPED.

**If an adult student lacks decisional capacity, as determined by a qualified professional, who makes educational decisions on the adult student’s behalf?**

An adult acknowledged by the Department of Education (DOE) as an educational representative or a guardian assigned by the court can make educational decisions on the adult student’s behalf.

**NOTIFICATION AND DOCUMENTATION**

**Does the public school notify the student and his/her parent(s) of Act 182 (Adult Special Education Transfer of Rights for Students with Disabilities Upon Reaching the Age of Majority) in Hawaii?**

Yes. Beginning at least one year before the student reaches the age of majority, the student and his/her parent(s) are to be informed that the rights under IDEA, 34 CFR §300.520(a)(1)(ii) will transfer to the student on reaching 18 years old. The school is to additionally inform the student and his/her parent(s) that upon the student reaching 18 years old, the adult student has options relating to the transfer of educational rights, in accordance with Act 182. To facilitate this, schools may share this Questions and Answers document with interested individuals.

**Does the public school only invite the adult student to Individualized Education Program (IEP) meetings?**

No. The public school, in accordance with 34 CFR §300.520(a)(1)(i), must provide notice to the parents, which includes parents of an adult student. If the public school has received documentation noting educational decisions will be made by another individual ( i.e. POA SPED, educational representative, or court appointed guardian), then the school is to also invite that individual; the individual can make educational decisions on behalf of the adult student.

**Where should transfer of rights documentation be placed?**

All documentation relating to the transfer of rights, such as a copy of a POA SPED, etc. is to be kept in the student's confidential file and notated in the electronic Comprehensive Student Support System.

**Does a copy of documentation relating to the revocation of a POA SPED have the same effect as the original?**

Yes. A copy of the POA SPED revocation document has the same effect as the original.

**Can the agent or the educational representative have access to student records?**

Yes. The agent or the educational representative has the same rights as the adult student to request, receive, examine, copy and consent to the disclosure of the IEP or any other educational records.

**APPOINTMENT OF AN AGENT – POWER OF ATTORNEY FOR SPECIAL EDUCATION**

**What is a POA SPED?**

A POA SPED is a written document, executed in the State of Hawaii by an adult student, which appoints an agent to make educational decisions on behalf of the adult student.

**Is there a restriction on who the adult student can appoint as an agent in the POA SPED?**

Yes. Unless related to the adult student by blood, marriage or adoption, the (adult) agent cannot be an owner, operator or employee of the public school/institution at which the adult student is receiving special education services.

**What are the duties and responsibilities of an agent?**

The agent shall have the opportunity to participate in meetings with respect to:

- The identification, evaluation, and educational placement of the adult student;
- The provision of free appropriate public education to the adult student; and
- The provision of input in accordance with the adult student's individual instructions or other wishes, if any, to the extent known.

The agent shall participate in accordance with the determination of the student's best interest. In determining the student's best interests, the student's personal values, to the extent known, shall be taken into consideration.

**Can the POA SPED be revoked by the adult student?**

Yes. The adult student can revoke the appointed agent by submitting written documentation to his/her supervising teacher (i.e. care coordinator, IEP teacher). Educational rights revert back to the adult student. A teacher (i.e. general education teacher, student services coordinator), agent or guardian who is notified of the revocation shall promptly communicate the fact of revocation to the supervising teacher and to any educational institution (i.e. public school) at which the student is receiving special education services.

**Are there any other circumstances when the appointed agent may be revoked?**

Yes. A decree of annulment, divorce, dissolution of marriage, or legal separation shall revoke the previous designation of a spouse as an agent, unless otherwise specified in the POA SPED.

**The school has a POA SPED. At a meeting a POA SPED with a later effective date and different instructions is presented. Which POA SPED is to be followed?**

A POA SPED that conflicts with an earlier dated POA SPED revokes the earlier power of attorney to the extent of the conflict.

**What information is required in the POA SPED?**

The POA SPED is to include the following information to be valid. The POA SPED will **not** be in effect if the required information is missing.

**Statement of Conditions & Acknowledgement**

- Date of execution in the State of Hawaii
- A statement indicating whether the adult student retains the power to make educational decisions while the POA SPED is in effect
- A statement with the method of revocation
- Adult student signature

**Agent Information**

- Printed first and last name of the individual to be the agent
- Relationship to the adult student

**Witness Information or Notary Public Information**

**Witness Information**

- Document is to be either signed by two individuals who witnessed the signing of the POA SPED or receive the adult student's acknowledgement of the authenticity of the adult student's signature

#### Notary Public Information

- Printed name of the notary public, accompanied with a signature and the date signed
- Printed address of the notary public
- Seal from the notary public

Although not stated in Act 182, the following information is needed:

#### Adult Student Information

- Printed first and last name of the adult student
- Contact information (i.e. address, phone number)

#### Agent Information

- Contact information (i.e. address, phone number)

### **What are the differences between a “power of attorney” and a “power of attorney for special education ?”**

According to HRS §560:5-105, a “power of attorney” may delegate to another person for a period not exceeding one year, any power regarding the care, custody, or property of a minor or ward. This may include educational matters, if specified. A power of attorney is often used to delegate an individual to make decisions for a minor, an individual who has not attained 18 years of age.

In Act 182, the “power of attorney for special education” specifically applies to adult students with a disability who choose to delegate another individual to make educational decisions on the adult student's behalf; it is valid for the length of time the adult student remains eligible for special education in a public school, unless otherwise specified in the POA SPED or upon revocation by the adult student.

It is important to remember securing a power of attorney is a family matter. For families who do not have an attorney and are in need of assistance, may contact the Legal Aid Society of Hawaii at (808) 536-4302 or the Hawaii State Bar Association at (808) 537-1868.

### **APPOINTMENT OF AN EDUCATIONAL REPRESENTATIVE**

#### **Who appoints the educational representative?**

The public school may appoint an educational representative upon receipt of the educational representative information, adult student's information and a statement from a qualified professional noting the student's lack of decisional capacity.

By means of Act 182, the law allows for the parent(s) or the adult spouse of an adult student with a disability who lacks capacity, to act as the educational representative on behalf of the adult student. If the parent(s) or adult spouse is not available or able, the public school shall appoint an educational representative from the following: a competent brother or sister, adult aunt or uncle, or grandparent. If these relatives are not willing or able to serve as the adult student's educational representative, then the public school is to submit a request for a surrogate parent to serve in this capacity.

### **What are the duties and responsibilities of the educational representative?**

The educational representative shall have the opportunity to participate in meetings with respect to:

- The identification, evaluation, and educational placement of the adult student;
- The provision of free appropriate public education to the adult student; and
- The provision of input in accordance with the adult student's individual instructions or other wishes, if any, to the extent known.

The educational representative shall participate in accordance with the determination of the student's best interest. In determining the student's best interests, the student's personal values, to the extent known, shall be taken into consideration.

### **What documentation is required to be an educational representative?**

While there is no specific form to be completed for an individual to be designated as an educational representative, written documentation by a qualified professional (student's primary physician, psychologist, psychiatrist or the Hawaii Department of Health – Developmental Disabilities Division) acknowledging the adult student lacks decisional capacity is required.

### **What information is required to be an educational representative?**

The following information is required:

#### **Certification Statement**

- Statement of determination that the adult student's lack of capacity by a qualified professional (student's primary physician, psychologist, psychiatrist or the Hawaii Department of Health – Developmental Disabilities Division)

Although not stated in Act 182, the following information is needed:

#### **Adult Student Information**

- Printed first and last name of the adult student
- Contact information (i.e. address, phone number)

#### **Educational Representative Information**

- Printed first and last name of the individual to be educational representative
- Contact information (i.e. address, phone number)
- Relationship to the adult student

### **What is the length of time an educational representative can represent a student?**

The educational representative can represent the adult student for the length of time the adult remains eligible for special education in the DOE except when an adult student has been re-assessed by qualified personnel and found to have regained decisional capacity; for additional information see the next question.

