




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

OFFICE OF THE SUPERINTENDENT

August 15, 2019

TO: The Honorable Catherine Payne
Chairperson, Board of Education

FROM: Dr. Christina M. Kishimoto 
Superintendent

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

1. RECOMMENDATION

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

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

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

Comments regarding Chapter 19 Only		
Commenter(s)	Comment	HIDOE Response
ACLU Hawaii, Robert Bidwell, Josephine Chang, SEAC, Joe Wilson	Did not support reclassifying bullying and harassment to a class A offense for high school students.	The purpose of designating an offense as a certain class offense is to inform students of the seriousness of their conduct. Disciplinary actions are not predetermined based on what class an offense falls under (e.g., students who engage in class A offenses do not automatically receive suspension). Instead, administrators determine what disciplinary actions are appropriate based on an assessment of the five factors, which are: (1) intention of the offender; (2) nature and severity of the offense; (3) the impact of the offense on others, including whether the action was committed by an individual or a group of individuals such as a gang; (4) the age of the offender; and (5) if the offender is a repeat offender.
Robert Bidwell, Josephine Chang, Dean Hamer	The definition of fighting should exclude students who are provoked into fighting due to discrimination, harassment, and/or bullying by other students.	HIDOE believes that it is important to teach students that fighting or any other physical response to teasing, harassing, threatening, and/or intimidating behavior is never appropriate. Instead, students should seek assistance from an adult in this situation.
Josephine Chang, Joe Wilson	Having school administrators respond to complaints will mean that there will be an inconsistent approach across different schools as to how the process is executed.	The intent of these amendments is to ensure all schools are using a consistent process to address discrimination, harassment, and/or bullying. While it is always challenging to implement system-wide changes across 256 schools, HIDOE believes that the responsibility for implementing Chapter 19 should remain with school administrators. HIDOE is committed to providing training to ensure that the proposed

Comments regarding Chapter 19 Only		
Commenter(s)	Comment	HIDOE Response
		amendments are implemented effectively, and the Civil Rights Compliance Branch will provide continued support and technical assistance to school administrators.
Josephine Chang	Informal resolution between parties is not considered appropriate for complaints of discrimination, harassment, or bullying at any age because: (1) the complainant has already been harmed by the conduct of the alleged perpetrator; (2) such a process would put the complainant at further risk of harm; and (3) it would put an overwhelming burden on K-12 students by suggesting that they undertake an informal resolution process.	Chapter 19 specifically states that informal resolution cannot be used in cases of bullying and discrimination. Informal resolution is focused on the students' needs and supports and is intended to be a healthy way to engage in conflict resolution. It will only be conducted if the involved parties agree to participate. Once the process is initiated, either party has the right to end the informal process at any time, which will result in the initiation of an investigation. Administrators will be trained to identify when it is and isn't appropriate to offer an informal resolution to students.

Comments regarding Chapters 19 and 89		
Commenter(s)	Comment	HIDOE Response
ACLU Hawaii, Robert Bidwell, Josephine Chang, Joe Wilson	The proposed amendments are overly focused on a complaint process, and instead, HIDOE should develop preventative processes. Discipline policies should be revised to address overall school climate and to focus on preventing harassment and bullying.	This complaint process was required by a resolution agreement made between the federal government and HIDOE. One of the purposes of Chapter 19 is to create proactive procedures to support students and to provide interventions to teach students appropriate behaviors when disciplinary actions are imposed. The proposed amendments are one part of a comprehensive approach by HIDOE

Comments regarding Chapters 19 and 89		
Commenter(s)	Comment	HIDOE Response
		to support positive school climate and address bullying, discrimination, and harassment. This approach is grounded in several Board of Education (BOE) policies, including Policy 101-1 (Student Code of Conduct), BOE Policy E-101 (Whole Student Development), BOE Policy 101-2 (Character Education), BOE Policy 101-6 (Comprehensive Student Support System), and BOE Policy 101-7 (School Climate and Discipline). This year, HIDOE is implementing the Hawaii Multi-Tiered System of Support to meet the social and emotional needs of all students. HIDOE is also in the second year of rolling out an anti-bullying app and has partnered with organizations across the state for the Youth Mental Health First Aid program.
Robert Bidwell, Josephine Chang, Dean Hamer, Joe Wilson	The two complaint processes outlined in Chapter 19 and Chapter 89 oversimplify how to respond to discrimination, harassment, and bullying. It is not usually a complaint only against a student. Many times, employees are involved in student to student conduct because they do not stop the discrimination, harassment, and/or bullying, and they are also contributing to a climate where such offenses are tolerated.	Chapter 19 requires that any HIDOE teacher, official, or employee who witnesses or has reasonable cause to believe a class A or class B offense has been or will be committed, shall promptly report the incident to the principal or designee. Employees who are involved in or fail to stop the discrimination, harassment, and/or bullying of students may be in violation of the Code of Conduct or BOE Policy 305-10 (Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees). Therefore, if it is determined that an employee either engaged in or failed to stop the discrimination, harassment, and/or bullying of a student, the employee will be found

Comments regarding Chapters 19 and 89		
Commenter(s)	Comment	HIDOE Response
		in violation of these policies and disciplined accordingly.
Robert Bidwell, Josephine Chang, Dean Hamer, Joe Wilson	The definition of discrimination should be expanded to not only prohibit treating students differently on the basis of a protected class but also to prohibit such treatment if it's based on perceiving (rightly or wrongly) the student to be of a protected class.	Students who are perceived (rightly or wrongly) to be of a protected class will be protected by the definition of discrimination. This will be clarified in the guidance documents and emphasized in training.
Josephine Chang, Dean Hamer, Joe Wilson	The proposed definition of harassment should not be narrowed, and the eight definitions from it should not be deleted.	The definition of harassment has not been narrowed; it has been clarified and updated. The current definition of harassment defines bullying and cyberbullying as harassment. In the proposed amendments, these are considered separate offenses. It is not common form to include so many examples in an administrative rule. Instead, such examples will be included in accompanying guidance for implementing the rule, and these examples will be taught to students and staff as they are educated on these proposed changes.
Robert Bidwell, Josephine Chang	If a lesbian, gay, bisexual, transgender/gender nonbinary and questioning (LGBTQ) student files a complaint, the proposed rule requires that notice will be sent to their parent. This may cause a safety concern for the student if their parent(s) are not aware of their LGBTQ status. There should be an accommodation for these students.	Parents should know about any complaint or investigation that pertains to their child, particularly if the student is a minor. Administrators will be trained on recognizing the sensitivity of each student's individual situation and how to address it as discreetly as possible. If an LGBTQ student is discouraged from making a complaint, administrators will be trained to provide appropriate support or resources to address the student's needs.

Comments regarding Chapters 19 and 89		
Commenter(s)	Comment	HIDOE Response
Joe Wilson	The proposed complaint processes would not allow students to submit a complaint against HIDOE employees or other students for harassment or bullying if it is not based on a protected class.	The proposed complaint process in Chapter 19 allows any student to submit a complaint against students for harassment and bullying, regardless of whether or not the harassment or bullying is based on a protected class. Students wishing to file complaints against HIDOE employees may do so at any time. It will then be investigated by the school or complex area unless the complaint is based on a protected class, in which case it will be investigated by the Civil Rights Compliance Branch in accordance with Chapter 89.

3. NEW IMPLICATIONS NOT PREVIOUSLY REPORTED

a. Educational

None.

b. Personnel

None.

c. Facilities

None.

d. Financial

None.

4. OTHER SUPPLEMENTARY INFORMATION

None.

CMK:sm

Attachments: Chapter 8-19, HAR

Written testimony submitted to the public hearing

c: Cynthia Covell, Assistant Superintendent, Office of Talent Management
Heidi Armstrong, Assistant Superintendent, Office of Student Support Services
Beth Schimmelfennig, Director, Civil Rights Compliance Branch

DEPARTMENT OF EDUCATION

Amendment and Compilation of Chapter 8-19
Hawaii Administrative Rules

(Insert date)

1. Chapter 8-19, Hawaii Administrative Rules entitled, "Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, Restitution for Vandalism, and Complaint Procedure and Investigation of Discrimination, Harassment (including Sexual Harassment), Bullying and/or Retaliation" is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 2

EDUCATION

PART 1

PUBLIC SCHOOLS

CHAPTER 19

STUDENT MISCONDUCT, DISCIPLINE, SCHOOL SEARCHES
AND SEIZURES, REPORTING OFFENSES, POLICE INTERVIEWS
AND ARRESTS, RESTITUTION FOR VANDALISM, AND
COMPLAINT PROCEDURE AND INVESTIGATION OF
DISCRIMINATION, HARASSMENT (INCLUDING SEXUAL
HARASSMENT), BULLYING AND/OR RETALIATION

Subchapter 1 General Provisions

- §8-19-1 Philosophy
- §8-19-2 Definitions
- §8-19-3 Applicability
- §8-19-4 Severability
- §8-19-4.1 Student's right to privacy

Subchapter 2 Student Misconduct and Discipline During the
Regular School Year

- §8-19-5 Disciplinary actions; authority
- §8-19-6 Prohibited student conduct; class offenses
- §8-19-7 Crisis removal
- §8-19-7.1 Investigation
- §8-19-8 Suspension
- §8-19-9 Due process for suspensions exceeding ten days, disciplinary
transfer, and dismissal
- §8-19-10 Duration of disciplinary actions
- §8-19-11 Alternate educational activities and other assistance when
students are found to be in violation of this chapter

Subchapter 3 Student Misconduct and Discipline in Summer
School

- §8-19-12 Disciplinary actions; authority
- §8-19-13 Prohibited student conduct; class offenses

Subchapter 4 School Searches and Seizures

- §8-19-14 Policy on opening and inspection of student lockers
- §8-19-15 Policy on general school searches and seizures
- §8-19-16 Authority
- §8-19-17 Conditions under which general school searches and seizures
may be carried out
- §8-19-18 Prohibited searches and seizures

Subchapter 5 Reporting Offenses

- §8-19-19 Reporting class A and class B offenses occurring in school
- §8-19-20 Indemnity upon reporting offenses
- §8-19-21 Failure to report class A or class B offenses occurring in school;
consequences

Subchapter 6 Police Interviews and Arrests

§8-19-22	Police interviews in school for school-related offenses
§8-19-23	Police interviews in school for non-school-related offenses
§8-19-24	Police arrests in school

Subchapter 7 Restitution for Vandalism

§8-19-25	Liability for vandalism
§8-19-26	Procedures applicable to vandalism
§8-19-27	Repealed
§8-19-28	Repealed
§8-19-29	Repealed

Subchapter 8 Complaint Procedure and Investigation of Discrimination, Harassment (Including Sexual Harassment), Bullying and/or Retaliation

§8-19-30	Complaint procedure
§8-19-31	Investigation
§8-19-32	Continued investigation
§8-19-33	Language assistance, writing assistance, or reasonable accommodation
§8-19-34	Retaliation prohibited
§8-19-35	Right to seek other relief

Historical Note: This chapter is based substantially upon Department of Education “Rule 21, Relating to Student Discipline” [Eff 3/28/64; am 11/29/73; am 5/01/76; R 9/1/82]; “Rule 3, Relating to Police Interviews and Arrest of Students During School Hours” [Eff 9/23/63; am 6/20/77; R 9/1/82]; “Rule 24, Relating to Students Smoking on School Premises” [Eff 3/28/64; R 9/1/82].

