



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

OFFICE OF THE SUPERINTENDENT

February 7, 2019

TO: The Honorable Catherine Payne
Chairperson, Board of Education

FROM: Dr. Christina M. Kishimoto
Superintendent

A handwritten signature in blue ink, appearing to read "Christina M. Kishimoto".

SUBJECT: **Board 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)**

1. RECOMMENDATION

It is recommended that the Board of Education ("Board") approve the recommendation by the Hawaii Department of Education ("HIDOE") to send the following matters for public hearing:

- 1) Repeal of HAR Chapter 8-41 ("Chapter 41"); and
- 2) Creation of HAR Chapter 8-89 ("Chapter 89").

2. RECOMMENDED EFFECTIVE DATE

Upon the start of the 2019-2020 school year.

3. RECOMMENDED COMPLIANCE DATE (if different from the effective date)

Not applicable.

4. DISCUSSION

a. Conditions leading to the recommendation:

On September 6, 2018, there was a hearing held by the joint Committees of Finance and Infrastructure and Student Achievement to consider the recommendation of the HIDOE to send the following matters out for public hearing: 1) revisions to Chapter 19; 2) repeal of Chapter 41; and 3) creation of Chapter 89. Written public testimony on these matters was submitted to the joint committees and one person presented oral testimony to the joint committees on Chapter 19 and Chapter 89.

Following the public testimony, the joint committees had questions for HIDOE representatives, expressed concerns about specific aspects of Chapters 19 and 89 and asked HIDOE to make changes to address them. There were no concerns from the joint committees or the public regarding the repeal of Chapter 41.

After receiving input and feedback from the public and the joint committees, HIDOE made several proposed updates to Chapter 19 and Chapter 89, which it presented to the Board on October 4, 2018. Again, written public testimony was submitted to the Board, and four people presented oral testimony. Following this testimony, the Board voted unanimously to send the revised Chapter 19 and Chapter 89 to public hearing.

Before proceeding to public hearing, in November and December 2018, HIDOE held 11 engagement sessions with school administrators and another 11 engagement sessions with community members to discuss the proposed changes to Chapter 19 and Chapter 89. These engagement sessions took place on Oahu, the Big Island, Maui, Kauai, Lanai, and Molokai. At these engagement sessions, school administrators and community members reacted positively to some aspects of the proposed rule updates, but also strongly expressed that a few more changes should be made to the proposed rules before they were presented and considered at a public hearing.

b. Arguments in support of the recommendation:

The primary argument in support of the recommendation to approve Chapter 89 for public hearing is that HIDOE carefully considered all feedback from school administrators and the public and updated the administrative rules accordingly. Approving Chapter 89 for public hearing will also support HIDOE in meeting its commitments outlined in the December 20, 2017, Resolution Agreement with the U.S. Department of Education, Office for Civil Rights. Proposed substantive updates made since the administrative rules were last

reviewed by the Board at its October 4, 2018, general meeting are detailed in the table below, along with the rationale for these changes. Smaller corrections were also made, including grammatical and formatting changes.

Updates to both Chapter 19 and 89		
Item	Proposed Updates	Rationale
Bullying Definition	Separated definitions of bullying and harassment.	Received strong feedback from school administrators that the definitions of bullying and harassment should remain separate.
	Specified that to qualify as bullying, the conduct must be sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment. [Updated “or” to “ that it ”]	Prior version using the connector “or” was confusing to school administrators and community. Changing the connector from “or” to “ that it ” puts the standard in line with other jurisdictions.
	Specified actions which should not be considered bullying – isolated incidents of teasing, horseplay, arguments, and/or peer conflict	Adding this ensures that all incidents between students will not be misclassified as bullying.
Harassment definition	Separated definitions of bullying and harassment.	Received strong feedback from school administrators that the definitions of bullying and harassment should remain separate.
Cyberbullying definition	Reinstated guidance that cyberbullying can occur in three ways: (a) on HIDOE premises/at HIDOE sponsored event; (b) through HIDOE systems if used without authorization; and (c) through an off-campus network if it impacts the educational environment.	This language was in the original Chapter 19 definition of cyberbullying, and school administrators requested that it remain. The previous draft of the rule misled that all cyberbullying occurring off campus would be considered a Chapter 19 offense; the newly proposed definition limits cyberbullying to incidents that