**Does the educational representative continue to represent an adult student if the adult student has regained capacity?**

No. Should an adult student be re-assessed by a qualified professional and found to have regained decisional capacity, the findings of the decision by the qualified professional is to be in writing and entered into the student's educational record. The adult student, now having decisional capacity, regains his/her educational rights to make educational decisions. No additional documentation is required.

**GUARDIAN**

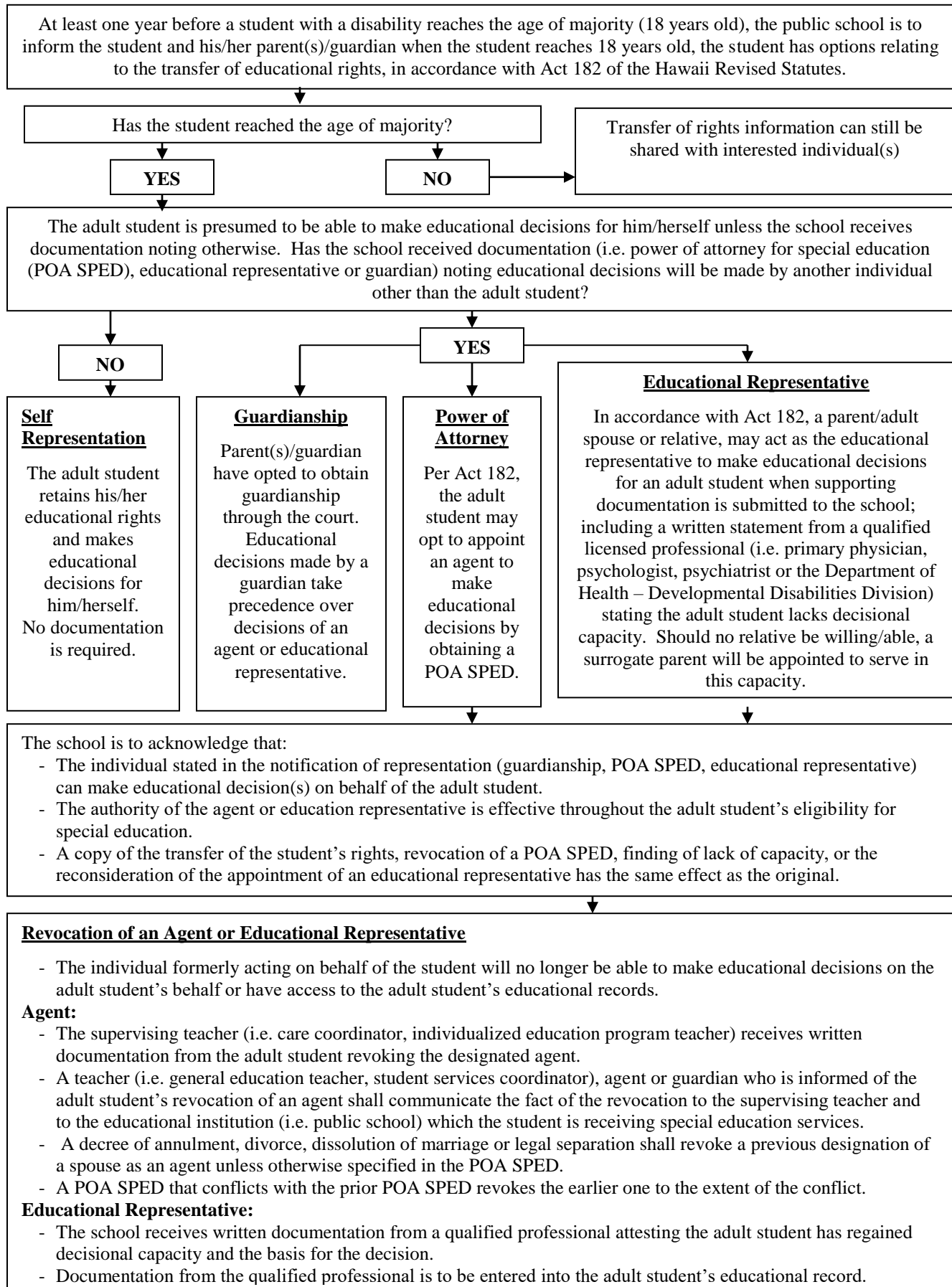
**What is guardianship?**

Guardianship, according to HRS §560:5-301, is when a person becomes a guardian of an incapacitated person by an appointment by a parent, spouse, or reciprocal beneficiary or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward. The appointment, powers, etc. of the guardian is to be in accordance with HRS §560:5-301 through §560:5-318.

**An adult student who lacks capacity has an educational representative. The courts have now appointed a guardian. Who makes the educational decisions for the adult student?**

Decisions made by a court appointed guardian takes precedence over that of an agent or educational representative, unless a court order states otherwise.

## Transfer of Rights for Adult Students with Disabilities upon Reaching the Age of Majority





**S E A C**  
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**September 6, 2018**

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Advisory Council**

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Finance and Infrastructure Committee  
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P. O. Box 2360  
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RE: II. B. Committee Action on approving for public hearing repeal of Hawaii Administrative Rules, Chapter 41, Civil Rights Policy and Complaint Procedure and adoption of draft of new Chapter 89, Civil Rights Policy and Complaint Procedures for Student(s) Complaints against Adult(s)

Dear Chairs Cox and Uemura and Members of the Committees,

The Special Education Advisory Council (SEAC) appreciates the opportunity to provide testimony on the proposed rules for Chapter 89. We find the new rule much more comprehensive than Chapter 41, and we support the Department's efforts to provide greater protections to students in protected classes from bullying and harrassment.

It is well documented that students with disabilities are bullied 2-3 times more than students without disabilities. Research has also shown a connection between certain kinds of emotional disabilities and bullying behavior. Bullying can cause lasting harm to all involved including poor academic achievement, depression and low self-esteem, and negative impacts to future employment and social relationships.

Chapter 89 establishes complaint and investigative procedures for students in protected classes, including students with disabilities, who may have been harrassed or bullied by school personnel or volunteers. SEAC recommends the following edits to the proposed rules to strengthen the protection of students with disabilities:

**RECOMMENDATION 1**

Under §8-89-2 Definitions. Harassment - "Disability harassment"

After defining disability harassment, the following statement is made: "Complaints relating to the denial of free appropriate public





#### RECOMMENDATION 1 (cont.)

education (FAPE) are addressed under Hawaii administrative rules §§ 8-60 and 8-61.” While this statement is factually true, SEAC believes this statement is more appropriately included in § 8-89-6 - Complaint and Investigative Procedure along with a description of the investigative process.

##### SEAC’s rationale:

The investigative process is what determines whether the complaint of disability harassment created a hostile environment for a student with a disability and whether that student’s receipt of appropriate services may have been affected, thereby resulting in a FAPE violation under IDEA or Section 504. Neither Chapter 60 or Chapter 61 includes language about disability harassment, so parents and teachers may not be aware of its effect on the provision of FAPE, or that bullying can be the basis of a written or due complaint under those chapters. The investigative process for complaints related to the protected class should make that determination and provide the parent with guidance on how to proceed with a written complaint or due process complaint under the appropriate administrative rule.