SUBCHAPTER 1

GENERAL PROVISIONS

§8-19-1 Philosophy. (a) Hawaii has established and supports a statewide system of public education. The compulsory nature of school attendance ensures that a student shall have the opportunity for an education. In addition to the education provided during the regular school year, the department offers students the opportunity to receive additional instruction and educational services through a self-supporting summer school program on a voluntary attendance basis. The department is committed to:

- (1) Provide the student with optimal learning conditions;
- (2) Select appropriate teachers for the student’s instruction; and
- (3) Other programs that will help the student to succeed.

In 1996, the ~~[Hawaii state-]~~ department ~~[of education-]~~ initiated a collaborative and systemic reform known as the Comprehensive Student Support System

(CSSS), which provides a continuum of academic, social, emotional, and physical environmental supports and services to all students to facilitate their learning and their meeting of high educational standards. It is a CSSS community of caring and supportive relationships among students, teachers, families, and agencies working together that promote timely and appropriate services for all students. The goal of the school system is to provide a learning experience ~~[that allows all students to achieve the Vision of the Public School Graduate, 2005-2008, Department of Education Strategic Plan, State of Hawaii, Department of Education, Office of Superintendent, June 2005,]~~ in safe, caring, nurturing, and orderly teaching and learning environments.

(b) It is the responsibility of every student to demonstrate respectful, responsible, non-discriminatory, safe, and ethical behaviors on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored activity on or off school property. The department supports this through the establishment of a proactive systems approach to schoolwide discipline.

(c) However, when a student's behavior violates established policies, rules, or regulations of the department, state or local laws, the department may take appropriate disciplinary action in accordance with this chapter. The purpose of school-administered discipline is to:

- (1) Promote and maintain a safe and secure educational environment;
- (2) Teach and acknowledge proper behavior which is beneficial to the educational process and self-development;
- (3) Deter students from acts which interfere with the purpose of education or which are self-destructive, self-defeating or anti-social; ~~[and]~~
- (4) Maintain proper student conduct to ensure that educational activities and responsibilities remain uninterrupted~~[-];~~ and
- (5) Stop any discrimination (including unlawful discrimination), harassment (including sexual harassment), or bullying against a student based on a protected class.

(d) An educational worker conducting or participating in a school program, activity, or function sponsored or approved by the department, or hired to engage in carrying out an educational function, has a reasonable expectation to be free of undue disruption and threat of disorder or acts of violence, or both, committed against them by students.

(e) In addition to the disciplinary action taken under this chapter, restitution for vandalism or for negligence shall be made in accordance with the provisions of this chapter. The purpose of restitution is to discourage acts of vandalism and negligence and to ensure recovery of the cost of public property damaged by acts of vandalism and negligence.

(f) On occasions it is necessary for police officers to interview students or to take them into custody. This chapter is also intended to safeguard the rights and interests of students in attendance, to cooperate with police officers in the performance of their duties, to preserve the school milieu, and to delineate responsibilities of school personnel. [Eff 9/1/82; am 5/23/86; am and comp 7/19/93; am and comp 5/19/97; comp 2/22/01; am and comp 9/10/09; am and comp
] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art.

X, §3; HRS §§302A-1101, 302A-1112)

§8-19-2 Definitions. As used in this chapter:

“Abusive language” means verbal messages that use words in an inappropriate way and may include but is not limited to swearing, name-calling, or profanity.

“Assault” means intentionally, knowingly, recklessly, or negligently causing serious bodily injury or bodily injury to another person with or without a dangerous instrument.

“Bullying” means any written, verbal, graphic, or physical act that ~~[a student or group of students exhibits toward other particular student(s) and the behavior causes mental or physical harm to the other student(s); and is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student(s).]~~ hurts, harms, humiliates or intimidates a student, including those with protected class statuses, that is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment.

“Burglary” means entering or remaining without school authorization in a building that is either owned or operated by the department ~~[of education]~~ with intent to commit an offense against a person, or against school property or other property located at the school.

“Child Welfare Services” means the Child Welfare Services of the State of Hawaii Department of Human Services.

“Civil Rights Compliance Branch” means the entity within the department responsible for monitoring and/or conducting investigations of discrimination, harassment (including sexual harassment), and/or bullying complaints described in this chapter.

“Class cutting” means an unauthorized absence of a student from class.

“Complex area superintendent” means the chief administrative officer of a complex area and the school complexes therein.

“Contraband” means a property, other than which is unlawful to produce or possess, which, as defined by local school rules, is prohibited on school premises has in the past lead to bodily injury or disruption of school operations.

“Controlled substance” means a drug or substance as defined in parts I through V in chapter 329, Hawaii Revised Statutes.

“Correction and conference with student” means a student meets with an administrator, their teacher(s), and/or parent and receives instruction on demonstrating appropriate behavior.

“Crisis removal” means the immediate exclusion of a student from school in an emergency, because the conduct of the student presents a clear, immediate threat to the physical safety of self or others, or the student is so extremely disruptive as to make the immediate removal of the student necessary to preserve the right of other students to pursue their education free from undue disruption.

“Cyberbullying” means electronically transmitted acts, ~~[i.e.,]~~ including but not limited to those transmitted through the Internet, cell phone, or other

~~[personal digital assistant (PDA), or] wireless hand-held device [that a student has exhibited]~~ initiated by one student toward another student or employee of the department, ~~[which causes mental or physical harm to the other student(s) or school personnel]~~ that hurts, harms, humiliates, or intimidates the student or employee; 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 ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~-sponsored activity or event on or off school property;
- (2) Through a department ~~[of education]~~ data system without department ~~[of education]~~ authorized communication; or
- (3) Through an off campus computer network~~[that is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student or school personnel, or both],~~ if the conduct impacts the educational environment.

~~[In evaluating whether conduct constitutes harassment, intimidation or bullying, special attention should be paid to the words chosen or the actions, taken, whether the conduct occurred in front of others or was communicated to others, how the perpetrator interacted with the victim, and the motivation, either admitted or appropriately inferred. Electronic transmissions include but are not limited to the use of data, computer software that is accessed through a computer, a computer network system, other computerized systems, cellular phones or other similar electronic devices that display e-mail, text messaging, blogs, photos, drawings, video clips, on-line community websites, or faxes, or a combination of the foregoing.]~~ 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.

"Dangerous instrument, or 'substance'" means any explosive device, instrument, material, or chemical, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or bodily injury. Examples of such items include but are not limited to knives, pipe bomb devices, fireworks, pepper spray, mace, martial arts devices such as sticks and throwing stars; and inanimate objects such as pipes, sticks, or baseball bats swung at a person in a menacing manner so as to cause or threaten bodily injury.

"Dangerous weapon" means an instrument whose sole design and purpose is to inflict bodily injury or death. Examples of such instruments include but are not limited to a dirk, dagger, butterfly knife, switchblade knife, blackjack, slug shot, billy, metal knuckles, or other weapons that inflict bodily injury or death.

"Department" means the department of education.

"Detention" means detaining a student on school campus during non-

instructional hours to require the student to carry out in-school educational or other activities as may be prescribed by school officials as a form of disciplinary action for student misconduct.

“Disciplinary transfer” means the removal of a student from the school the student is attending as a result of a violation of section 8-19-6. Disciplinary transfer does not include cases involving the revocation of geographic exceptions under chapter 13 of title 8 under circumstances in which the purpose for granting the geographic exception is no longer valid.

“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.

“Dismissal” means the removal of a student from Hawaii public schools for the remainder of the school year or for a period of not less than one calendar year for firearm violations.

“Disorderly conduct” means the following actions or activities on campus or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored activity or event on or off school property:

- (1) Engaging in fighting or threatening, or in violent or tumultuous behavior such as yelling or screaming, or both;
- (2) Making unreasonable noise as to cause disruption of normal school operations;
- (3) Making any offensively coarse utterance, gesture, or display, or addressing abusive language to any person present, which is likely to provoke a violent response;
- (4) Creating a hazardous or physically offensive condition by any act which is not performed under any authorized license or permit;
- (5) Impeding or obstructing any person in a public school for the purpose of begging or soliciting alms or other forms of aid; or
- (6) Inappropriate physical contact including but is not limited to consensual sex or consensual touching of body parts, or both.

“Drug paraphernalia” means any equipment, products, or materials of any kind, or combination thereof which is used, intended for use, or designed for use, in planting, harvesting, producing, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

- (1) Kits, devices, equipment, separation gins, balance scales, blenders, bowls, containers, spoons, capsules, balloons, envelopes, other objects used, intended for use, or designed for use in preparing, processing, mixing, storing, or concealing controlled substances;
- (2) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use by injecting the controlled substances into the human body;
- (3) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish,

or hashish oil, or forms of methamphetamine, or anabolic steroids into the human body, such as:

- (A) Metal, wooden, glass, acrylic, stone, plastic, or ceramic pipes, water pipes, smoking and carburetion masks, roach clips; meaning objects used to hold burning materials such as marijuana cigarettes, that have become too small or too short to be held in the hand;
- (B) Miniature cocaine spoons, and cocaine vials, bongs, ice pipes, or chillers; and
- (C) Any and all other drug paraphernalia as described and defined pursuant to section 329-1, Hawaii Revised Statutes.

“Educational worker” means any administrator, specialist, counselor, teacher, or employee of the department [~~f-education~~], or a person who is a volunteer in a school program, activity, or function that is sponsored or approved by the department [~~of education~~], or a person hired by the department [~~of education~~] on a contractual basis and engaged in carrying out an educational function.

“Extortion” means an act committed by a person who:

- (1) Obtains, or exerts control over, the property or services of another with intent to deprive that person of the property or services by threatening by word or conduct to:
 - (A) Cause bodily injury in the future to the person threatened or to any other person;
 - (B) Cause damage to property;
 - (C) Subject the person threatened or any other person to physical confinement or restraint;
 - (D) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule, or to impair the person’s credit or business repute;
 - (E) Reveal any information sought to be concealed by the person threatened or any other person;
 - (F) Testify provide information, or withhold testimony or information with respect to another’s legal claim or defense;
 - (G) Take or withhold action as a public servant, or cause a public servant to take or withhold such action;
 - (H) Bring about or continue a strike, boycott, or other similar collective action, to obtain property which is not demanded or received for the benefit of the group which the student purports to represent; or
 - (I) Do any other act which would not in itself substantially benefit the person committing the act but which is calculated to substantially harm some person with respect to that person’s health, safety, education, business, calling, career, financial condition, reputation, or personal relationship;
- (2) Compels or induces another person to engage in conduct from

which that person has a legal right to abstain or to abstain from conduct in which that person has a legal right to engage by threatening by word or conduct to do any of the actions set forth in paragraph (A) through (I) of this definition; or

- (3) Makes or finances any extension of credit, or collects any extension of credit by extortionate means.

