



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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January 19, 2018

Dr. Christina Kishimoto  
Superintendent  
Hawaii State Department of Education  
P.O. Box 2360  
Honolulu, Hawaii 96804-2360

Re: Hawaii State Department of Education  
OCR Reference No. 10115003

Dear Superintendent Kishimoto:

This letter is to inform you that the U.S. Department of Education (the Department), Office for Civil Rights (OCR), has completed its compliance review of the policies, procedures, and processes used by Hawaii State Department of Education (HDOE) for responding to complaints of harassment of students on the basis of race, color, national origin,<sup>1</sup> sex, or disability.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), and its implementing regulations at 34 C.F.R. § 100 *et seq.*, Title IX of the Education Amendments of 1972 (Title IX), and its implementing regulations at 34 C.F.R. § 106 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulations at 34 C.F.R. § 104 *et seq.* These laws prohibit discrimination on the bases of race, color, national origin (Title VI), sex (Title IX), and disability (Section 504), respectively, in programs and activities that are recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulations at 28 C.F.R. § 35 *et seq.* This law prohibits discrimination on the basis of disability by public entities. HDOE is a recipient of federal financial assistance from the Department and is a public entity. It must therefore comply with these laws.<sup>2</sup>

As part of the compliance review, OCR investigated the following issues:

1. Whether HDOE complies with Title IX, Section 504, and Title II by having designated a coordinator to carry out its responsibilities under these laws and notified students and employees of the designated responsible employee.

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<sup>1</sup> For ease of reference, complaints of race, color and national origin harassment will be referred to collectively in this document as complaints of race harassment.

<sup>2</sup> Section 504 and its implementing regulations apply to any recipient that employs 15 or more persons. Title II and its implementing regulations apply to any public entity that employs 50 or more persons. HDOE employs more than 50 persons. It must therefore comply with the regulatory requirements of Section 504 and Title II.

2. Whether HDOE complies with Title VI, Title IX, Section 504, and Title II by having properly developed and disseminated a notice of nondiscrimination.
3. Whether HDOE complies with Title VI, Title IX, Section 504, and Title II by having adopted and published grievance procedures that, as written, provide for prompt and equitable responses to complaints and reports of harassment.

As set forth below, OCR found that HDOE is not in compliance with Title IX, Section 504, and Title II regarding the requirement that it designate and provide notice of a coordinator; HDOE is not in compliance with Title VI, Title IX, Section 504, and Title II regarding the requirement that it disseminate a notice of nondiscrimination; and HDOE is not in compliance with Title VI, Title IX, Section 504 and Title II regarding the requirement that it provide appropriate grievance procedures.

## **I. BACKGROUND INFORMATION**

HDOE is the 10th largest school district in the United States. It is a single school district encompassing the entire state and consisting of 255 non-charter schools. For the 2014-2015 school year, enrollment in HDOE non-charter schools was 170,482 students. HDOE is divided into 15 complex areas across six islands, each of which has a complex area superintendent. A complex area is composed of two to four complexes and each complex is comprised of a high school and the elementary and middle schools that feed into it.

As part of its compliance review, OCR reviewed HDOE's policies prohibiting harassment of students on the bases of sex, race, color, national origin, and disability, and HDOE's grievance or complaint procedures for resolving complaints of harassment against students on those bases. OCR also selected 29 schools on which to focus its investigation based on a review of reported incidents across HDOE schools and school quality surveys indicating higher than average levels of concern regarding bullying and harassment. OCR examined discipline records of these 29 schools for the 2014-2015 and 2015-2016 school years, and evidence obtained through the investigation of other individual OCR complaints.

OCR also conducted two onsite visits. During the first, in May 2013, OCR conducted approximately 200 interviews with administrators and staff, including several complex area superintendents, teachers, counselors, security personnel, and student services coordinators. OCR also met with groups of students at several schools, representatives of numerous community groups, and individuals representing informal groups of Micronesian and Chuuk communities, and gay, lesbian, and transgender students. During the second onsite, in May 2014, OCR conducted follow-up interviews with individuals that OCR contacted in 2013. OCR also met with the HDOE Deputy Superintendent and Acting Director of the Civil Rights Compliance Office (CRCO).