#### RECOMMENDATION 2

Under §8-19-2 Definitions. “Immediate interventions”

Specify a specific timeline for “immediate” interventions.

##### SEAC’s rationale:

The term “immediate” sets an expectation with parents that information or service offered will occur on the same day as the complaint is filed. When schools fail to notify parents of optional interventions in a timely manner, it creates a basis of mistrust between home and school. Specifying a timeline will create uniform expectations between school officials and parents.

#### RECOMMENDATION 3

Under §8-19-2 Definitions. “Parent”

The statement “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” needs to be amended to add “including through the provisions offered to parents of adult students with disabilities under Act 182.”

##### SEAC’s rationale:

There are many reasons why parents of students with disabilities choose not to obtain legal guardianship of their adult children. Disability advocates helped to pass SB 2879 (Act 182) during the 2008 Legislative Session. It allows alternatives to legal guardianship for retaining the right to act as the decision maker under IDEA for educational decisions pertaining to their adult child when that child lacks decisional capacity or when he or she elects to have his parent(s) appointed as his Power of Attorney for Educational Decisions. (see attached synopsis of Act 182)

#### RECOMMENDATION 4

Under §8-89-6 Complaint and Investigative Procedure

Add procedures regarding parent notification of alleged misconduct toward a student when the



RECOMMENDATION 4 (cont.)

person(s) making the complaint is other than the parent.

SEAC's rationale:

Schools cannot assume that a child with a disability will report suspected abuse to his or her parents directly. Children with disabilities often lack the ability to clearly express events that happen at school that may have upset or traumatized them. In other instances prohibited discrimination may be occurring and neither the student or the parent is aware that it is taking place. If a third party reports alleged misconduct, it is the parent's right to know of the complaint as soon as it is filed or within 24 hours of its filing.

RECOMMENDATION 5

Under §8-89-6 Complaint and Investigative Procedure (g)

Add the following language to the description of the investigational process: "When investigating disability harassment, the investigator will consider factors outlined by the Office for Civil Rights to determine whether harassment occurred under Section 504 and whether there was a denial of FAPE under Section 504 or IDEA." (See attached Office for Civil Rights **Dear Colleague Letter: Responding to Bullying of Students with Disabilities**, dated October 21, 2014).

SEAC rationale:

OCR has outlined a clear process for analyzing complaints involving the bullying of students with disabilities. They also provide a decision tree for how OCR conducts its investigations. It is important for school-level personnel as well as equity specialists to understand their obligations in this respect to avoid findings of discriminatory treatment. While a school employee who discriminates suffers consequences, so, too, do schools who violate their obligations under Section 504.

RECOMMENDATION 6

Under §8-89-6 Complaint and Investigative Procedure (i)

Add a requirement that a copy of the investigative findings be given to the complainant, and to the parent of the student with a disability, if the complainant is other than the parent.

SEAC rationale:

As a procedural safeguard, SEAC believes the investigative procedure regarding alleged misconduct toward students with disabilities should mirror the timelines and requirements for written complaints under Chapter 60, including providing a copy of the report to the parent within 60 days.

Thank you for the opportunity to provide recommendations on these important regulations. Should you have questions, we will be happy to provide answers or clarification.

Respectfully,

Martha Guinan  
SEAC Chair

Ivalee Sinclair  
Legislative Committee Chair



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

October 21, 2014

Dear Colleague:

While there is broad consensus that bullying is wrong and cannot be tolerated in our schools, the sad reality is that bullying persists in our schools today, and especially so for students with disabilities.<sup>1</sup> In recent years, the Office for Civil Rights (OCR) in the U.S. Department of Education (Department) has received an ever-increasing number of complaints concerning the bullying of students with disabilities and the effects of that bullying on their education, including on the special education and related services to which they are entitled. This troubling trend highlights the importance of OCR's continuing efforts to protect the rights of students with disabilities through the vigorous enforcement of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). It also underscores the need for schools to fully understand their legal obligations to address and prevent disability discrimination in our schools.

Today's guidance follows a long history of guidance issued by the Department in this critical area of disability discrimination. In 2000, OCR and the Office of Special Education and Rehabilitative Services (OSERS) issued joint guidance informing schools that disability-based harassment may deny a student equal educational opportunities under Section 504 and Title II.<sup>2</sup> The 2000 guidance also noted the responsibilities of schools under Section 504 and the Individuals with Disabilities Education Act (IDEA) to ensure that students receive a free appropriate public education (FAPE),

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<sup>1</sup> These students are bullied or harassed more than their nondisabled peers. See Office of Special Education and Rehabilitative Services (OSERS) 2013 Dear Colleague Letter on Bullying of Students with Disabilities, <http://www.ed.gov/policy/speced/guid/idea/memosdcrltr/bullyingdcl-8-20-13.doc>, at page 2 ("Students with disabilities are disproportionately affected by bullying."). That letter explains that, "[b]ullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles." *Id.* Throughout this guidance, the terms "bullying" and "harassment" are used interchangeably to refer to these types of conduct. See Office for Civil Rights (OCR) 2010 Dear Colleague Letter on Harassment and Bullying, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>, at page 3 ("The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications.").

<sup>2</sup> OCR-OSERS 2000 Dear Colleague Letter: Prohibited Disability Harassment, <http://www.ed.gov/ocr/docs/disabharassltr.html>.

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and alerted schools that harassment of a student based on disability may adversely impact the school's provision of FAPE to the student.<sup>3</sup> In 2010, OCR issued a Dear Colleague Letter on Harassment and Bullying that provided further guidance concerning when a school's inappropriate response to bullying or harassment of a student based on disability constitutes a disability-based harassment violation under Section 504 and Title II.<sup>4</sup> In 2013, OSERS issued a Dear Colleague Letter on Bullying of Students with Disabilities that, in turn, provided additional guidance to schools that the bullying of a student with a disability on *any* basis can result in a denial of FAPE under IDEA that must be remedied.<sup>5</sup>

Building on OSERS's 2013 guidance, today's guidance explains that the bullying of a student with a disability on *any* basis can similarly result in a denial of FAPE under Section 504 that must be remedied; it also reiterates schools' obligations to address conduct that may constitute a disability-based harassment violation and explains that a school must also remedy the denial of FAPE resulting from disability-based harassment. Following an overview of the federal protections for students with disabilities in schools, the guidance elaborates on the elements of a disability-based harassment violation and a FAPE violation, discusses how OCR generally analyzes complaints involving bullying of students with disabilities on each of these bases, and then concludes with a series of hypothetical examples that illustrate varying circumstances when conduct may constitute both a disability-based harassment violation and FAPE violation, a FAPE violation, or neither. Although by no means exhaustive, in the context of this discussion, the guidance also offers some insight into what OCR might require of a school to remedy instances of bullying upon a finding of disability discrimination. OCR urges schools to consider these hypothetical resolution agreement provisions in proactively working to ensure a safe school environment, free from discrimination, for all students.<sup>6</sup>

## **I. Overview of Federal Protections for Students with Disabilities in Schools**

OCR enforces Section 504 and Title II, both of which prohibit disability discrimination. Section 504 prohibits disability discrimination by recipients of Federal financial assistance.<sup>7</sup> OCR enforces Section 504 against entities that receive Federal financial assistance from the Department, including all public schools and school districts as well as all public charter schools and magnet schools. Under Section 504, recipients that operate a public elementary or secondary education program must

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<sup>3</sup> The terms "school" and "school district" are used interchangeably in this letter and refer to public elementary and secondary schools that receive financial assistance from the Department.