“Fighting” means instigating or provoking physical contact involving anger or hostility. Fighting includes but is not limited to:

- (1) Engaging in mutual physical contact involving anger or hostility;
- (2) Teasing, harassing, threatening, or intimidating others resulting in physical contact involving anger or hostility;
- (3) Retaliating physically for teasing, harassing, threatening, or intimidating behavior; verbally inciting; or
- (4) Physically supporting a fight by one’s presence and encouragement.

“Firearm” means:

- (1) Any weapon including but is not limited to a starter gun, shotgun, air guns which includes BB guns, pellet guns, paintball guns, or cross bow or any other instrument which will or is designed to or may readily be converted to expel a projectile;
- (2) The frame or receiver of any such weapon;
- (3) Any firearm muffler or firearm silencer; or
- (4) Any destructive device. The term "destructive device" means:
 - (A) Any explosive, incendiary, or poison gas:
 - (i) Bomb;
 - (ii) Grenade;
 - (iii) Rocket having a propellant charge;
 - (iv) Missile having an explosive or incendiary charge;
 - (v) Mine; or
 - (vi) Device similar to any of the devices described in the preceding clause;
 - (B) Any type of weapon which will, or which may be readily converted to expel a projectile, including but is not limited to a weapon that expels a projectile by action of an explosive or other propellant; or
 - (C) Any combination or parts either designed or intended for use in converting any device described above, and from which a destructive device may be readily assembled.

“Forgery” means:

- (1) A student signing a name other than the student’s own name on a document or;
- (2) The illegal production or reproduction of materials such as fundraising or sports event tickets.

“Gambling” means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, upon an agreement or understanding that the person or someone

else will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but is not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but is not limited to contracts of indemnity or guaranty and life, health, or accident insurance.

“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 a student who is harassing, bullying, including cyberbullying, annoying, or alarming another person by engaging in the following conduct that includes but is not limited to:~~

- ~~(1) Striking, shoving, kicking, or otherwise touching a person in an offensive manner or subjecting such person to offensive physical contact;~~
- ~~(2) Insulting, taunting, or challenging another person in a manner likely to provoke a violent response;~~
- ~~(3) Making verbal or non-verbal expression that causes others to feel uncomfortable, pressured, threatened, or in danger because of reasons that include but are not limited to the person’s race, color, national origin, ancestry, sex, including gender identity and expression, religion, disability, or sexual orientation that creates an intimidating, hostile, or offensive educational environment, or interferes with the education of a student or otherwise affects the educational opportunity of a student or students;~~
- ~~(4) Name calling, making rude gestures, insulting, or teasing another person who feels humiliated, intimidated, threatened, or embarrassed;~~
- ~~(5) Making a telephone call without purpose of legitimate communication;~~
- ~~(6) Making repeated communications anonymously, or at extremely inconvenient hours, or in offensively coarse language on campus or on department of education premises, on department of education transportation, or during a department of education sponsored activity or event on or off school property;~~
- ~~(7) Causing fear as to prevent others from gaining legitimate access to or use of school building, facilities, services, or grounds such as, but is not limited to, restroom facilities; or grounds; or~~
- ~~(8) Physically harming, physically restraining, threatening, or stalking or a combination of the foregoing.]~~

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 property;
- (2) Interfering with a student's educational performance, opportunities, or benefits; or
- (3) Disrupting the orderly operation of a school.

"Hazing" means any conduct or method of initiation into any student organization or activity, whether on campus or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored activity or event on or off school property, which willfully or recklessly endangers the physical or mental health of any student. Such conduct shall include, but is not limited to whipping, beating, branding, forced calisthenics, exposure to weather, forced consumption of any food, liquor, beverage, drug or other substance, indecent exposure, or any other treatment or forced physical activity which is likely to adversely affect the physical or mental health, or both, or safety of any student, or which subjects any student to extreme mental stress, including deprivation of sleep or rest, extended isolation, or personal humiliation.

"Hijacking" means to extort from another by a threat or a perceived threat.

"Homicide" means causing the death of another person.

"Inappropriate or questionable uses, or both, of internet materials and equipment" means ~~[when a student is in violation of the Internet Access Policy, Board of Education Policy 2170, amended 10/1997, <http://lilinode.k12.hi.us/STATE/BOE/POL1.NSF> the department's Internet Access Regulations, Hawaii Department of Education 2170.1 Internet Access Regulations, amended 08/2000, <http://www.k12.hi.us/~atr/policy2000/intaccereg.htm> and the Network Support Services Branch's Acceptable User Guidelines Department of Education Network and Internet Services, updated 11/29/2004; <http://nssb.k12.hi.us> for using computers and network resources]~~ that a student did not adhere to the department's state and school level technology guidelines. Examples of inappropriate or questionable uses of the department's computer and network resources include but are not limited to disabling or bypassing the filters, gambling software, music sharing software, or sexually explicit photographs and pictures that do not support the department's mission and purpose. ~~[Copies of these policies are available via the websites listed in the footnotes or may be obtained from school office.]~~

"Illicit drugs" means substances, the possession, distribution, ingestion, manufacture, use, sale, or delivery, of which are prohibited under chapter 329, Hawaii Revised Statutes and chapter 712, part IV, Hawaii Revised Statutes.

"Immediate interventions" means individualized services offered as soon as possible, but no later than seventy-two hours after receipt of the complaint, to either or both the complainant/victim or respondent involved in a complaint as appropriate to protect students from possible harassment or bullying, including racial, sexual, or disability discrimination, harassment or bullying. Immediate interventions may be offered prior to an investigation or while an investigation is pending. Immediate interventions 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 department on a case-by-case and temporary basis after receiving 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/victim's educational experience, ensure the safety of all parties and the broader department community, maintain the integrity of the investigative and/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.

“Individualized instruction related to student’s problem behaviors” means as a result of a disciplinary action the student receives individualized instruction specifically related to the student’s problem behaviors. Examples of individualized instruction include but are not limited to the development and implementation of behavior support plans, developing behavioral contracts or social skills training, or a combination of the foregoing.

“Insubordination” means disregard or refusal to obey an order which a teacher, officer, or other employee of the department is entitled to give.

“In-school suspension” means a student is temporarily removed from his/her school program for disciplinary purposes but remains under the direct supervision of school personnel to complete instruction work.

“Interim alternative educational setting” or “IAES” means a temporary placement for a student who has been suspended or otherwise removed from his current educational placement for disciplinary reasons in which the student continues to receive educational services to enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student’s IEP.

“Intoxicating substance use” means the use of any substance, which causes disturbance of the normal physical or mental functioning including but is not limited to alcohol.

“Laser pen/pointer” means a device that emits a bright laser light that appears as a dot on any surface at which it is aimed and is without authorized department ~~[of education]~~ purpose and use. Unless authorized, the possession or use is prohibited on campus, or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored activity or event on or off school property.

“Leaving campus without consent” means leaving the premises of a school, department ~~[of education]~~ facility, or department ~~[of education]~~ program without first obtaining permission from school officials.

“Low intensity problem behaviors” means those behaviors that are demonstrated with low frequency, brief engagement, and do not lead to serious harm.

“Mail” or “mailed” means documents sent via:

(1) Regular mail;

- (2) Certified mail; or
- (3) Return receipt requested.

“Minor problem behaviors” means demonstration of low-intensity problem behaviors that may include, but are not limited to the following.

- (1) “Defiance/disrespect/non-compliance” means student engages in brief or low-intensity failure to respond to adult requests;
- (2) “Disruption” means student engages in low-intensity, inappropriate disruption;
- (3) “Dress code violation” means student wears clothing that is not within the dress code guidelines defined by the school;
- (4) “Inappropriate language” means student engages in low-intensity instance of inappropriate language;
- (5) “Physical contact” means student engages in non-serious, inappropriate physical contact;
- (6) “Property misuse” means student engages in low-intensity misuse of property;
- (7) “Tardy” means a student arrives to school after school has started, or a student arrives at class after class has started, or both.

“Negligence” means the failure to use the care that a prudent and careful person would use under similar circumstances which results in harm to a person or loss, destruction, breakage, or damage of school books, equipment, or of supplies.

“Parent” means the natural or legal parent, legal guardian or other legal custodian of the 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.

“Property damage” or “vandalism” means:

- (1) Damaging the property of the school or another person;
- (2) Destroying or defacing school property or facility; or
- (3) Destroying or defacing school materials, such as but is not limited to planners, identification nametags, or meal cards.

“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.

“Rendering a false alarm” means a student causes a false alarm of fire or other emergency to be transmitted to or within an official or volunteer fire department, any governmental agency, or public utility that deals with emergencies involving danger to life or property.

“Restitution” means monetary or non-monetary repayment to the department [~~of education~~] or the State of Hawaii for the reasonable value of public school property lost, damaged, broken or destroyed as the result of student negligence or vandalism.

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

“Robbery” means, in the course of committing a theft, or hijacking, a student:

- (1) Attempts to kill another person, or inflicts or attempts to inflict serious bodily injury upon another person; or
- (2) With or without a dangerous instrument:
 - (A) Uses force against the person with the intent to overcome the owner’s physical resistance or physical power of resistance;
 - (B) Threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property; or
 - (C) Inflicts serious bodily injury upon another person.

“School” or “public school” means all academic and non-college type schools established and maintained by the department in accordance with state law.

“School books” means library and textbooks.

“School official” means any administrator, specialist, counselor, teacher, school security attendant, or other department employee, responsible for the supervision of students. It does not include individuals whose services are procured.

“School related offenses” means offenses involving school property, or offenses committed on campus, or other department [~~of education~~] premises, on department [~~of education~~] transportation, or during a department [~~of education~~] sponsored activity or event on or off school property.

“School rules” means school wide conduct rules that have been established by the school.

“School staff” means any teacher, officer, or other employee of the department.

“Search” means if after requesting the student to voluntarily relinquish the contraband item(s) and the student refuses and there are reasonable grounds to believe that the student has violated the law or provisions prohibited under this chapter, or if there is a health or safety issue with illicit drugs, dangerous weapons, dangerous instruments or firearms, or a combination of the foregoing,

the school official may examine the contents and belongings which may include but are not limited to purses, fanny packs, backpacks, jackets, shoes, socks, or any other outer clothing.

“Seizure” means to take possession of the contraband item(s) that is or are uncovered during a search.