Following the May 2014 onsite, OCR gathered and reviewed survey data from HDOE students on incidents of harassment in HDOE schools on the bases of sex, race, color, national origin, and disability, school responses to those incidents, and student levels of concern for their safety at school. OCR obtained the data it reviewed by developing the survey and requesting that HDOE administer it to all students, state-wide, in the 5<sup>th</sup> grade and above. HDOE did so in November and December 2014.

*Survey Data Gathered from HDOE Students*

The response rate to OCR's survey state-wide was 66.07%, or 69,905 out of 105,709 possible students.<sup>3</sup> Of the students responding, more than 27,000 students reported being either "somewhat" or "very" concerned about bullying or harassment that had occurred at their current school, representing 38.8% of all responses. Nearly one-third (more than 20,000, or 31.5%) of those responding to the survey also reported having been personally bullied or harassed at school, on the way to or from school, or at a school-sponsored off-campus function during the 2014-2015 school year. Of those students who indicated that they were bullied or harassed, 12,828 (61.7%) reported that they believed it was because of their race, sex, and/or disability.

Of those students who indicated in response to OCR's survey that they were bullied or harassed, over half (10,744, or 54.07%) indicated that they or someone else reported the harassment to a teacher or other school employee. Of the incidents that school officials were made aware of, nearly two-thirds (6,727, or 62.6%) concerned incidents where students believed that they had been bullied or harassed on the basis of their sex, race, color, national origin, or disability. In 980 of these responses (14.6% of the total), according to the survey results, the school took no action in response. Of the students who further answered the survey question regarding whether they were bullied or harassed again after school officials were made aware of their initial incident, over half (51.75%, or 5,270 students), indicated that they were.

Of the students who indicated on the survey that they were bullied or harassed but who indicated that they did not report the incident to a school official (9,128 students, or 45.93%), nearly half (4,261, or 46.6%) indicated that they did not do so because they did not believe the school would do anything in response to their report (1,104, or 12%), that it would make the bullying and harassment worse (1,989, or 22%), or both (1,168, or 13%). These 4,261 responses correspond to 6% of all the survey responses that OCR gathered from across the state. Many students also reported that they did not know how to report harassment. Of the students indicating that they were bullied or harassed and who further indicated they did not report it to school officials, in addition to the responses noted above, an additional 750 (8% of these respondents) indicated that the only reason they did not make a report is that they did not know to whom to report the harassment.

In response to being asked whether they had personally witnessed another student being bullied or harassed within the past school year, more than half (32,850, or 52.7%) of all HDOE students responding to OCR's survey reported that they had personally witnessed such conduct. Of the students who indicated having witnessed bullying or harassment, more than three-fourths (24,706, or 75.2%) indicated that the bullying or harassment was because of the victim's race, sex, and/or disability. Finally, nearly 40% (25,745 students, or 39.21%) of all students taking the survey indicated that incidents of bullying or harassment that they had either experienced or witnessed made them feel unsafe at school.

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<sup>3</sup> This response rate is the lowest possible percentage of HDOE students responding to the survey that OCR is able to calculate because HDOE does not disaggregate special education enrollment figures by grade; only by elementary, middle, and secondary schools (K-6, 7-8, and 9-12). OCR therefore included all HDOE special education students in grades K-6 in determining the total number of possible responses to its November 2014 survey even though HDOE administered it to only those special education students in grades 5 and above.

*Discipline Records of Student-on-Student Harassment*

OCR reviewed discipline records for 197 incidents of student-on-student harassment that occurred across 29 HDOE schools during the 2014-2015 (113 incidents) and 2015-2016 (84 incidents) school years. According to data gathered by OCR's survey, 1,284 incidents of harassment based on sex, race, color, national origin, and disability occurred at the 29 schools during the 2014-2015 school year. Comparing the number of incidents according to the records provided by HDOE for the 2014-2015 school year—113—with the number of incidents according to the survey data collected by OCR for that same time period—1,284—indicates a disparity of 1,177 incidents between the two sources of information. Of the 29 schools from which OCR requested that HDOE produce records, four of them reported having no records of any incidents of student-on-student harassment based on membership in a protected class during the 2014-2015 school year. Only five of the 29 schools produced records documenting more than five incidents. Two schools, Maui Waena Intermediate School and Washington Middle School, produced 49 of the 113 records for the 2014-2015 school year that OCR received.<sup>4</sup>