<sup>4</sup> OCR 2010 Dear Colleague Letter on Harassment and Bullying, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>.

<sup>5</sup> OSERS 2013 Dear Colleague Letter on Bullying of Students with Disabilities, <http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc>.

<sup>6</sup> This guidance addresses only student-on-student bullying and harassment. Under Section 504 and Title II, students with disabilities are also protected from bullying by teachers, other school employees, and third parties. Such bullying can trigger a school's obligation to address disability-based harassment, remedy a denial of FAPE, or both. See 34 C.F.R. §§ 104.4, 104.33; 28 C.F.R. pt. 35. OCR recommends that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying that involve school personnel.

<sup>7</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104.



provide students with disabilities equal educational opportunities. Among other things, this means they must ensure that students with disabilities receive FAPE, defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that satisfy certain requirements concerning educational setting, evaluation, placement, and procedural safeguards.<sup>8</sup> Schools also have an obligation under Section 504 to evaluate students who need or are believed to need special education or related services. Further, schools have an obligation to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.<sup>9</sup> Schools often document these services in written plans, sometimes referred to as Section 504 plans, or, if the child is receiving IDEA FAPE services, through the required individualized education program (IEP).<sup>10</sup>

Title II prohibits disability discrimination by public entities, including all public schools and school districts, as well as all public charter schools and magnet schools, regardless of whether they receive Federal financial assistance.<sup>11</sup> OCR, along with the U.S. Department of Justice (DOJ), enforces Title II in public elementary and secondary schools. Title II is generally construed to provide no less protection than Section 504. Therefore, violations of Section 504, including the failure to provide needed regular or special education and related aids and services to students with disabilities, also constitute violations of Title II.<sup>12</sup>

IDEA is another key Federal law addressing the needs of students with disabilities. OSERS, not OCR or DOJ, administers IDEA.<sup>13</sup> OCR, however, enforces the Section 504 and Title II rights of IDEA-eligible students.<sup>14</sup> Under Part B of IDEA, the Department provides Federal funds to State educational agencies and through them to local educational agencies (school districts), to assist

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<sup>8</sup> For Section 504 and Title II, the term “disability” means a physical or mental impairment that substantially limits one or more major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B); 42 U.S.C. § 12102. The Americans with Disabilities Act Amendments Act (Amendments Act), Pub. Law No. 110-325, amended the disability definition for Section 504 and Title II. Most notably, the Amendments Act required that “disability” under these statutes be interpreted broadly. More information about the Amendments Act is available from OCR’s website at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html> and <http://www.ed.gov/ocr/docs/dcl-504faq-201109.html>.

<sup>9</sup> In this letter, the term “Section 504 FAPE services” is used to refer to the regular or special education and related aids and services provided to students with disabilities as specified in 34 C.F.R. § 104.33(b). The term “IDEA FAPE services” is used in this letter to refer to the special education and related services provided to students with disabilities that meet the requirements of 34 C.F.R. pt. 300, as specified in 34 C.F.R. §§ 300.17 (FAPE), 300.39 (special education), and 300.34 (related services).

<sup>10</sup> Students with disabilities who are IDEA-eligible also have rights under Section 504 and Title II. The Department’s Section 504 regulations provide that implementation of an IEP developed in accordance with IDEA is one means of providing Section 504 FAPE services. 34 C.F.R. § 104.33(b)(2).

<sup>11</sup> 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

<sup>12</sup> 42 U.S.C. § 12201(a). To the extent that Title II provides greater protection than Section 504, covered entities must comply with Title II’s requirements.

<sup>13</sup> For more information about OSERS, please visit <http://www.ed.gov/osers>.

<sup>14</sup> This letter only addresses Federal law; other State or local laws and policies may apply.

school districts in providing FAPE to eligible children with disabilities through the provision of special education and related services.<sup>15</sup> School districts must ensure that IDEA FAPE services in the least restrictive environment are made available to all eligible children with disabilities through a properly developed IEP that provides a meaningful educational benefit to the student. In addition, school districts must locate, identify, and evaluate children suspected of having disabilities who may need special education and related services.

## **II. Schools' Obligations to Address Disability-Based Harassment**

Bullying of a student on the basis of his or her disability may result in a disability-based harassment violation under Section 504 and Title II.<sup>16</sup> As explained in OCR's 2010 Dear Colleague Letter on Harassment and Bullying, when a school knows or should know of bullying conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred.<sup>17</sup> If a school's investigation reveals that bullying based on disability created a hostile environment—i.e., the conduct was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school—the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Therefore, OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.<sup>18</sup>

As explained in Section III, below, for the student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services, a school's investigation should include determining whether

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<sup>15</sup> 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. IDEA establishes 13 disability categories: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment. 34 C.F.R. § 300.8(c).

<sup>16</sup> These legal protections extend to all students with disabilities, including students who are regarded as having a disability or who have a record of a disability and students with disabilities who are not receiving services under Section 504 or IDEA. In addition to being protected from harassment on the basis of disability, students with disabilities, like all students, are entitled to protection from harassment on the basis of race, color, national origin, sex (including sexual violence), and age under the Federal civil rights laws that OCR enforces. For more information about other types of discriminatory harassment, see [OCR's 2010 Dear Colleague Letter](#) referenced in note 4.

<sup>17</sup> Schools know or should know about disability-based harassment when, for example, a teacher or other responsible employee of the school witnesses the conduct. For more information about how to determine when knowledge of such conduct will be imputed to schools, refer to the OCR 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, <http://www.ed.gov/ocr/docs/shguide.pdf> at page 13; and [OCR 2010 Dear Colleague Letter on Harassment and Bullying](#), at page 3 and note 11.

<sup>18</sup> This is the standard for administrative enforcement of Section 504 and in court cases where plaintiffs are seeking injunctive relief. It is different from the standard in private lawsuits for money damages, which, many courts have held, requires proof of a school's actual knowledge and deliberate indifference. See *Long v. Murray Cnty. Sch. Dist.*, 522 Fed. Appx. 576, 577 & n. 1 (11th Cir. 2013) (applying the test enunciated in *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643 (1999)).

that student's receipt of appropriate services may have been affected by the bullying.<sup>19</sup> If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's IDEA FAPE services or Section 504 FAPE services may have been affected by the bullying, the school has an obligation to remedy those effects on the student's receipt of FAPE.<sup>20</sup> Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services.

### **III. Bullying and the Denial of a Free Appropriate Public Education**

The bullying on *any* basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied under Section 504. The OSERS 2013 Dear Colleague Letter clarified that, under IDEA, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team<sup>21</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide a meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP team must determine the extent to which additional or different IDEA FAPE services are needed to address the student's individualized needs and then revise the IEP accordingly. Any decisions made by the IEP team must be consistent with the IDEA provisions addressing parental participation and should keep the student with a disability in the original placement or setting (e.g., the same school and classroom) unless the student can no longer receive FAPE in that placement or setting. Under IDEA, schools have an ongoing obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE in accordance with his or her IEP—an obligation that exists whether the student is being bullied based on his or her disability or is being bullied based on other reasons.

Similarly, under Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives IDEA FAPE services or Section 504 FAPE services and who is the target of bullying continues to receive FAPE—an obligation that exists regardless of why the student

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<sup>19</sup> As stated in [OCR 2010 Dear Colleague Letter on Harassment and Bullying](#) at page 2, "The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors." When a student with a disability who receives Section 504 FAPE services is being bullied, an appropriate "other factor" is whether that student's receipt of services has been affected by the bullying.