“Serious discipline” means disciplinary actions including dismissals, disciplinary transfers, crisis removals, and suspensions which either exceed ten school days or will result in the student affected being crisis removed or suspended more than a total of ten school days in any single semester.

~~“Sexual offense” or “sexual assault” means unwanted touching or grabbing of sexual parts, indecent exposure, using force to engage in intercourse, oral sex, or other sexual contact, engaging in intercourse, oral sex, or other sexual contact despite the other person’s clearly expressed refusal or mental or physical inability to consent.”~~

“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, 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, 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 his or her 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.

“Smoking” or “use of tobacco” means possession, use, sale or distribution of tobacco products on campus, or other department [~~of education~~]-premises, on department [~~of education~~] transportation, or during a department [~~of education~~] sponsored activity or event on or off school property.

“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.

“Strip search” means searches, which require the removal of clothing that results in the exposure of the genitals, the female breasts, or underwear or combination thereof.

“Suspension” means exclusion from school for a specific period during a school year.

“Switchblade knife” means any knife having a blade which opens automatically:

- (1) By hand pressure applied to a button or other device in the handle of the knife, or
- (2) By operation of inertia, gravity, or both.

“Terroristic threatening” means:

- (1) A threat, by word or conduct, to cause bodily injury to another person or serious damage to property of another person;
- (2) With the intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation; or
- (3) Displaying a “look-alike” gun or weapon.

“Theft” means:

- (1) Obtaining, or exerting control over, the property of another and depriving that person of the property;
- (2) Obtaining, or exerting control over, the property of another by deceiving and depriving the person of the property;
- (3) Obtaining, or exerting control over, the property of another which the person knows to have been lost or mislaid, or to have been delivered under a mistake as to the nature or amount of the property, the identity of the recipient, or other facts, and with the intent to deprive the owner of the property, the person fails to take reasonable measures to discover and notify the owner;
- (4) Obtaining services, known by the person to be available only for compensation, by deception, false token, or other means to avoid payment for the services;
- (5) Having control over the disposition of services of another to which the person is not entitled and diverts those services to the person’s own benefit or to the benefit of a person not entitled thereto;

- (6) Failing to make required disposition of funds by:
 - (A) Obtaining property from anyone upon an agreement, or subject to a known legal obligation, to make specified payment or other disposition, whether from the property or its proceeds or from the person's own property reserved in equivalent amount, and dealing with the property as the person's own and failing to make the required payment or disposition; or
 - (B) Obtaining personal services from an employee upon agreement or subject to a known legal obligation to make a payment or other disposition of funds to a third person on account of the employment, and intentionally failing to make the payment or disposition at the proper time;
- (7) Receiving, retaining, or disposing of the property of another, knowing that it has been stolen, with intent to deprive the owner of the property; or
- (8) Shoplifting:
 - (A) Concealing or taking possession of the goods or merchandise of any department [~~of education~~] store or department [~~of education~~] retail establishment, with intent to defraud;
 - (B) Altering the price tag or other price marking on goods or merchandise of any department [~~of education~~] store or department [~~of education~~] retail establishment, with intent to defraud; or
 - (C) Transferring the goods or merchandise of any department [~~of education~~] store or department [~~of education~~] retail establishment from one container to another, with intent to defraud.

"Trespass" means entering or remaining in or upon the premises of any school, or department [~~of education~~] facility after reasonable warning or request to leave by school authorities or police officer.

"Truancy" means a student is absent from class(es) or the school campus without authorization from the principal or designee. [Eff 9/1/82; am 5/23/86; am and comp 7/19/93; am and comp 5/19/97; am and comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-101, 302A-1101, 302A-1112, 302A-1134, 302A-1134.5)

§8-19-3 Applicability. (a) The provisions of this chapter shall apply to all students enrolled in a public school during the regular school year, summer session, or intersessions regardless of age with the addition that, outside of the hours when school is in session, boarding students are subject to the dormitory rules developed by the school and agreed upon through written consent by the parent(s) or legal guardian(s) of boarding students.

(b) The Hawaii administrative rules for students with disabilities shall apply

in the discipline of students who are eligible to receive special education or other services under those chapters.

(c) References to principal or designee in subchapter 2 shall be construed to include summer school director for purposes of discipline in summer school. References to school year in this chapter shall be construed to mean summer session whenever summer school applies.

(d) Discipline during intersessions and in summer school shall be governed by subchapter 3. Discipline of students who receive special education services during an extension of the student's school year shall be governed by subchapter 2 and the guidelines and requirements of the Hawaii administrative rules for students with disabilities.

(e) In all cases of student-related administrative actions and reporting, chapter 8-34 shall apply. In addition, for students who receive special education services, the Hawaii administrative rules for students with disabilities shall prevail.

(f) No action relating to suspension, serious discipline, or restitution for vandalism or negligence shall be taken except in accordance with this chapter.

(g) All matters relating to police interviews or arrests, or both, of students shall be administered in accordance with this chapter.

(h) For conduct by adult(s) towards student(s) based on the student(s)' protected class, refer to chapter 8-89 for guidance. [Eff 9/1/82; am 5/23/86; am and comp 7/19/93; am and comp 5/19/97; am and comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS 302A-1101)

§8-19-4 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 5/23/86; comp 7/19/93; comp 5/19/97; comp 2/22/01; comp 9/10/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

§8-19-4.1 Student's right to privacy. (a) Information relating to complaints, investigations, and reports shall remain confidential and will only be shared with appropriate individuals necessary to complete the investigation and decision making process.

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

(c) Investigation records shall be maintained by the department separate from educational records. [Eff] (Auth: HRS §302A-1112) (Imp: HRS §§302A-1101, 302A-1112)

SUBCHAPTER 2

STUDENT MISCONDUCT AND DISCIPLINE DURING THE REGULAR SCHOOL YEAR

§8-19-5 Disciplinary actions; authority. (a) Suspensions exceeding ten school days or suspensions that will result in the student being suspended more than a total of ten school days in any single semester, disciplinary transfers, dismissals, and extension of crisis removals shall be approved by complex area superintendent.

(b) Crisis removals and suspensions of ten school days or less may be approved by the principal or designee.

(c) In determining disciplinary actions, the principal or designee shall consider the intention of the offender, the nature and severity of the offense, the impact of the offense on others including whether the action was committed by an individual or a group of individuals such as a gang, the age of the offender, and if the offender was a repeat offender. [Eff 9/1/82; ren §8-19-4, 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §§302A-1112, 302A-1002) (Imp: HRS §§302A-1112, 302A-1002)

§8-19-6 Prohibited student conduct; class offenses. (a) The following prohibited conduct applies to all students in the public school system, on campus, or other department [~~of education~~]premises, on department [~~of education~~]transportation, or during a department [~~of education~~]sponsored activity or event on or off school property.

(1) Class A offenses:

- (A) Assault;
- (B) Bullying (for students in grades 9-12);
- (C) Dangerous instrument, or substance; possession or use of;Burglary;
- (D) Dangerous weapons; possession, or use of;Cyberbullying (for students in grades 9-12);
- (E) Drug paraphernalia; possession, use, or sale of;Dangerous instrument, or substance; possession or use of;
- (F) Extortion;Dangerous weapons; possession, or use of;
- (G) Fighting;Drug paraphernalia; possession, use, or sale of;
- (H) Firearms; possession or use of;Extortion;
- (I) Homicide;Fighting;
- (J) Illicit drugs; possession, use, or sale of;Firearms; possession or use of;
- (K) Intoxicating substances; possession, use, or sale of;Harassment (for students in grades 9-12);
- (L) Property damage or vandalism;Homicide;
- (M) Robbery;Illicit drugs; possession, use, or sale of;
- (N) Sexual offenses; or;Intoxicating substances; possession, use, or sale of;

- (O) [Terroristic threatening;]Property damage or vandalism;
 - (P) Robbery;
 - (Q) Sexual assault;
 - (R) Sexual exploitation;
 - (S) Sexual harassment (for students in grades 5-12);
 - (T) Stalking; or
 - (U) Terroristic threatening.
- (2) Class B offenses:
- (A) Bullying (for students in grades K-8);
 - (B) Cyberbullying for students in grades K-8);
 - (C) [Disorderly conduct;]Discrimination;
 - (D) [False alarm;]Disorderly conduct;
 - (E) [Forgery;]False alarm;
 - (F) [Gambling;]Forgery;
 - (G) [Harassment;]Gambling;
 - (H) [Hazing;]Harassment (for students in grades K-8);
 - (I) [Inappropriate or questionable uses, or both of internet materials or equipment, or both;]Hazing;
 - (J) [Theft; or]Inappropriate or questionable uses, or both of internet materials or equipment, or both;
 - (K) [Trespassing;]Retaliation;
 - (L) Sexual harassment (for students in grades K-4);
 - (M) Theft; or
 - (N) Trespassing.
- (3) Class C offenses:
- (A) Abusive language;
 - (B) Class cutting;
 - (C) Insubordination;
 - (D) Laser pen/laser pointer; possession or use of;
 - (E) Leaving campus without consent;
 - (F) Smoking or use of tobacco substances; or
 - (G) Truancy.
- (4) Class D offenses:
- (A) Contraband; possession or use of;
 - (B) Minor problem behaviors; or
 - (C) Other school rules.
 - (i) Any other conduct as may be prescribed and prohibited by school rules. Individual school rules shall be published or made available for inspection at the school office and shall inform students, school staff, and parents of the prohibited conduct under class A through D of this section.
 - (ii) No disciplinary action amounting to serious discipline shall be imposed for violation of any individual school rule as a class D offense.
- (b) Any student who possesses a firearm shall be dismissed from school

for not less than one calendar year period. The possession or use of a firearm is prohibited on campus, or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored activity or event on or off school property except for participation in athletic teams, clubs and/or Junior Reserve Officer Training Corp (JROTC) shooting sports programs and marksmanship training, education, and competitions. The superintendent or designee, on a case-by-case basis, may modify the dismissal of a student found to be in possession of a firearm. If a student is dismissed from school, that student shall be provided alternate educational activities or other appropriate assistance as provided in section 8-19-11.