The discipline records OCR reviewed predominantly concerned incidents of inappropriate sexual language (for example, “slut,” “pussy,” “faggot”), inappropriate touching (of buttocks, breasts, kissing, pantsing, etc.), racial slurs (for example, “haole,” “nigger,” “black bitch,” “cracker”), racial violence (fighting provoked by the use of racial slurs, targeting of certain racial groups) and disability-related harassment (rock throwing, insults). In responding to these incidents of protected-class student-on-student harassment, the records OCR reviewed indicated that HDOE schools consistently used Chapter 19 of Title 8 (Chapter 19) of the Hawaii Administrative Rules (HAR) as its only procedure for addressing alleged incidents of harassment. Chapter 19 is entitled “Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, and Restitution for Vandalism,” and is the primary HDOE discipline code for schools. During OCR's May 2013 onsite, school officials consistently confirmed that schools utilize only the Chapter 19 discipline code in responding to incidents of student-on-student protected-class harassment.

Consistent with using the procedures set forth in Chapter 19 (pp. 12-16), the records OCR reviewed resembled discipline files rather than school district harassment investigative files. Approximately 27% of the records (53 of 197), for example, did not contain any documentation of what, if any, investigative steps school officials took to reach conclusions about an allegation of harassment. Rather, they contained only a conclusion about the incident as determined to have happened by school officials, with no information provided about the sources of information or evidence school officials reviewed in substantiating the incident description.

Beyond documentation of the discipline imposed on offending students, in approximately 82% of all discipline records OCR reviewed (162 of 197), there was no indication of whether school officials took steps to protect individuals involved in a harassment incident from retaliation. In approximately 76% of the records (150 out of 197), there was no indication of whether school officials took or considered taking interim measures, pending the outcome of their investigation, to protect students. In 83% of the records (164 out of 197), there was no indication that school officials took affirmative efforts to follow

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<sup>4</sup> Survey responses from the 29 schools, for which OCR reviewed records of student-on-student harassment, indicate that students at Washington Middle School and Maui Waena Intermediate School reported being harassed on the basis of membership in a protected class at rates consistent with those reported by students at the other 27 schools.

up with student victims or their families as part of or in the aftermath of addressing the offending student's behavior.

Across the 29 schools, OCR's review of discipline records identified inconsistencies in the ways that the schools responded to incidents of protected-class harassment involving students. Some schools used a standard state-wide Chapter 19 discipline form titled "Chapter 19 Confidential Notice of Investigation Findings and Discipline." Some used HDOE's electronic student information system. Some used the school's own forms, and some reported the incidents in written narratives. The discipline that school officials imposed in response to incidents of harassment based on membership in a protected class also varied. At one intermediate school with an enrollment greater than 1,000 students during the 2014-2015 and 2015-2016 school years, for example, the records OCR reviewed indicated that school officials imposed an out-of-school suspension in 35 out of the 42 harassment incidents that occurred during those years. School officials also filed police reports in 15 incidents. At a middle school with an enrollment of between 700-800 students during those same school years, the records OCR reviewed indicated that school officials imposed out-of-school suspensions in four out of 52 incidents of harassment that occurred during the 2014-2015 and 2015-2016 school years. In 35 of the incidents, the offending student received counseling and detention as the only disciplinary sanction. At both schools, the discipline records reviewed concerned similar behaviors—racial and sexual name-calling, and inappropriate touching. Also, only one school (a high school) for which OCR reviewed discipline records utilized Chapter 19's most serious classification to address incidents of inappropriate touching. All other schools for which OCR reviewed discipline records exclusively classified this behavior using a less serious classification.

Within schools, OCR's review of discipline records also reflected inconsistencies in the school's response to harassment incidents. At one high school, the records OCR reviewed indicated that the school used Chapter 19's most serious classification for three out of five instances of inappropriate touching. During the same time period, the school used a less serious classification for two other similar instances. At a middle school one student was found to have made inappropriate sexual comments and gestures on three different occasions during the 2014-2015 school year; he received a one-day in-school suspension for each incident. The next year, the same student engaged in the same behaviors and received a one-hour detention. In another incident at the same school, a student was punished for stalking another student with a one-day in-school suspension. A month later, school officials determined that he had stalked the same student again. For the second offense, he received a warning and participated in mediation with school staff as his only disciplinary sanction.