<sup>20</sup> When a student with a disability has engaged in misconduct that is caused by his or her disability, the student's own misconduct would not relieve the school of its legal obligation to determine whether that student's civil rights were violated by the bullying conduct of the other student. For example, if a student, for reasons related to his disability, hits another student and other students then call him "crazy" on a daily basis, the school should, of course, address the conduct of the student with a disability. Nonetheless, the school must also consider whether the student with a disability is being bullied on the basis of disability under Section 504 and Title II.

<sup>21</sup> The IEP team is the group of persons specified in IDEA that determines the appropriate IDEA FAPE services for an IDEA-eligible student. 34 C.F.R. § 300.321(a).



is being bullied.<sup>22</sup> Accordingly, under Section 504, as part of a school's appropriate response to bullying on *any* basis, the school should convene the IEP team or the Section 504 team<sup>23</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed,<sup>24</sup> ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.<sup>25</sup> In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.

Although there are no hard and fast rules regarding how much of a change in academic performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient.<sup>26</sup> By contrast, one low grade for an otherwise straight-A student who shows no other changes in academic progress or behavior will generally not, standing alone, trigger the school's obligation to determine whether the student's needs are still being met. Nonetheless, in addition to addressing the bullying under the school's anti-bullying policies, schools should promptly convene the IEP team or Section 504 team to determine whether FAPE is being provided

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<sup>22</sup> At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under State law to provide elementary and secondary educational services to students with disabilities; or a student to whom a State is required to provide FAPE under IDEA. 34 C.F.R. § 104.3(f). In addition to the provision of regular or special education and related aids and services pursuant to 34 C.F.R. § 104.33, FAPE protections extend to educational setting, evaluation and placement, and procedural safeguards. 34 C.F.R. §§ 104.34-.36.

<sup>23</sup> The Section 504 team is the group of knowledgeable persons that determines the appropriate Section 504 FAPE services for a qualified student with a disability under Section 504.

<sup>24</sup> A reevaluation would not be needed unless there is a reason to believe the student's underlying disability or disabilities have changed or the student has an additional disability.

<sup>25</sup> OCR would expect that schools address bullying behavior to ensure that the burden does not fall on the student with a disability. Along these lines, and consistent with the OSERS 2013 Dear Colleague Letter, schools should exercise caution when considering a change in placement, or the location of services (including classroom) provided to the student with a disability who is the target of bullying and should keep the student in the original placement unless the student can no longer receive Section 504 FAPE in that placement. OCR also urges schools to allow for parental participation when considering any change in placement or location of services (including classroom). See 34 C.F.R. pt. 104, app. A (discussion of Subpart D).

<sup>26</sup> In light of schools' ongoing obligation to ensure that students with disabilities are receiving FAPE, adverse changes in the academic performance or behavior of a student receiving FAPE services could trigger the school's obligation to convene the IEP team or Section 504 team regardless of the school's knowledge of the bullying conduct. See, e.g., Section V, Hypothetical Example B, below. As a best practice, schools should train all staff to report bullying to an administrator or school official who can promptly convene a meeting of knowledgeable people (e.g., the student's Section 504 team or IEP team) to ensure that the student is receiving FAPE and, as necessary, address whether the student's FAPE needs have changed.



to a student with a disability who has been bullied and who is experiencing any adverse changes in academic performance or behavior.

When bullying results in a disability-based harassment violation, it will not always result in a denial of FAPE. Although all students with disabilities are protected from disability-based harassment, the requirement to provide FAPE applies only to those students with disabilities who need or may need FAPE services because of their disability.<sup>27</sup> This means that if a student is the target of bullying resulting in a disability-based harassment violation, but that student is not eligible to receive IDEA or Section 504 FAPE services, there could be no FAPE violation.

When a student who receives IDEA FAPE services or Section 504 FAPE services has experienced bullying resulting in a disability-based harassment violation, however, there is a strong likelihood that the student was denied FAPE. This is because when bullying is sufficiently serious to create a hostile environment and the school fails to respond appropriately, there is a strong likelihood both that the effects of the bullying included an impact on the student's receipt of FAPE and that the school's failure to remedy the effects of the bullying included its failure to address these FAPE-related concerns.

Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: (1) the student's educational needs have changed; (2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and (3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly. By doing so, the school will be in the best position to ensure the student's ongoing receipt of FAPE.

#### **IV. How OCR Analyzes Complaints Involving Bullying of Students with Disabilities**

When OCR evaluates complaints involving bullying and students with disabilities, OCR may open an investigation to determine whether there has been a disability-based harassment violation, a FAPE violation, both, or neither, depending on the facts and circumstances of a given complaint.

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<sup>27</sup> The FAPE requirement to evaluate applies to all students who are known or believed to need special education or related services, regardless of the nature or severity of the disability. 34 C.F.R. §§ 104.33, -.35. For a student who is suspected of having a disability but who is not yet receiving IDEA or Section 504 services, OCR may consider whether the school met its obligation to evaluate the student. 34 C.F.R. § 104.35. For example, if a student suspected of having a disability was missing school to avoid bullying, OCR may consider whether the student's evaluation was unduly delayed (e.g., if the school knew or should have known of the bullying and failed to act) in determining whether there was a denial of FAPE under the circumstances.

**When investigating disability-based harassment, OCR considers several factors, including, but not limited to:**

- Was a student with a disability bullied by one or more students based on the student's disability?
- Was the bullying conduct sufficiently serious to create a hostile environment?
- Did the school know or should it have known of the conduct?
- Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?

*If the answer to each of these questions is "yes," then OCR would find a disability-based harassment violation under Section 504 and, if the student was receiving IDEA FAPE or Section 504 FAPE services, OCR would have a basis for investigating whether there was also a denial of FAPE under Section 504.*

*Even if the answers to one or more of these questions is "no," for a student who was receiving IDEA FAPE or Section 504 FAPE services, OCR may still consider whether the bullying resulted in a denial of FAPE under Section 504 that must be remedied.*

**When investigating whether a student receiving IDEA FAPE or Section 504 FAPE services who was bullied was denied FAPE under Section 504, OCR considers several factors, including, but not limited to:**

- Did the school know or should it have known that the effects of the bullying may have affected the student's receipt of IDEA FAPE services or Section 504 FAPE services? For example, did the school know or should it have known about adverse changes in the student's academic performance or behavior indicating that the student may not be receiving FAPE?

*If the answer is "no," there would be no FAPE violation.<sup>28</sup> If the answer is "yes," OCR would then consider:*

- Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student's educational needs were still being met, and if not, making changes, as necessary, to his or her IEP or Section 504 plan?

*If the answer is "no," and the student was not receiving FAPE, OCR would find that the school violated its obligation to provide FAPE.*

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<sup>28</sup> Where a student is suspected of having a disability but is not yet receiving IDEA FAPE services or Section 504 FAPE services, OCR could consider whether the student's evaluation was unduly delayed in determining whether there was a denial of FAPE under the circumstances. See fn. 27, above.

## **V. Hypothetical Examples**

The following hypothetical examples illustrate how OCR would analyze a complaint involving allegations of the bullying of a student with a disability who only receives Section 504 FAPE services.

### **A. Disability-Based Harassment Violation and FAPE Violation**

At the start of the school year, a ten-year-old student with Attention Deficit Hyperactivity Disorder (ADHD) and a speech disability is fully participating in the classroom, interacting with his peers at lunch and recess, and regularly attending speech therapy twice a week. In addition to providing for speech services, the student's Section 504 plan also provides for behavior supports that call for all his teachers and other trained staff to supervise him during transition times, provide constructive feedback, and help him use preventative strategies to anticipate and address problems with peers.