(c) Any student who possesses, sells, or uses a dangerous weapon, switchblade knife or any improperly used knife, intoxicating substance(s), or illicit drug(s) while attending school may be excluded from attending school for up to ninety-two school days. Any student who reasonably appears to be under the influence of, have consumed or used intoxicating substance(s) or illicit drug(s) prior to attending school or attending department-supervised activities held on campus, or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored activity or event on or off school property may be excluded from attending school for up to ninety-two school days and the school shall administer a substance use screening tool to determine whether there is a need for the student to be referred for a substance abuse assessment pursuant to section 302A-1134.6(f), Hawaii Revised Statutes. The school administrator shall comply with the provisions of this chapter by conducting an investigation of the reported incident and inform the parent of the disciplinary action. In addition, the school administrator shall arrange for the student to be screened by a trained screener. The designated screener will summarize the results with the student, and inform the school administrator of the results. The school administrator shall then inform the family of the screening results, the early return provisions of the law, and provide a contact list of medical insurance agencies that conduct substance abuse assessments. During the screening the student will be asked a series of questions to determine if the student is at low, high or very-high risk for a substance use problem. If the screening interview indicates high or very- high results, the student will be referred for a formal substance abuse assessment. A formal substance abuse assessment serves to provide expert clinical opinion to determine if a substance abuse problem exists, and if so, offer treatment recommendations. If referred for a substance abuse assessment, students with medical health insurance shall be asked to contact their medical health carrier to schedule an appointment. Professionals who can provide substance abuse assessments include certified substance abuse counselors (CSAC), psychiatrists, advanced practice registered nurses (APRN), psychologists, and licensed clinical social workers. The principal or designee can approve suspensions of one to ten school days. The complex area superintendent shall approve suspensions exceeding ten school days. In exercising this discretion and determining disciplinary actions, the principal or designee shall consider, the

nature and severity of the offense, the impact of the offense on others, the age of the offender, and if the offender is a repeat offender. If the student is excluded from attending school, the principal or designee shall ensure that alternate educational activities or other appropriate student support assistance shall be provided, and that the student is referred for appropriate intervention or treatment services, or both, as determined by the principal or designee in consultation with the appropriate school staff or in accordance with the Hawaii administrative rules for students with disabilities, if applicable.

(d) Disciplinary action shall be taken for all class offenses in grades kindergarten through twelve in accordance with procedures established under this chapter and within the following options as determined by the authorities designated in section 8-19-5. Interventions to teach students appropriate behaviors must be instituted when disciplinary actions are imposed. Disciplinary action options may include the following:

- (1) Correction and conference with student;
- (2) Detention;
- (3) Crisis removal;
- (4) Individualized instruction related to student's problem behaviors;
- (5) In-school suspension;
- (6) Interim alternate education setting;
- (7) Loss of privileges;
- (8) Parent conferences;
- (9) Time in office;
- (10) Suspension of one to ten school days;
- (11) Suspension of eleven or more school days;
- (12) Saturday school;
- (13) Disciplinary transfer;
- (14) Referral to alternative education programs;
- (15) Dismissal; or
- (16) Restitution.

(e) Students shall be counseled in addition to any disciplinary action taken under subsections (c) and (d).

(f) No action amounting to serious discipline shall be imposed on students for committing class D offenses.

(g) No suspension or serious discipline shall be imposed on any student because of class cutting or truancy.

(h) The disciplinary action options of subsections (c) and (d) shall be construed as disciplinary actions within a school year.

(i) Disciplinary actions may be carried over to the following school year if the offense is committed within twenty school days from the last instructional day for students in that school year. [Eff 9/1/82; am and ren §8-19-5, 5/23/86; am and comp 7/19/93; am and comp 5/19/97, am and comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §302A-1112) (Imp: HRS §§302A-1112, 302A-1134, 302A-1134.5)

§8-19-7 Crisis removal. (a) A principal or designee, in an emergency,

may crisis remove a student immediately based upon preliminary inquiry and findings that the student's conduct presents a clear immediate threat to the physical safety of self or others or is so extremely disruptive as to make the student's immediate removal necessary to preserve the right of other students to pursue an education free from undue disruption.

(b) Upon imposition of a crisis removal, schools shall make a good faith effort to inform the parent immediately by telephone.

(c) A follow-up written notice of the crisis removal shall be personally delivered or mailed to the parent. The notice of the crisis removal shall contain the following written statements:

- (1) Allegations of the specific acts committed by the student that form the basis of the crisis removal;
- (2) The allegations of the specific acts that were substantiated;
- (3) A statement of the disciplinary action(s); and
- (4) A statement of a conference date, time, and place offered establishment from the school administration to meet with the parent.

A copy of the

crisis removal notice shall be mailed to the complex area superintendent. In addition to the crisis removal notice required by this subsection, the principal or designee shall attempt to confirm the notice by telephoning the parent.

(d) A student who is the subject of a crisis removal shall be permitted to resume attendance at school as soon as the crisis no longer exists.

(e) A crisis removal shall not continue for more than ten school days, except when approved by the complex area superintendent during an appeal.
[Eff 9/1/82; am and ren §8-19-6, 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

§8-19-7.1 Investigation. (a) Immediately after making a crisis removal or whenever the principal or designee has reason to believe that a student has engaged in an activity warranting the imposition of a suspension, the principal or designee shall initiate a thorough investigation. Complaints of discrimination, harassment (including sexual harassment), bullying and/or retaliation are subject to the complaint and investigation provisions of section 8-19-30.

(b) When conducting an investigation, the principal or designee shall make a good faith effort at the earliest point possible to inform the parent about the school's investigation. If after making reasonable attempts, the principal or designee is unable to contact the parent, the school may engage in and complete the investigation. The investigation shall be completed as quickly as possible. If the principal or designee elects to initiate proceedings for the imposition of serious discipline other than crisis removal, the principal or designee upon completion of the investigation, shall make a written report containing a brief summary of the testimony of witnesses interviewed, any other evidence, and the principal or designee's reason(s) for the initiation of disciplinary proceedings.

(c) The principal or designee shall give to the parent notice of the findings

against the student. If the student or parent denies the charge(s), the principal or designee shall indicate to the parent and the student the evidence to support the findings of the school official. The student or parent shall be given an opportunity to present the student's version of the incident. [Eff and comp 9/10/09; am and comp] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

§8-19-8 Suspension. (a) Whenever a principal or designee has reason to believe that a student has engaged in activity warranting the imposition of suspension, the principal or designee shall immediately conduct an investigation of the incident. Upon completion of the investigation and findings, the student may be suspended if the principal or designee finds that the findings are sustained. The principal or designee shall inform the parent in writing of the findings and the disciplinary actions.

(b) If the student or parent denies the charge(s), the principal or designee shall indicate to the student and parent what evidence school authorities have to support the findings of the school official. The student or parent, or both shall be given an opportunity to present the student's version of the incident. However, where the student is unable to understand the seriousness of the charges, the nature of the proceedings, and consequences thereof, or is of such age, intelligence or experience as to make meaningful discussion difficult, the principal or designee shall request that the parent be present to participate in the discussion.

(c) If the total number of days in any single semester for suspensions exceeds ten school days, the due process procedures of this chapter shall apply unless otherwise indicated by law.

(d) The parent shall be given verbal notice of any suspension regardless of its length. Prior notice for suspension shall be by telephone, if feasible, and the written notice personally delivered or mailed to the parent upon completion of the investigation. The suspension notice shall contain the following written statements:

- (1) Allegations of the specific acts committed by the student that form the basis of the suspension;
- (2) The allegations of the specific acts that were substantiated;
- (3) A statement of the disciplinary action(s); and
- (4) A statement of a conference date, time, and place offered by the school administration to meet with the parent.

A copy of the notice shall be mailed to the complex area superintendent. In addition to the notice required by this subsection, the principal shall attempt to confirm the notice by telephoning the parent. [Eff 9/1/82; am and ren §8-19-7, 5/23/86; am and comp 7/19/93; comp 5/19/97; am and comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

§8-19-9 Due process for suspensions exceeding ten days, disciplinary transfer, and dismissal. (a) If, based upon the investigation, the principal or designee believes that a student engaged in an activity which

constitutes a violation of this chapter, and if the principal or designee recommends that serious discipline other than crisis removal be imposed, the principal or designee shall immediately notify the complex area superintendent to initiate disciplinary proceedings by obtaining verbal authorization from the complex area superintendent.

(b) Upon obtaining verbal authorization from the complex area superintendent, the principal or the designee will make a good faith effort to inform the parent of:

- (1) The serious discipline incident,
- (2) The opportunity to appeal, and
- (3) That the disciplinary action will be implemented immediately.

(c) Within three school days of the verbal authorization from the complex area superintendent, the principal or designee shall mail a written notice of the serious discipline incident with the appeal form to the parent. A facsimile signature of or an electronic approval confirmation of the complex area superintendent on the serious discipline incident form is sufficient. The written notice of serious discipline shall contain the following statements:

- (1) Allegations of the specific acts committed by the student that form the basis of the serious discipline;
- (2) The allegations of the specific acts that were substantiated;
- (3) A statement of the disciplinary action(s); and
- (4) A statement that the parent has a right to an appeal to the complex area superintendent at which time the parent may present evidence, call and cross-examine witnesses, and be represented by legal counsel and to the extent the parent provides a written notice of legal representation at least ten calendar days prior to the appeal.
- (5) If the student or parent would like to file an appeal, the appeal must be submitted in writing and received by the complex area superintendent by the close of business of the seventh school day from the date of the issued serious discipline notice. The student shall be permitted to attend the school of the student pending the appeal unless the principal finds the continued presence of the student creates a substantial risk to self or others or to the rights of other students to pursue their education free from disruption. However, the student shall not participate in any extracurricular activities, including but are not limited to athletics, trips, or clubs.

(d) Upon receipt of a written request for an appeal, the complex area superintendent shall, within ten school days, schedule an appeal and shall inform the parent of the date, time, and place. Written notice of the appeal shall be mailed to the parent and principal or designee at least fifteen calendar days before the appeal. The appeal shall be conducted by the complex area superintendent or by an impartial department ~~[of education]~~ person, or an impartial designee, who may be an official of the department, designated by the complex area superintendent. The appeal shall be conducted as follows:

- (1) The appeal shall be closed unless the student or parent requests that it be public;

- (2) Parent and principal or designee have the right to present evidence, cross-examine witnesses, and submit rebuttal testimony;
- (3) Parent and principal or designee may be represented by legal counsel;
- (4) The complex area superintendent or the impartial department [of education] designee need not follow the formal rules of evidence;
- (5) The complex area superintendent or the impartial department [of education] designee shall impartially weigh the evidence presented;
- (6) A parent, at the parent's own expense, may record or obtain a copy of the department's tape recording, or transcript of the department's tape recording of the proceedings only if requested for purposes of court review. The complex area superintendent or the impartial department [of education] designee shall record a transcript or tape recording of the proceedings;
- (7) The complex area superintendent shall no later than seven school days from the close of the appeal render a decision in writing stating clearly the action(s) to be taken and the bases for such actions. The written decision shall be mailed or personally delivered to the parent, the student's attorney of record, and a copy to the school. If the disciplinary action is upheld, the complex area superintendent shall indicate the total number of suspension days and within the suspension beginning and ending dates take into consideration the number of suspension days the student may have already served.