## **II. DESIGNATION OF COORDINATORS**

### *Legal Standards*

Title IX, at 34 C.F.R. § 106.8(a), requires each recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations implementing Title IX, including any investigation of any complaint communicated to the recipient alleging any actions which would be prohibited by Title IX. Recipients must also notify students and employees of the name or title and contact information for the person designated to coordinate the recipient's compliance with these regulations.

Section 504, at 34 C.F.R. § 104.7(a), requires a recipient that employs 15 or more persons to designate at least one person to coordinate its efforts to comply with Section 504.

Title II, at 28 C.F.R. § 35.107(a), requires a public entity that employs 50 or more persons to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title II, including any investigation of any complaint alleging its noncompliance with Title II or alleging any actions that would be prohibited by Title II. Recipients must also notify students and employees of the name or title and contact information for the person designated to coordinate the recipient's compliance with these regulations.

### *Findings of Fact*

In November 2014, HDOE identified the Director of the CRCO to OCR as the person responsible for coordinating compliance with Title IX, Section 504, and Title II. At all times relevant to this compliance review, HDOE has had a Director or Acting Director of the CRCO.

While HDOE identified the Director of the CRCO as the designated person for coordinating compliance with Title IX, Section 504, and Title II, it also clarified to OCR that the Director only coordinates and carries out HDOE's responsibilities under these statutes as they relate to complaints against *employees by students or others*. The Director of the CRCO is not responsible for coordinating HDOE's efforts to comply with and carry out its statutory responsibilities as they relate to complaints *made by students against other students*. HDOE explained that the handling and investigation of sex and disability harassment complaints made by students against other students are handled at the school level by the school principal or his or her designee, not by the CRCO. Consistent with this, the records reviewed by OCR relating to the 197 HDOE incidents of student-on-student harassment do not reflect any involvement by the CRCO.

OCR confirmed that the principals or their designees handle complaints from students alleging harassment by other students under HDOE's discipline code by receiving and investigating complaints, and assigning discipline as appropriate. HDOE presented OCR with no information suggesting that school administrators acting in this role constituted, or were intended to be, a designation of these personnel as HDOE's Title IX, Section 504, or Title II Coordinators. In interviews with OCR, no school level official identified themselves as a Coordinator under Title IX, Section 504 and Title II.<sup>5</sup>

Regarding contact information for the Title IX, Section 504, and Title II Coordinator, in November 2015, HDOE required all principals to disseminate the title and contact information of the Director of the CRCO, including phone number and address, by posting it on each school's website and placing a link to the Coordinator contact information on each school's website home page. In the notice for

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<sup>5</sup> OCR notes that limited training was provided to some school level officials on Title VI, Title IX, Section 504 and Title II. Training was provided in October and November of 2015 to the principals and vice principals of the Campbell-Kapolei Complex Area, in the Leeward District. The Campbell-Kapolei Complex Area is comprised approximately 43 high, middle, and elementary schools. The CRCO's Title IX specialist provided Title IX training to Farrington-Kaiser-Kalani Complex Area principals, in the Honolulu District, in November of 2015, consisting of 24 high, middle, and elementary schools. The CRCO also provided a number of Title IX trainings for principals and vice principals on Maui in October and November 2016, consisting of eight high, middle and elementary schools on Maui. This accounts for approximately 20% of HDOE Complex Areas trained.

dissemination that HDOE provided to schools containing this information, the Director of the CRCO is identified as the individual to whom students and parents should report complaints of harassment by an HDOE employee. Each school's "administrator" is identified as the official to whom parents and students should make a complaint regarding harassment by other students.