Because of the student's disabilities, he makes impulsive remarks, speaks in a high-pitched voice, and has difficulty reading social cues. Three months into the school year, students in his P.E. class begin to repeatedly taunt him by speaking in an exaggerated, high-pitched tone, calling him names such as "weirdo" and "gay," and setting him up for social embarrassment by directing him to ask other students inappropriate personal questions. The P.E. teacher witnesses the taunting, but neither reports the conduct to the appropriate school official, nor applies the student's behavior supports specified in his 504 plan. Instead, she pulls the student aside and tells him that he needs to start focusing less on what kids have to say and more on getting his head in the game. As the taunting intensifies, the student begins to withdraw from interacting with other kids in P.E. and avoids other students at lunch and recess. As the student continues to withdraw over the course of a few weeks, he misses multiple sessions of speech therapy, but the speech therapist does not report his absences to the Section 504 team or another appropriate school official.

In this example, OCR would find a disability-based harassment violation. The student's peers were making fun of him because of behaviors related to his disability. For OCR's enforcement purposes, the taunting the student experienced, including other students impersonating him and calling him "weirdo" and "gay," was therefore based on his disability.<sup>29</sup> The school knew about the bullying because the P.E. teacher witnessed the conduct.<sup>30</sup> Yet upon witnessing the taunting, the P.E. teacher not only failed to provide the student behavior supports as required in the student's 504 plan, but also failed to report the conduct to an appropriate school official. Had she taken this step, the school could have conducted an investigation and found that the conduct created a hostile environment because it interfered with the student's ability to benefit from the speech therapy services that he

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<sup>29</sup> OCR would have also investigated whether a school's inappropriate response to the use of the word "gay" in this context constituted a gender-based harassment violation under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; 34 C.F.R. pt. 106, which prohibits discrimination on the basis of sex. For a discussion of gender-based harassment, see [OCR 2010 Dear Colleague Letter on Harassment and Bullying](#), at pages 7-8.

<sup>30</sup> The P.E. teacher in this example is a responsible employee. See fn. 17, above.

should have been receiving and negatively affected his ability to participate fully in P.E., lunch, and recess. The school's failure to appropriately respond to the bullying violated Section 504.

OCR would also find FAPE violations under Section 504. First, when the P.E. teacher failed to implement the behavior supports in the student's Section 504 plan, the school denied the student FAPE under Section 504. In addition, and independent of the failure to provide behavior supports, because the bullying impacted the student's receipt of Section 504 FAPE, the school should have addressed the student's changed needs; by failing to do so, the student was denied Section 504 FAPE. The school should have known about the missed Section 504 services and related changes in behavior. The P.E. teacher knew about the bullying but did nothing to report the student's behavioral changes (e.g., the student's increasing efforts to isolate himself from other students) to the Section 504 team members or other appropriate school official. Similarly, the speech therapist knew that the student was missing speech therapy but did not report this to the 504 team or to an appropriate school official. By failing to address the adverse effects of the bullying on FAPE, the school did not make necessary changes to ensure the student was provided FAPE under Section 504. If, upon concluding its investigation, OCR and the district were to enter into a resolution agreement, OCR could require, for example, that the district (1) ensure that FAPE is provided to the student by convening the Section 504 team to determine if the student needs different or additional services (including compensatory services) and, if so, providing them; (2) offer counseling to the student to remedy the harm that the school allowed to persist; (3) monitor whether bullying persists for the student and take corrective action to ensure the bullying ceases; (4) develop and implement a school-wide bullying prevention strategy based on positive behavior supports; (5) devise a voluntary school climate survey for students and parents to assess the presence and effect of bullying based on disability and to respond to issues that arise in the survey; (6) revise the district's anti-bullying policies to develop staff protocols in order to improve the district's response to bullying; (7) train staff and parent volunteers, such as those who monitor lunch and recess or chaperone field trips, on the district's anti-bullying policies, including how to recognize and report instances of bullying on any basis; and (8) provide continuing education to students on the district's anti-bullying policies, including where to get help if a student either witnesses or experiences bullying conduct of any kind.

#### **B. FAPE Violation, No Disability-Based Harassment Violation**

A thirteen-year-old student with depression and Post-Traumatic Stress Disorder (PTSD) who receives counseling as part of her Section 504 services is often mocked by her peers for being poor and living in a homeless shelter. Having maintained an A average for the first half of the academic year, she is now getting Bs and Cs, neglecting to turn in her assignments, and regularly missing counseling sessions. When asked by her counselor why she is no longer attending scheduled sessions, she says that she feels that nothing is helping and that no one cares about her. The student tells the counselor that she no longer wants to attend counseling services and misses her next two scheduled sessions. The counselor informs the principal that the student has missed several counseling sessions and that the student feels the sessions are not helping. Around the same time, the student's teachers inform the principal that she has begun to struggle academically. The

principal asks the teachers and counselor to keep her apprised if the student's academic performance worsens, but does not schedule a Section 504 meeting.

In this example, whether or not the school knew or should have known about the bullying, OCR would not find a disability-based harassment violation under Section 504 because the bullying incidents were based on the student's socio-economic status, not her disability.

Independent of the basis for the bullying and regardless of whether school officials knew or should have known about the bullying, the school district still had an ongoing obligation under Section 504 to ensure that this student with a disability was receiving an education appropriate to her needs. Here, the student's sudden decline in grades, coupled with changes in her behavior (missing counseling sessions), should have indicated to the school that her needs were not being met. In this example, OCR would find that these adverse changes were sufficient to put the school on notice of its obligation to promptly convene the Section 504 team to determine the extent of the FAPE-related problems and to make any necessary changes to her services, or, if necessary, reevaluate her, in order to ensure that she continues to receive FAPE. By failing to do more than keep track of the student's academic performance, the school failed to meet this obligation, which violated Section 504.<sup>31</sup>

### **C. No Disability-Based Harassment Violation, No FAPE Violation**

A seven-year-old student with a food allergy to peanuts has a Section 504 plan that provides for meal accommodations, the administration of epinephrine if the student is exposed to peanuts, access to a peanut-free table in the cafeteria, and the prohibition of peanut products in the student's classroom. In advance of the upcoming Halloween party, the teacher reminds the class that candy with peanuts is prohibited in the classroom at all times, including Halloween. That afternoon, while on the bus, a classmate grabs the student's water bottle out of the student's backpack, drinks from it, and says, "I had a peanut butter sandwich for lunch today, and I just finished it." The following day, while having lunch at the peanut-free table in the lunchroom with some friends, a classmate who had been sitting at another table sneaks up behind her and waves an open candy bar with peanuts in front of her face, yelling, "Time to eat peanuts!" Though the candy bar does not touch her, a few other classmates nearby begin chanting, "Time to eat peanuts," and the student leaves the lunchroom crying. When the student goes back to her classroom and tells her teacher what happened at lunch and on the bus, the teacher asks her whether she came into contact with the candy bar and what happened to the water bottle. The student confirms that the candy bar did not touch her and that she never got the water bottle back from the classmate who took it, but says that she is scared to go back into the lunchroom and to ride the bus. The teacher promptly informs the principal of the incidents, and the peers who taunted the student on the bus and in the lunchroom are removed from the lunchroom, interviewed by the assistant principal, and required to meet with the counselor during

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<sup>31</sup> If OCR and the district were to enter into a resolution agreement in this case, such an agreement could include, for example, any of the provisions specified in Hypothetical Example A, above.

recess to discuss the seriousness of their conduct. That same week, the school holds a Section 504 meeting to address whether any changes were needed to the student's services in light of the bullying. The principal also meets with the school counselor, and they decide that a segment on the bullying of students with disabilities, including students with food allergies, would be added to the counselor's presentation to students on the school's anti-bullying policy scheduled in the next two weeks. Furthermore, in light of the young age of the students, the counselor offers to incorporate a puppet show into the segment to help illustrate principles that might otherwise be too abstract for such a young audience. In the weeks that follow, the student shows no adverse changes in academic performance or behavior, and when asked by her teacher and the school counselor about how she is doing, she indicates that the bullying has stopped.