Updates to both Chapter 19 and 89		
Item	Proposed Updates	Rationale
		impact the educational environment.
	Specified that to qualify as cyberbullying, the conduct must be sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment. [Updated "or" to "that it"]	Prior version using the connector " or " was confusing to school administrators and community. Changing the connector from " or " to " that it " puts the standard in line with other jurisdictions.
Disorderly conduct definition	Reinstated the following type of disorderly conduct: "inappropriate physical contact including but is not limited to consensual sex or consensual touching of body parts, or both."	It was removed because there was an attempt to consolidate all sexual activity under the sexual harassment definition, but school administrators pointed out that it was not appropriate to include consensual sexual behavior in the sexual harassment definition.
Offense Levels for bullying, cyberbullying, and harassment	Originally proposed that bullying/harassment and cyberbullying be a Class B offense for grades K-6 and Class A offense for grades 7-12 . This was updated so that these offenses are considered a Class B offense for grades K-8 and a Class A offense for grades 9-12 .	Strong feedback from middle and intermediate school administrators that the new groupings better align with grade levels in schools.
Immediate Interventions	Added that the Civil Rights Compliance Branch will ensure interim interventions are taken.	This was required by the federal Department of Education's Office of Civil Rights to comply with the December 2017 Resolution Agreement.
Notification of Investigation's Conclusion	Added that the notification sent to both parties will include whether the allegations were	This was required by the federal Department of Education's Office of Civil Rights to comply with the

Updates to both Chapter 19 and 89		
Item	Proposed Updates	Rationale
	substantiated.	December 2017 Resolution Agreement.

c. Arguments against the recommendation:

The public and advocacy groups may continue to offer suggestions for strengthening these administrative rules, but it is the HIDOE's position that public feedback has been carefully considered and the rules updated accordingly.

CMK:cac

Attachment A: HAR, Chapter 8-41

Attachment B: HAR, Chapter 8-89, Ramseyer format

c: Office of Talent Management - Civil Rights Compliance Branch

DEPARTMENT OF EDUCATION

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

Date

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

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

"HAWAII ADMINISTRATIVE RULES

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 2

EDUCATION

PART 1

PUBLIC SCHOOL

CHAPTER 89

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

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

Historical Note: This chapter is based substantially upon Department of Education "Rule 52, Relating to Civil Rights Complaint Procedure for Students" and Hawaii Administrative Rules, Title 8, Chapter 41, "Civil Rights Complaint Procedure." [Eff. 12/9/78; am 7/21/80; R 4/21/86, am and comp 10/28/1995]

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

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

(c) The department shall take immediate and appropriate steps to stop discrimination, harassment (including sexual harassment) or bullying

against a student to prevent recurrence and remedy discrimination effects on the complainant or others, if appropriate.

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

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

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

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

- race, religion, sex or ancestry;
- (8) Age Discrimination Act of 1975, Public Law 94-135;
 - (9) Section 302A-461, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in athletics offered by a public high school;
 - (10) Section 302A-1001, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in any educational or recreational program or activity receiving state or county financial assistance or utilizing state or county facilities; and
 - (11) Act 110, Session Laws of Hawaii 2018, which prohibits discrimination on the basis of sex, gender identity or expression or sexual orientation in any state educational program or activity or any educational program or activity that receives state funding.

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

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

"Bullying" means any written, verbal, graphic, or physical act that hurts, harms, humiliates, or intimidates a student(s), including those with protected class statuses, that is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment. Bullying does not include isolated incidents of teasing, horseplay, argument, or peer conflict.

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

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

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

- (1) Title VI of the Civil Rights Act of 1964, Public Law 88-352, which prohibits discrimination on the basis of race, color, or national origin;
- (2) Title IX of the Educational Amendments Act of 1972, Public Law 92-318, which prohibits discrimination on the basis of sex;
- (3) Title IV of the Civil Rights Act of 1964, which prohibits discrimination on the basis of religion;
- (4) Section 504 of the Rehabilitation Act of 1973, Public Law 92-112, which prohibits discrimination against persons with disabilities;
- (5) Individuals with Disabilities Education Act, Public Law 101-476, which ensures students with a disability are provided with free and appropriate public education that is tailored to their individual needs;
- (6) Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination against persons with disabilities in programs, activities, and services;
- (7) Article X, Section 1, Hawaii State Constitution, which prohibits discrimination in public educational institutions because of race, religion, sex, or ancestry;
- (8) Age Discrimination Act of 1975, Public Law 94-135;
- (9) Section 302A-461, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in athletics offered by a public high school;
- (10) Section 302A-1001, Hawaii Revised Statutes, which prohibits discrimination on the basis of sex in any educational or recreational program or activity receiving state or county financial assistance or utilizing state or county facilities; and
- (11) Act 110, Session Laws of Hawaii 2018, which prohibits discrimination on the basis of sex, gender identity or expression, or sexual orientation in any state educational program or activity or any educational program or activity that receives state funding.