(e) The parent may appeal the decision of the complex area superintendent by providing written notice of their appeal and a specific statement whether they are requesting a hearing to the superintendent of education or state level designee identifying the specific issues and arguments with supporting documents and evidence the individual is appealing. The written appeal shall be delivered to the superintendent of education or state level designee within seven school days of the date of the complex area superintendent's written decision. If no specific request is made for a hearing, the superintendent of education or state level designee shall render a decision based upon the entire record of the proceedings of the complex area superintendent and the parent submitted on the appeal. The superintendent of education or state level designee shall render a final written decision. The student shall be permitted to attend the school of the student pending the appeal unless the complex area superintendent finds that the continued presence of the student creates a substantial risk to self or others or to the rights of other students to pursue their education free from disruption. Where the student is to be excluded from school pending the appeal, the superintendent of education or state level designee shall render a decision within twenty-one calendar days of the date of the receipt of the appeal.

(f) Upon written receipt of an appeal, from the parent or the parent's legal counsel, the written decision of the complex area superintendent and all documents and recordings from the proceeding provided for in subsection (d) of this section shall be forwarded to the superintendent of education or state level

designee within ten calendar days. The superintendent of education or state level designee shall examine the evidence and render a decision based on the disciplinary action within fourteen calendar days. The decision shall be personally delivered or mailed to the parent or attorney of record. In addition, the parent shall be informed of the right to submit written exceptions to the decision and to present argument to the superintendent of education or state level designee. In the event that a parent should file written exceptions for the length of time of a firearms dismissal or modification based upon a designee's decision, the written exception will be heard by the superintendent of education or the state level designee. Written exceptions and the request to present argument to the superintendent of education or state level designee must be received within five calendar days of the date of the decision rendered by the superintendent of education, designee or state level designee. A parent may submit written exceptions and waive the right to present argument; however, there will be no right to present argument without first submitting written exceptions. If the parent has timely submitted written exceptions and requests the right to present the argument, the superintendent of education or state level designee shall, within two school days of receiving the request to present argument, inform the parent of the specific date, time, and place to present their arguments. The date for presentation of argument shall be no less than five calendar days and no more than fourteen calendar days from the date of the notice informing the parent of the specific date, time, and place to present their arguments. The superintendent of education or state level designee shall mail a written decision to the parent or the attorney of record within fourteen calendar days of the date of the presentation of the argument or in the case where the parent has waived the parent's right to present argument, within fourteen calendar days of the receipt of the parent's written exceptions. [Eff 9/1/82; am and ren §8-19-8, 5/23/86; am and comp 7/19/93; am and comp 5/19/97; am and comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §302A- 1112) (Imp: HRS §302A-1112)

§8-19-10 Duration of disciplinary actions. (a) If the disciplinary action could not be imposed as result of the appeal process, the disciplinary action may be carried over to the next school year at any public school and does not include summer school.

(b) If the acts, which resulted in disciplinary action, was committed within twenty days from the last instructional day for students in the school year the disciplinary action may be carried over to the next school year at any public school and does not include summer school.

(c) This section shall not apply to firearm violations. Disciplinary action for firearm violations is a mandatory not less than one calendar year.

(d) Other than as described in subsections (a) and (b), no disciplinary action shall continue beyond the school year in which the action was committed. [Eff 9/1/82; ren §8-19-9, 5/23/86; comp 7/19/93; am and comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112, 302A-1134)

§8-19-11 Alternate educational activities and other assistance when students are found to be in violation of this chapter. (a) The complex area superintendent shall ensure that alternate educational activities or active participation of the public or private agencies are provided as appropriate for all students who are crisis removed for a period exceeding ten school days or suspended for a period exceeding ten school days.

(b) For all students who are suspended for one to ten school days, the principal or designee may consider providing alternate educational activities based on student's need.

(c) The Hawaii administrative rules for students with disabilities shall apply for students eligible under this chapter. [Eff 9/12/82; am and ren §8-19-10, 5/23/86; comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: §302A-1112) (Imp: HRS §§302A-1112, 302A-1128)

SUBCHAPTER 3

STUDENT MISCONDUCT AND DISCIPLINE DURING SUMMER SCHOOL

§8-19-12 Disciplinary actions; authority. The summer school director or designee shall impose disciplinary action against any student attending summer school. [Eff 5/23/86; comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: HRS 302A-1112)

§8-19-13 Prohibited student conduct; class offenses. (a) The following prohibited conduct applies to all students in summer school during summer school hours, on campus, or other department [~~of education~~]premises, on department [~~of education~~]transportation, or during a department [~~of education~~]sponsored activity or event on or off school property.

(1) Class A offenses:

- (A) Assault;
- (B) ~~[Burglary;]~~Bullying (for students in grades 9-12);
- (C) ~~[Dangerous instrument, or substance; possession or use of;]~~Burglary;
- (D) ~~[Dangerous weapons; possession, or use of;]~~Cyberbullying (for students in grades 9-12);
- (E) ~~[Drug paraphernalia; possession, use, or sale of;]~~Dangerous instrument, or substance; possession or use of;
- (F) ~~[Extortion;]~~Dangerous weapons; possession, or use of;
- (G) ~~[Fighting;]~~Drug paraphernalia; possession, use, or sale of;
- (H) ~~[Firearms; possession or use of;]~~Extortion;
- (I) ~~[Homicide;]~~Fighting;
- (J) ~~[Illicit drugs; possession, use, or sale of;]~~Firearms; possession or use of;

- (K) ~~[Intoxicating substances; possession, use, or sale of;]~~
Harassment (for students in grades 9-12);
- (L) ~~[Property damage or vandalism;]~~Homicide;
- (M) ~~[Robbery;]~~Illicit drugs; possession, use, or sale of;
- (N) ~~[Sexual offenses; or]~~Intoxicating substances; possession, use, or sale of;
- (O) ~~[Terroristic threatening;]~~Property damage or vandalism;
- (P) Robbery;
- (Q) Sexual assault;
- (R) Sexual exploitation;
- (S) Sexual harassment (for students in grades 5-12);
- (T) Stalking; or
- (U) Terroristic threatening.

(2) Class B offenses:

- (A) Bullying (for students in grades K-8);
- (B) Cyberbullying (for students in grades K-8);
- (C) ~~[Disorderly conduct;]~~Discrimination;
- (D) ~~[False alarm;]~~Disorderly conduct;
- (E) ~~[Forgery;]~~False alarm;
- (F) ~~[Gambling;]~~Forgery;
- (G) ~~[Harassment;]~~Gambling;
- (H) ~~[Hazing;]~~Harassment (for students in grades K-8);
- (I) ~~[Inappropriate or questionable uses, or both of internet materials or equipment, or both;]~~Hazing;
- (J) ~~[Theft; or]~~Inappropriate or questionable uses, or both of internet materials or equipment, or both;
- (K) ~~[Trespassing;]~~Retaliation;
- (L) Sexual harassment (for students in grades K-4);
- (M) Theft; or
- (N) Trespassing.

(3) Class C offenses:

- (A) Abusive language;
- (B) Class cutting;
- (C) Insubordination;
- (D) Laser pen/laser pointer; possession or use of;
- (E) Leaving campus without consent;
- (F) Smoking or use of tobacco substances; or
- (G) Truancy.

(4) Class D offenses:

- (A) Contraband; possession or use of;
- (B) Minor problem behaviors; or
- (C) Other school rules.

(b) Class C and D offenses: A summer school student who commits two of any class C or D offense as defined in section 8-19-6 in the course of summer school shall receive a warning for the first offense and may be released from summer school for the second offense.

(c) Any student who commits a class A or class B offense shall be dismissed from summer school. The summer school director or designee shall notify and meet with the student and parent prior to dismissal from summer school. The summer school director shall file a report with the complex area superintendent and shall provide a copy to the parent.

(d) A summer school director or designee, in an emergency, may impose a crisis removal of a student immediately after finding that the student's conduct presents an immediate clear threat to the physical safety of self or others or is so extremely disruptive as to make the student's immediate removal necessary to preserve the right of other students to pursue an education free from undue disruption. The summer school director or designee shall inform and meet with the student and parent prior to the student's reinstatement in summer school. No student shall be reinstated without the meeting. The summer school director or designee shall file a report with the complex area superintendent and shall provide a copy to the parent. [Eff 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112)

SUBCHAPTER 4

SCHOOL SEARCHES AND SEIZURES

§8-19-14 Policy on opening and inspection of student lockers.

School lockers provided to the students on campus are subject to opening and inspection (and external dog sniffs) by school officials at any time with or without cause, provided that the searches are not because of the student's race, color, national origin, ancestry, sex, gender identity and expression, religion, disability, or sexual orientation. Section 8-19-15 shall have no applicability to the opening and inspection (and external dog sniffs) of student lockers. None of the restrictions in sections 8-19-15 through 8-19-18 or related to general school searches and seizures shall in any way be construed to create an expectation of privacy in student lockers. Students should assume that their lockers are subject to opening and inspection (and external dog sniffs) any time with or without cause. [Eff 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-1101, 302A-1112)]

§8-19-15 Policy on general school searches and seizures. Except as provided in section 8-19-14 regarding student lockers, students have a reasonable expectation of privacy in their persons on campus, or other department [~~of education~~] premises, on department [~~of education~~] transportation, or during a department [~~of education~~]-sponsored activity or event on or off school property. Schools have an equally legitimate need to maintain order and an environment where learning can take place. In fulfilling this legitimate need, school officials may on occasions need to carry out searches and seizures on

campus, or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~-sponsored activity or event on or off school property. As a general policy, except as provided in section 8-19-14 regarding student lockers, the searches and seizures are permissible if there are reasonable grounds to suspect, based on the attendant circumstances that the search will turn up evidence that the student or students have violated or are violating either the law or the student conduct prohibited under this chapter. Searches and seizures conducted by school officials shall abide by the provisions of this subchapter. [Eff 5/23/86; comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-1101, 302A-1112)]

§8-19-16 Authority. Except as provided in section 8-19-14 regarding student lockers, property may be searched if there are reasonable grounds to suspect, based on the attendant circumstances that the search will turn up evidence that student or students, or others on campus, or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored activity or event on or off school property have violated the law or the provisions of this chapter. A school official conducting a search shall be accompanied by another school official serving as a witness, unless it is an emergency where prompt action is necessary to protect the health or safety, or both of any person or persons. [Eff 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-1101, 302A-1112)

§8-19-17 Conditions under which general school searches and seizures may be carried out. (a) Except as provided in section 8-19-14 regarding student lockers searches and seizures may be carried out by school officials when all of the following conditions are met:

- (1) If at the time of the search, there are reasonable grounds to suspect based on the attendant circumstances that the search will turn up evidence that the student or students have violated the law or provisions prohibited under this chapter.
- (2) The manner in which the search is to be conducted is reasonably related to the purpose of the search.
- (3) The student who will be subjected to a search shall be informed of the purpose of the search and shall be given an opportunity to voluntarily relinquish the evidence sought by the school official.

(b) The principal or designee of the school shall be informed by the school official who will conduct the search that a search is to be conducted and of the purpose of the search unless it is an emergency where immediate action is necessary to protect the health or safety, or both of a person or persons.