In this example, based on the school's appropriate response to the incidents of bullying, OCR would not find a disability-based harassment violation under Section 504. The bullying of the student on account of her food allergy to peanuts was based on the student's disability. Moreover, the physically threatening and humiliating conduct directed at her was sufficiently serious to create a hostile environment by limiting her ability to participate in and benefit from the school's education program when she was near the classmates who bullied her in the lunchroom and on the bus. School personnel, however, did not tolerate the conduct and acted quickly to investigate the incidents, address the behavior of the classmates involved in the conduct, ensure that there were no residual effects on the student, and coordinate to promote greater awareness among students about the school's anti-bullying policy. By taking prompt and reasonable steps to address the hostile environment, eliminate its effects, and prevent it from recurring, the school met its obligations under Section 504.

OCR also would not find a FAPE violation under Section 504 on these facts. Once the school became aware that the student feared attending lunch and riding the bus as a result of the bullying she was experiencing, the school was on notice that the effects of the bullying may have affected her receipt of FAPE. This was sufficient to trigger the school's additional obligation to determine whether, and to what extent, the bullying affected the student's access to FAPE and take any actions, including addressing the bullying and providing new or different services, required to ensure the student continued receiving FAPE. By promptly holding a Section 504 meeting to assess whether the school should consider any changes to the student's services in light of the bullying, the school met its independent legal obligation to provide FAPE under Section 504.

## **VI. Conclusion**

OCR is committed to working with schools, students, families, community and advocacy organizations, and others to ensure that schools understand and meet their legal obligations under Section 504 and Title II to appropriately address disability-based harassment and to ensure that students with disabilities who are bullied continue to receive FAPE.

OCR also encourages States and school districts to reevaluate their policies and practices in light of this letter, as well as OCR's and OSERS's prior guidance. If you would like to request technical assistance or file a complaint alleging discrimination, please contact the OCR enforcement office that serves your area. Contact information is posted on OCR's website at:

<http://www.ed.gov/ocr/complaintintro.html> or please contact OCR's customer service team at 1-800-421-3481 (TDD 1-800-877-8339).

I look forward to continuing our work together to address and reduce incidents of bullying in our schools so that no student is limited in his or her ability to participate in and benefit from all that our educational programs have to offer.

Sincerely,

/s/

Catherine E. Lhamon  
Assistant Secretary for Civil Rights

The following question and answer sheet was developed by the State Special Education Section after the passage of Act 182:

**TRANSFER OF RIGHTS FOR AN ADULT STUDENT WITH A DISABILITY  
ENROLLED IN A PUBLIC SCHOOL  
Questions and Answers**

**AGE OF MAJORITY**

**What does the phrase “age of majority” or “adult student” mean?**

According to Hawaii Revised Statutes (HRS) §577-1, the “age of majority” is when all persons residing in the State, who have attained the age of eighteen years, shall be regarded as of legal age and their period of minority to have ceased. An “adult student” is a student who has reached the age of majority.

**What is the significance of a student with a disability reaching the age of majority?**

When a student with a disability reaches the age of majority, the educational rights to make decisions accorded to the parent, under *Part B of the Individuals with Disabilities Education Improvement*

*Act of 2004 (IDEA) and Chapter 56, currently being revised as Chapter 60*, transfer to the adult student, except for a student with a disability who has been determined to be incompetent/lacking decisional capacity under state law.

**ACT 182 – TRANSFER OF RIGHTS**

**What is the purpose of Act 182, the Transfer of Rights, of the Hawaii Revised Statutes?**

Effective July 1, 2008, the purpose of Act 182 is to provide educational decision making options to an adult student with a disability, enrolled in a public school.

**What are the educational decision making options for an adult student mentioned in Act 182?**

There are three educational decision making options available to an adult student:

- Appointment of an agent through a (limited) power of attorney for special education (POA SPED) to make educational decisions on behalf of an adult student;
- Appointment of an educational representative for an adult student who lacks decisional making capacity to make educational decisions for him/herself; or
- Appointment of a guardian, established through court, for an adult student who lacks decisional capacity to make educational decisions for him/herself.

***Presumption: An adult student is presumed to have decisional capacity to make educational decisions for him/herself. No documentation is required.***

**DECISIONAL CAPACITY**



**What does having “decisional capacity” mean?**

Having decisional capacity refers to an adult student being able to understand, reason and act on his/her own behalf. An adult student who has decisional capacity is able to provide informed consent with respect to educational decisions or program.

**What does “lack of decisional capacity” mean?**

As noted in Act 182, the adult student has an inability to:

- Understand the nature, extent and probable consequences of a proposed educational program or option, on a continuing or consistent basis;
- Make a rational evaluation of the benefits or disadvantages of a proposed educational decisions or programs as compared with the benefits or disadvantages of another proposed educational decisions or programs, on a continuing or consistent basis; or
- Communicate understanding in any meaningful way.

**Who determines if an adult student has a lack of decisional capacity to provide informed consent?**

The determination that an adult student has a lack of decisional capacity, as noted in Act 182, shall be made by a qualified professional, such as the student’s primary physician, psychologist, psychiatrist or by the Hawaii Department of Health - Developmental Disabilities Division.

**Why is it important to know if an adult student has a lack of decisional capacity?**

The decisional capacity of the adult student will help determine which of the three transfer of rights option(s) may be appropriate for consideration. Remember, the adult student is presumed to be capable of making his/her own educational decisions unless there is documentation supporting otherwise.

**Can an adult student, who has decisional capacity, make educational decisions for him/herself?**

Yes, an adult student is presumed to make educational decisions for him/herself. An adult student can also opt to appoint an agent to make educational decisions on his/her behalf by completing a POA SPED.

**If an adult student lacks decisional capacity, as determined by a qualified professional, who makes educational decisions on the adult student’s behalf?**

An adult acknowledged by the Department of Education (DOE) as an educational representative or a guardian assigned by the court can make educational decisions on the adult student’s behalf.

**NOTIFICATION AND DOCUMENTATION**

**Does the public school notify the student and his/her parent(s) of Act 182 (Adult Special Education Transfer of Rights for Students with Disabilities Upon Reaching the Age of Majority) in Hawaii?**

Yes. Beginning at least one year before the student reaches the age of majority, the student and his/her parent(s) are to be informed that the rights under IDEA, 34 CFR §300.520(a)(1)(ii) will transfer to the student on reaching 18 years old. The school is to additionally inform the student and his/her parent(s) that upon the student reaching 18 years old, the adult student has options relating to the transfer of educational rights, in accordance with Act 182. To facilitate this, schools may share this Questions and Answers document with interested individuals.

**Does the public school only invite the adult student to Individualized Education Program (IEP) meetings?**

No. The public school, in accordance with 34 CFR §300.520(a)(1)(i), must provide notice to the parents, which includes parents of an adult student. If the public school has received documentation noting educational decisions will be made by another individual ( i.e. POA SPED, educational representative, or court appointed guardian), then the school is to also invite that individual; the individual can make educational decisions on behalf of the adult student.