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

- (1) On campus, or other department premises, on department

transportation, or during a department sponsored activity or event on or off school property;

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

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

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

"Department" means the Department of Education.

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

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

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

"Employee" means a department employee.

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

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

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

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

"Immediate interventions" means individualized services offered as soon as possible to either or both the complainant or respondent involved

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

occurring. [Eff. _____] (Auth: HRS §302A-1112)

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

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

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

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

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

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

(d) When a complaint is received, the Civil Rights Compliance Branch shall promptly assess the situation, will determine if the complaint

falls under this chapter, and will investigate in accordance with section 8-89-6(f)-(i). Complaints that do not fall under this chapter will be referred to the appropriate office for review.

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

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

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

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

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

(i) The investigator shall make a good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution. The investigation will be completed within sixty calendar days of the filing of a complaint or from the report of the suspected violation of this chapter, unless the Civil Rights Compliance Branch determines in its discretion that more time is required to initiate and complete the investigation. If the investigation cannot be completed within the sixty calendar day time frame, the Civil Rights Compliance Branch will notify the complainant and respondent in writing of the status of the investigation and provide an update on status every thirty calendar days thereafter. [Eff. _____] (Auth: HRS §302A-1112)

§8-89-7 Continued investigation. When a complainant makes a complaint against an employee, volunteer, or third party, the investigation shall be completed in the event that the employee resigns before it is finished and shall include a determination of any potential immediate interventions or remedies for complainant(s) and any other students or employees affected by the alleged harassment. Additionally, the Civil Rights Compliance Branch shall investigate allegations of violations of this chapter even absent a filing of a formal complaint or if a complaint has been withdrawn. [Eff. _____] (Auth: HRS §302A-1112)

§8-89-8 Retaliation prohibited. Retaliation and retaliatory harassment is prohibited against any person because the person engaged in a protected activity. [Eff. _____] (Auth: HRS §302A-1112)

§8-89-9 Right to seek other relief. Nothing in this chapter shall be construed to limit or waive the right of the complainant to seek other relief as provided under federal and state laws. A complainant has the right to file a discrimination complaint with the federal or state government, including law enforcement agencies:

- (1) Without filing a complaint under this chapter;
- (2) At the same time a complaint is filed under this chapter;
- (3) At any time during the pendency of a complaint filed under this chapter; or
- (4) After a complaint filed under this chapter has been addressed.

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

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

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

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

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

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

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

Catherine Payne, Chairperson
Board of Education

APPROVED AS TO FORM:

Deputy Attorney General

Hawaii Department of Education

Board 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)

Board Action on Approving for Public Hearing Draft Amendments to Hawaii Administrative Rules, Chapter 19, Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews, and Arrests, and Restitution for Vandalism

February 7, 2019

HAWAII STATE DEPARTMENT OF EDUCATION

HawaiiPublicSchools.org



Overview Of Feedback And Update Process

- Drafts presented in the October 4, 2018 general meeting.
- HIDOE held 22 engagement sessions on Oahu, Big Island, Maui, Kauai, Lanai, and Molokai.
- Changes were made based upon feedback. We are now seeking approval to conduct a public hearing on these latest drafts.



Current Bullying Definition

“Bullying” means any written, verbal, graphic, or physical act that hurts, harms, humiliates, or intimidates a student(s), including those with protected class statuses, that is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment. Bullying does not include isolated incidents of teasing, horseplay, argument, or peer conflict.



Updated Definitions

The following definitions were also updated:

- Harassment
- Cyberbullying
- Disorderly Conduct



Reclassified Certain Chapter 19 Offenses

October 2018 Draft

Offense	Level of Offense for Grades K-6	Level of Offense for Grades 7-12
Bullying/Harassment	Class B	Class A
Cyberbullying	Class B	Class A

Updated Draft

Offense	Level of Offense for Grades K-8	Level of Offense for Grades 9-12
Bullying	Class B	Class A
Cyberbullying	Class B	Class A
Harassment	Class B	Class A



Clarified Length of Time for School Administrators to Conduct Investigations

- October 2018 draft specified that investigations must be completed within five calendar days.
- Based on feedback, the process was amended so that investigations must be completed within five school days.



Changes Made From USDOE OCR Feedback

The following changes were made in both Chapter 19 and Chapter 89:

- Added that the CRCB will ensure interim interventions are taken.
- Added that both parties will be notified whether the allegations were substantiated.



Next Steps

- Legislative Reference Bureau
- Governor
- Public Hearing Notice
- Public Hearing
- Sign Bills
- Training