(c) If more than one student is suspected of committing a violation, then, if practical and not a risk to health or safety, the school official conducting the

search shall start with the student most suspected of having the item sought in the search. [Eff 5/23/86; am and comp 7/19/93; am and comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §§302A-1112, 703-309(2)) (Imp: Hawaii Const. Art. X, §3, HRS §§302A-1101, 302A-1112, 703-309(2))

§8-19-18 Prohibited searches and seizures. Except as provided in section 8-19-14 regarding student lockers:

- (1) Random searches are prohibited.
- (2) Strip searches are prohibited.
- (3) A school official shall not conduct a search requiring bodily contact of a student except when such a search is necessary to prevent harm to the health or safety, or both of a person or persons.
- (4) In the course of a search, the use of force against a student is prohibited unless the school official believes that the force to be used is necessary to prevent harm to the health or safety, or both of a person or persons or where the student physically resists the search.
- (5) A search conducted under the provisions of this subchapter shall be limited to the object or objects for which the search was conducted. However, any other object observed during a search may be seized by a school official when possession of the object is a violation of law or the provisions of this chapter, or when non-seizure may pose a threat to the health or safety, or both of a person or persons, including the school official conducting the search. [Eff 5/23/86; comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-1101, 302A-1112)

SUBCHAPTER 5

REPORTING OFFENSES

§8-19-19 Reporting class A and class B offenses occurring in school. (a) Any teacher, official, or other employee of the department who is a witness to a class A or class B offense as defined in this chapter, or who has reasonable cause to believe that a class A or class B offense has been committed or will be committed, against a student, teacher, official, or other employee of the department, or involving school property, shall promptly report the incident to the principal or designee. Nothing in this subsection shall be construed to prohibit or prevent a teacher, official, or other employee of the department from reporting class C or class D offenses to the principal or designee.

(b) Upon receiving a class A or class B offense report, the principal or designee shall conduct an investigation to determine whether the behavior requires a direct call to the police or whether the behavior can be handled

through school disciplinary procedures. The principal or designee shall call the police whenever there is perceived danger and the behavior cannot be handled by the school staff.

(c) The principal or designee shall record the incident information into the department's electronic database system within five school days of the reported offense.

(d) The principal or designee shall notify the reporting teacher, official, or other employee, of the disciplinary action, if any, taken on the class offense(s) within five school days after the incident is reported in accordance with subsection (c).

~~[(e) If the teacher, official, or other employee is dissatisfied with the disciplinary action taken on the offense reported, or if no disciplinary action has been taken within ten school days after the incident was reported by the teacher, official, or other employee, the person who made the report may appeal to the complex area superintendent, in writing.~~

~~(f) Within five school days of receiving an appeal as provided in subsection (e), the complex area superintendent or designee shall notify the appellant, in writing, of the disciplinary action taken on the offense reported.]~~ [Eff 9/1/82; am and ren §8-19-11, 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; am and comp]
(Auth: HRS §§302A-1112, 302A-1002) (Imp: HRS §§302A-1112, 302A-1002)

§8-19-20 Indemnity upon reporting offenses. Any teacher, official, or other employee of the department who in good faith reports as required under §8-19-19 shall be indemnified and held harmless in accordance with section 302A-1003, Hawaii Revised Statutes. [Eff 9/1/82; am and ren §8-19-12, 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §§302A-1112, 302A-1003) (Imp: HRS §§302A-1112, 302A-1003)

§8-19-21 Failure to report class A or class B offenses occurring in school; consequences. (a) The superintendent of education shall furnish an annual written notice to all schools and offices that failure to report class A or class B offenses occurring on campus, or other department [of education] premises, on department [of education] transportation, or during a department [of education] sponsored activity or event on or off school property may result in disciplinary actions against responsible teachers, officials, or other employees of the department. Disciplinary actions may include:

- (1) Oral warning;
- (2) Written warning;
- (3) Suspension without pay;
- (4) Demotion; or
- (5) Dismissal.

(b) Teachers, officials, or other employees of the department who fail to report offenses as required by section 8-19-19 may be disciplined in accordance with the regulations and procedures of the department.

(c) Any teacher, official, or other employee of the department who is disciplined for failure to report class A or class B offenses occurring on campus, or other department ~~[of education]~~ premises, on department ~~[of education]~~ transportation, or during a department ~~[of education]~~ sponsored event on or off property shall have the right to appeal the disciplinary action as provided by state law or the regulations and procedures of the department or applicable collective bargaining agreements. [Eff 9/1/82; am and ren §8-19-13, 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; am and comp] (Auth: HRS §§302A-1112, 302A-1002) (Imp: HRS §§302A-1112, 302A-1002)

SUBCHAPTER 6

POLICE INTERVIEWS AND ARRESTS

§8-19-22 Police interviews in school for school-related offenses. (a) Police officers may appear at a school to question a student. Upon arrival at the school, the police officer shall be directed to the principal or designee to request permission to interview a student. If permission to interview a student is to be granted, the principal or designee shall make an effort to inform the parent of the police interview and the right to be present when the interview is conducted. The interview may be conducted if the principal or designee is unable to inform the parent or if the parent is informed and declines to be present, or if after a reasonable period of time after the notice is given the parent fails to appear at school for the police interview.

(b) The principal or designee shall be present during a police interview unless excluded by the police officer.

(c) If a student is arrested, the principal or designee shall follow the procedures prescribed in section 8-19-24. [Eff 9/1/82; am and ren §8- 19-14, 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-1101, 302A-1112)

§8-19-23 Police interviews in school for non-school-related offenses. (a) Police officers shall contact the school and advise the principal or designee of the nature and circumstances of the visit. Upon arrival at the school, the police officer shall be directed to the principal or designee to request permission to interview a student.

(b) Prior to any interview, the principal or designee shall inform the parent of the right to be present while the police interview is conducted. The interview can take place upon obtaining verbal consent from the parent. The notification and consent requirements of this subsection shall not be followed if the nature of the interview involves child abuse or other offenses where a parent or household member is suspected of committing an offense against the student.

(c) The principal or designee shall keep a log and record the student's

name, the date of the police interview, and the police officer's name and badge number and police report number if available.

(d) If the student is arrested by the police, the principal or designee shall follow the procedure prescribed in section 8-19-24. [Eff 9/1/82; am and ren §8-19-15, 5/23/86; am and comp 7/19/93; am and comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A- 1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-1101, 302A-1112)

§8-19-24 Police arrests in school. Police shall be directed to the principal or designee. Whenever possible the student shall be sent to the principal's office for the police officer to effect the pending arrest. Upon police arrival to arrest a student, the principal or designee shall make a good faith effort to inform the parent. [Eff 9/1/82; am and ren §8-19-16, 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §§302A-1101, 302A-1112)

SUBCHAPTER 7

RESTITUTION FOR VANDALISM

§8-19-25 Liability for vandalism. (a) When any student is found to be responsible for an act of vandalism against any public school building, facility, or ground, restitution shall be made by the student or parent. There shall be no restitution when vandalism cannot be proved to have been committed by the student.

(b) Notwithstanding the provisions of this chapter, the State may elect to bring any appropriate action for the recovery of damages to school properties.

(c) If a student is to be disciplined for an act of vandalism under this chapter, restitution procedures shall be initiated only after the disciplinary procedures of this chapter have been completed and the principal or designee conducting the investigation has reason to believe that the student has violated the provisions of this chapter. [Eff 5/23/86; comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: HRS §§302A-1112, 302A-1153)

§8-19-26 Procedures applicable to vandalism. (a) Whenever a principal or designee has reason to believe that a student may be responsible for an act of vandalism against any public school building, facility or ground, the principal or designee shall immediately initiate an investigation.

(b) If the vandalism is an act which subjects the student to disciplinary action under this chapter, the principal or designee shall include as part of the investigation required under sections 8-19-7, 8-19-8, 8-19-9, and 8-19-10, a determination of the facts and circumstances that support restitution under this subchapter. Further action related to restitution shall be held in abeyance until

disciplinary action has been determined and appeal procedures have been exhausted.

(c) If after the investigation, the principal or designee has reason to believe that a student is responsible for the vandalism, the principal or designee shall schedule a conference with the student and parent. Attendance at the conference shall be limited to the principal or designee, student, and parent.

(d) Advance written notice of the conference shall be made on departmental forms, which shall be delivered by mail to the parent. No student or parent shall be required to make restitution in any manner unless the parent has been notified and has been given an opportunity to be heard. The notice shall inform the parent of the findings and the date, time, and location of the conference. The notice shall be mailed at least fifteen calendar days before the date of the conference. When necessary to achieve effective communication the notice shall be provided in the native language of the parent. The school may use other means of communication, such as the telephone, to augment the written communication between the school and the parent.

(1) The parent shall respond to the notice within seven calendar days from the date of the notice.

(2) The conference date provided for in the notice may be rescheduled if the parent of the student contacts the school to arrange for a new conference date. The request to reschedule the conference shall be made within seven calendar days of the date of the notice.

(3) The conference and an informal settlement may be agreed upon in cases where damages do not exceed \$3,500. If a settlement is reached, a written agreement for restitution shall be executed between the parent and school. A written agreement shall be executed only if the damages do not exceed \$3,500.

(e) If a parent fails to respond to the notice within the time limit, the principal or designee may:

(1) Reschedule the conference date if the principal or designee determines that the failure to respond was for good cause or if it is in the best interest of the school or student; or

(2) Inform the parent in writing that a notice was given for an opportunity to be heard at a conference with the principal or designee, and because of the failure to respond to the notice, the matter shall be referred to the complex area superintendent by the principal or designee for further action.

(f) The conference shall be conducted in the following manner:

(1) The parties present at the conference shall be the principal or designee, student, and parent. Except for the principal or designee of the school in which the vandalism occurred, the student, and the parent, no other person shall be permitted to be present at the conference for any reason.

(2) At the conference, the principal or designee of the school in which the vandalism occurred shall present the findings of the investigation and the restitution requirements.