**Where should transfer of rights documentation be placed?**

All documentation relating to the transfer of rights, such as a copy of a POA SPED, etc. is to be kept in the student's confidential file and notated in the electronic Comprehensive Student Support System.

**Does a copy of documentation relating to the revocation of a POA SPED have the same effect as the original?**

Yes. A copy of the POA SPED revocation document has the same effect as the original.

**Can the agent or the educational representative have access to student records?**

Yes. The agent or the educational representative has the same rights as the adult student to request, receive, examine, copy and consent to the disclosure of the IEP or any other educational records.

**APPOINTMENT OF AN AGENT – POWER OF ATTORNEY FOR SPECIAL EDUCATION**

**What is a POA SPED?**

A POA SPED is a written document, executed in the State of Hawaii by an adult student, which appoints an agent to make educational decisions on behalf of the adult student.

**Is there a restriction on who the adult student can appoint as an agent in the POA SPED?**

Yes. Unless related to the adult student by blood, marriage or adoption, the (adult) agent cannot be an owner, operator or employee of the public school/institution at which the adult student is receiving special education services.

**What are the duties and responsibilities of an agent?**

The agent shall have the opportunity to participate in meetings with respect to:

- The identification, evaluation, and educational placement of the adult student;
- The provision of free appropriate public education to the adult student; and
- The provision of input in accordance with the adult student's individual instructions or other wishes, if any, to the extent known.

The agent shall participate in accordance with the determination of the student's best interest. In determining the student's best interests, the student's personal values, to the extent known, shall be taken into consideration.

**Can the POA SPED be revoked by the adult student?**

Yes. The adult student can revoke the appointed agent by submitting written documentation to his/her supervising teacher (i.e. care coordinator, IEP teacher). Educational rights revert back to the adult student. A teacher (i.e. general education teacher, student services coordinator), agent or guardian who is notified of the revocation shall promptly communicate the fact of revocation to the supervising teacher and to any educational institution (i.e. public school) at which the student is receiving special education services.

**Are there any other circumstances when the appointed agent may be revoked?**

Yes. A decree of annulment, divorce, dissolution of marriage, or legal separation shall revoke the previous designation of a spouse as an agent, unless otherwise specified in the POA SPED.

**The school has a POA SPED. At a meeting a POA SPED with a later effective date and different instructions is presented. Which POA SPED is to be followed?**

A POA SPED that conflicts with an earlier dated POA SPED revokes the earlier power of attorney to the extent of the conflict.

**What information is required in the POA SPED?**

The POA SPED is to include the following information to be valid. The POA SPED will **not** be in effect if the required information is missing.

**Statement of Conditions & Acknowledgement**

- Date of execution in the State of Hawaii
- A statement indicating whether the adult student retains the power to make educational decisions while the POA SPED is in effect
- A statement with the method of revocation
- Adult student signature

**Agent Information**

- Printed first and last name of the individual to be the agent
- Relationship to the adult student

**Witness Information or Notary Public Information**

**Witness Information**

- Document is to be either signed by two individuals who witnessed the signing of the POA SPED or receive the adult student's acknowledgement of the authenticity of the adult student's signature

#### Notary Public Information

- Printed name of the notary public, accompanied with a signature and the date signed
- Printed address of the notary public
- Seal from the notary public

Although not stated in Act 182, the following information is needed:

#### Adult Student Information

- Printed first and last name of the adult student
- Contact information (i.e. address, phone number)

#### Agent Information

- Contact information (i.e. address, phone number)

### **What are the differences between a “power of attorney” and a “power of attorney for special education ?”**

According to HRS §560:5-105, a “power of attorney” may delegate to another person for a period not exceeding one year, any power regarding the care, custody, or property of a minor or ward. This may include educational matters, if specified. A power of attorney is often used to delegate an individual to make decisions for a minor, an individual who has not attained 18 years of age.

In Act 182, the “power of attorney for special education” specifically applies to adult students with a disability who choose to delegate another individual to make educational decisions on the adult student's behalf; it is valid for the length of time the adult student remains eligible for special education in a public school, unless otherwise specified in the POA SPED or upon revocation by the adult student.

It is important to remember securing a power of attorney is a family matter. For families who do not have an attorney and are in need of assistance, may contact the Legal Aid Society of Hawaii at (808) 536-4302 or the Hawaii State Bar Association at (808) 537-1868.

### **APPOINTMENT OF AN EDUCATIONAL REPRESENTATIVE**

#### **Who appoints the educational representative?**

The public school may appoint an educational representative upon receipt of the educational representative information, adult student's information and a statement from a qualified professional noting the student's lack of decisional capacity.

By means of Act 182, the law allows for the parent(s) or the adult spouse of an adult student with a disability who lacks capacity, to act as the educational representative on behalf of the adult student. If the parent(s) or adult spouse is not available or able, the public school shall appoint an educational representative from the following: a competent brother or sister, adult aunt or uncle, or grandparent. If these relatives are not willing or able to serve as the adult student's educational representative, then the public school is to submit a request for a surrogate parent to serve in this capacity.

### **What are the duties and responsibilities of the educational representative?**

The educational representative shall have the opportunity to participate in meetings with respect to:

- The identification, evaluation, and educational placement of the adult student;
- The provision of free appropriate public education to the adult student; and
- The provision of input in accordance with the adult student's individual instructions or other wishes, if any, to the extent known.

The educational representative shall participate in accordance with the determination of the student's best interest. In determining the student's best interests, the student's personal values, to the extent known, shall be taken into consideration.

### **What documentation is required to be an educational representative?**

While there is no specific form to be completed for an individual to be designated as an educational representative, written documentation by a qualified professional (student's primary physician, psychologist, psychiatrist or the Hawaii Department of Health – Developmental Disabilities Division) acknowledging the adult student lacks decisional capacity is required.

### **What information is required to be an educational representative?**

The following information is required:

#### **Certification Statement**

- Statement of determination that the adult student's lack of capacity by a qualified professional (student's primary physician, psychologist, psychiatrist or the Hawaii Department of Health – Developmental Disabilities Division)

Although not stated in Act 182, the following information is needed:

#### **Adult Student Information**

- Printed first and last name of the adult student
- Contact information (i.e. address, phone number)

#### **Educational Representative Information**

- Printed first and last name of the individual to be educational representative
- Contact information (i.e. address, phone number)
- Relationship to the adult student

### **What is the length of time an educational representative can represent a student?**

The educational representative can represent the adult student for the length of time the adult remains eligible for special education in the DOE except when an adult student has been re-assessed by qualified personnel and found to have regained decisional capacity; for additional information see the next question.

**Does the educational representative continue to represent an adult student if the adult student has regained capacity?**

No. Should an adult student be re-assessed by a qualified professional and found to have regained decisional capacity, the findings of the decision by the qualified professional is to be in writing and entered into the student's educational record. The adult student, now having decisional capacity, regains his/her educational rights to make educational decisions. No additional documentation is required.

**GUARDIAN**

**What is guardianship?**

Guardianship, according to HRS §560:5-301, is when a person becomes a guardian of an incapacitated person by an appointment by a parent, spouse, or reciprocal beneficiary or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward. The appointment, powers, etc. of the guardian is to be in accordance with HRS §560:5-301 through §560:5-318.

**An adult student who lacks capacity has an educational representative. The courts have now appointed a guardian. Who makes the educational decisions for the adult student?**

Decisions made by a court appointed guardian takes precedence over that of an agent or educational representative, unless a court order states otherwise.

## Transfer of Rights for Adult Students with Disabilities upon Reaching the Age of Majority