- (3) If the student and the parent agree with the amount and manner in which restitution is to be made, the principal or designee, the student and the parent shall execute a written agreement on departmental forms which shall specify the manner in which restitution is to be made and the time period within which the restitution shall be completed, provided that the damages do not exceed \$3,500. Restitution may be made in any manner, including monetary restitution by the student and parent. If damages exceed \$3,500, the matter shall be referred to the complex area superintendent who shall refer the matter to the attorney general for further action.
- (4) When the restitution is completed, all records and documents regarding the investigation and conference shall be maintained at the school for three years. No information about the investigation, conference and the actions taken shall be communicated to any person not directly involved in the proceedings.
- (5) If a written agreement is executed and the parent or student fails to comply with the terms of the agreement, the principal or designee may forward the matter to the complex area superintendent. The complex area superintendent shall review the matter and take appropriate action, which may include referral to the attorney general for further action.
- (6) If the student and the parent do not agree with the findings made by the principal or designee, the principal or designee shall transmit all the records and documents regarding the investigation and conference, and shall report the findings and circumstances of the matter to the complex area superintendent who shall review the matter and take appropriate action which may include referral of the matter to the attorney general for further action. If damages exceed \$3,500, the matter shall be referred to the attorney general for further action. [Eff 5/23/86; am and comp 7/19/93; comp 5/19/97; comp 2/22/01; am and comp 9/10/09; comp] (Auth: HRS §302A-1112) (Imp: HRS §§302A-1112, 302A-1153)

§8-19-27 REPEALED [R 2/22/01]

§8-19-28 REPEALED [R 2/22/01]

§8-19-29 REPEALED [R 2/22/01]

SUBCHAPTER 8

COMPLAINTS PROCEDURE AND INVESTIGATION OF DISCRIMINATION, HARASSMENT (INCLUDING SEXUAL HARASSMENT), BULLYING AND/OR RETALIATION

§8-19-30 Complaint procedure. (a) The department will take immediate and appropriate steps to stop any discrimination, harassment (including sexual harassment), or bullying against a student, including those based on a protected class as defined in section 8-19-2, to prevent its recurrence and to remedy discriminatory effects on the complainant/victim or others, if appropriate.

(b) Complaints regarding inappropriate behavior or stemming from allegations that fall under this chapter may be filed at any time 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.

(c) Complaints alleging violations of this chapter may be made using the Department of Education Hawaii Administrative Rules Title 8, Chapter 19 Complaint Form, and the complaint may be filed at any time. Individuals who do not have access to or prefer not to use the Department of Education Hawaii Administrative Rules Title 8, Chapter 19 Complaint Form may nonetheless make a complaint, either in writing or orally, by providing 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, harassment (including sexual harassment), bullying, or retaliation allegedly occurred;
- (3) A factual description of how the discrimination, harassment (including sexual harassment), bullying, or retaliation allegedly occurred and the protected basis of the complaint, if any;
- (4) A description of the injury or harm, if any; and
- (5) Attachments, if any, documenting the alleged conduct.

(d) 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.

(e) The principal or designee or complex area superintendent, in consultation with the Civil Rights Compliance Branch, will assess the complaint to determine if the factual allegations allege actionable discrimination, harassment (including sexual harassment), bullying, or retaliation. Complaints that do not fall under the subchapter will be referred to the appropriate office or administrator for review.

(f) When a complaint is filed, the principal or designee will either:

(1) Immediately initiate an investigation pursuant to section 8-19-31; or
(2) If deemed appropriate, offer the parties an opportunity to resolve the complaint informally before any formal investigation process begins. This informal process will only be used if the parties voluntarily agree to participate. The parties are not required to resolve the complaint directly with each other. Once the informal process is initiated, either party has the right to end the informal process at any time, which will result in starting the formal investigative process.

Informal resolution is not appropriate in cases where:

(1) the allegation is serious enough that it appears to place the complainant/victim or any other person at physical risk;
(2) the incident has resulted in a criminal charge;
(3) the incident involves a referral to the police or Child Welfare Services;
(4) the complaint involves an allegation of severe, persistent or pervasive bullying or other serious form of discrimination;
(5) there is a pending investigation against the respondent;
(6) there is an objective and obvious power imbalance between the parties; or

(7) an investigation is otherwise appropriate under the circumstances.

If informal resolution is not appropriate, or if the parties are unable to come to a resolution, an investigation will be initiated by the principal or designee in accordance with section 8-19-31.

(g) 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. [Eff

] Auth: HRS §302A-1112) (Imp: HRS §§302A-1101, 302A-1112; 5 U.S.C. §301, 42 U.S.C. §2000d et seq., 34 C.F.R. §100.9; 34 C.F.R. §101.11)

§8-19-31 Investigation. (a) When a complaint is made, the principal or designee will assign an impartial school level investigator ("investigator") to conduct a thorough and impartial investigation. Once an investigation is initiated, the principal or designee shall make a good faith effort at the earliest point possible to inform the parents about the investigation. If after making reasonable attempts, the principal or designee is unable to contact the parent, the investigator may engage in and complete the investigation.

The complainant/victim and respondent will be allowed to provide the names of witnesses who they believe have information relevant to the complaint and provide evidence that they believe is relevant to the complaint.

(b) 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 findings of fact and make a determination on any appropriate action that needs to be taken to end any discrimination, harassment, bullying, or retaliation and prevent its recurrence and remedy its effects on the complainant/victim and the department community. The investigator will forward their findings to the principal or designee, who will determine whether the facts constitute prohibited student conduct under either section 8-19-6(a) or 8-19-13(a). Any disciplinary actions taken will be subject to the provisions of sections 8-19-5 through 8-19-13, as applicable, including the right to appeal.

(c) At the conclusion of the investigation, the principal or designee, in consultation with the Civil Rights Compliance Branch, shall determine whether any remedies will be provided to any individual involved in the investigation. If it is determined that remedies will be provided, the principal or designee will implement the remedies. The complainant/victim 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/victim. The respondent 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 respondent.

(d) The investigator will seek to complete the investigation within five school days from the date the investigator was assigned the matter. If the investigation takes longer than five days, the investigator will notify the parties in writing of the delay, provide reasons for the delay, and the length of additional time needed to complete the investigation. [Eff]
(Auth: HRS §302A-1112) (Imp: HRS §§302A-1101, 302A-1112; 5 U.S. C. §301, 42 U.S.C. §2000d et seq., 34 C.F.R. §100.9; 34 C.F.R. §101.11)

§8-19-32 Continued investigation. The department will investigate allegations of violations of this subchapter even absent a filing of a formal complaint or if a complaint has been withdrawn. [Eff] (Auth: HRS §302A-1112)

§8-19-33 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)

§8-19-34 Retaliation prohibited. Retaliation and retaliatory harassment is prohibited against any person because the person engaged in a protected activity.

[Eff] (Auth: HRS §302A-1112)

§8-19-35 Right to seek other relief. Nothing in this chapter shall be construed to limit or waive the right of the complainant/victim to seek other relief as provided under federal and state laws. A complainant/victim 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 or an incident is reported under this chapter;
- (3) At any time during the pendency of a complaint filed or an incident reported under this chapter; or
- (4) After a complaint filed or incident reported under this chapter has been addressed.” [Eff] (Auth: HRS §302A-1112)

2. Material, except source notes and other notes, to be repealed is bracketed and stricken. New material is underscored.

3. Additions to update source notes and other notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 8-19, Hawaii Administrative Rules, shall take effect ten days after filing with the office of the Lieutenant Governor.

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

CATHERINE PAYNE, Chairperson
Board of Education

APPROVED AS TO FORM

Deputy Attorney General

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Testimony

To: Department of Education (HIDOE) Public Hearing

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

Meeting: July 16, 2019 Public Hearing

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

2) Adoption of Proposed HAR Chapter 8-89

3) Repeal of HAR Chapter 8-41

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

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

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

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

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

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

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

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

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

My specific concerns include the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully,

Robert J. Bidwell, M.D.

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

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



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

Dear Board of Education members and Department of Education officials:

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

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

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

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

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

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

Sincerely,

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

Aloha,

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

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

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

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

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

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

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

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

Thanks for your attention and consideration.

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

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

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

Aloha,

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

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

My specific concerns are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Dean H Hamer, PhD

Qwaves.com

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



S E A C
Special Education Advisory Council
1010 Richards Street, Room 118 Honolulu, HI 96813
Phone: 586-8126 Fax: 586-8129
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July 16, 2019

**Special Education
Advisory Council**

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

Ms. Brendelyn Ancheta
Ms. Virginia Beringer
Ms. Deborah Cheeseman
Ms. Annette Cooper
Mr. Motu Finau
Dr. Kurt Humphrey
Ms. Cathy Kahooohanohano
Ms. Tina King
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Ms. Kau'i Rezendes
Ms. Rosie Rowe
Mr. James Street
Mr. Francis Taele
Mr. Steven Vannatta
Dr. Amy Wiech
Ms. Jasmine Williams
Ms. Susan Wood

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

Amanda Kaahanui, Staff
Susan Rocco, Staff

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


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

Dear Director Schemmelfennig,

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

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

Sincerely,


Martha Guinan
Chair


Ivalee Sinclair
Legislative Committee Chair



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July 16, 2019

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

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

Dear Director Schemmelfennig,

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

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

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

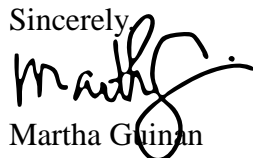
A June 14th article in the *Staradvertiser* also cited information from the Department's Data Governance Section that harassment is one of the two most common offenses leading to suspensions. While students



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

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

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

Sincerely,

Martha Guinan
Chair


Ivalee Sinclair
Legislative Committee Chair

Board of Education

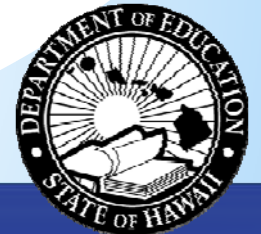
Board Action on: (1) Repeal of Hawaii Administrative Rules Chapter 41, entitled “Civil Rights Policy and Complaint Procedure”; (2) Adoption of Draft of New Hawaii Administrative Rules Chapter 89, entitled “Civil Rights Policy and Complaint Procedures for Student(s) Complaints Against Adult(s)”; and (3)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

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

Heidi Armstrong, Assistant Superintendent, Office of Student Support Services

Cynthia Covell, Assistant Superintendent, Office of Talent Management

August 15, 2019



Comprehensive Supports Approach

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



Timeline of Rule Update Process

DEC. 20, 2017

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

SEPT. 2018

Surveys administered to community stakeholders and all DOE employees

OCT. 4, 2018

Proposed rules presented to Board

FEB. 7, 2019

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

APR/MAY 2018

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

SEPT. 6, 2018

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

NOV/DEC. 2018

11 school administrator engagement sessions and 11 community engagement sessions

JULY 16, 2019

Public Hearing on proposed rules



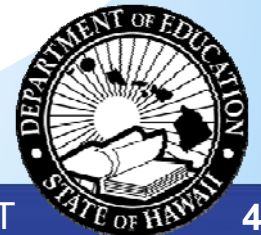
Overview of Proposed Updates

CHAPTER 19

- Updated definitions
- Complaint process
- Reclassified offenses

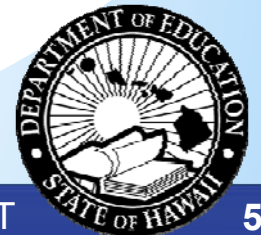
CHAPTER 89

- Complaint process



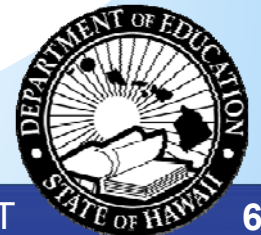
Comments Regarding Chapter 19

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



Comments Regarding Chapter 89

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



Comments - Chapter 19 and 89

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



Next Steps

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