As of December 2017, OCR conducted internet searches for websites for the 29 HDOE schools for which OCR reviewed discipline records. For seven of the 29 schools, OCR was not able to locate a website. Of the 22 websites that OCR was able to locate and review, seven schools did not have the title and contact information of the Director of the CRCO posted while fifteen schools did publish the contact information.<sup>6</sup> For one of the schools for which OCR was able to locate and review a website, the contact information of the Director of the CRCO was only posted in a section of the website entitled "Employment Opportunities." A brochure regarding HDOE's Equal Employment Opportunity policy (EEO brochure) available on the HDOE website provided the contact information for the Director of the CRCO, including phone number and address, and directed a student to contact his or her teacher or school administrator or the CRCO if the student believed he or she was being harassed by an employee. The EEO brochure did not provide instructions for how to report incidents of harassment committed by another student against a student.

#### *Analysis and Conclusion*

OCR has determined that HDOE is not in compliance with the regulations implementing Title IX, Section 504, and Title II, by failing to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations, and is not in compliance with Title IX and Title II by failing to adequately notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with these regulations.

The Director of the CRCO only coordinates and oversees investigations of harassment *made against employees*. As a result, OCR does not have sufficient evidence to demonstrate that the Director of the CRCO is designated as the employee responsible for coordinating HDOE's efforts to comply with and carry out its responsibilities under the regulations as they relate to discrimination complaints *made against students*. Moreover, to the extent that harassment complaints against students are handled at the school level, OCR does not have sufficient evidence to demonstrate that the school level administrators are designated as the employees responsible for coordinating HDOE's efforts to comply with and carry out its responsibilities under the regulations. In its written responses to OCR and in interviews, HDOE does not identify school level administrators as designated employees, or Title IX/Section 504/Title II Coordinators. As such, OCR finds that HDOE has failed to designate at least one employee to carry out its full responsibilities to comply with Title IX, Section 504, and Title II.

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<sup>6</sup> OCR notes that for 14 of the schools that did have the contact information for the Director of the CRCO listed in connection with making a complaint of harassment against an HDOE employee, the contact information for the principal or his or her designee was not listed. Rather, on the web pages for 13 of the schools, the notice stated: "Any student or parent who believes another student at their school is engaging in harassment should report allegations to the school's administrator." For the remaining two schools, one school provided contact information for the Director of the CRCO but no reference to any school level official, and the other provided contact information on the school's website both for the Director of the CRCO and the school level official responsible for addressing concerns of discrimination on the part of other students.

In addition, Title IX and Title II require the recipient to provide students and families with the contact information for the coordinator. While HDOE issued a mandate in November 2015 requiring schools to post on their websites the contact information of the Director of the CRCO, as noted above, the Director of CRCO was identified only as the person responsible for responding to complaints of harassment against HDOE employees, not those alleging harassment by another HDOE student. Moreover, OCR reviewed numerous schools' websites and established that the contact information for the Director of the CRCO was not available on approximately one-third of the websites reviewed (seven out of 22).

OCR notes that the survey evidence OCR gathered regarding incidents of harassment at HDOE schools indicates that the failure to identify a specific coordinator as the person responsible for addressing complaints of harassment made against students may have negatively impacted the educational environment for students. In response to OCR's survey, more than 1,000 students, 23% of those responding, who indicated they had been harassed that also indicated they did not report the harassment to a school official, stated as the reason they did not make a report to be that they did not know to whom to make it. OCR has not established a direct link between these students' lack of knowledge of whom to report incidents and the failure of HDOE to identify a coordinator as responsible for addressing complaints of student-on-student harassment at the school level.<sup>7</sup> What evidence OCR has gathered, however, indicates that HDOE's noncompliance with Title IX, Section 504 and Title II with regard to properly designating a coordinator may have had a material impact on the capacity of HDOE students to seek assistance in response to being harassed on the basis of being a member of a protected class.

### **III. NOTICE OF NONDISCRIMINATION**

#### *Legal Standards*

Title VI, at 34 C.F.R. § 100.6(d), requires a recipient to notify students and others of the regulatory provisions prohibiting discrimination based on race, color, and national origin in a manner that OCR would find necessary to inform students and others of their protections against discrimination under the statute and regulations.

Title IX, at 34 C.F.R. § 106.9, requires each recipient to notify students, parents of elementary and secondary students, employees, applicants of employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in any educational program or activity which it operates, and that it is required by Title IX and its implementing regulations not to discriminate in such a manner. The notice of nondiscrimination must include a statement that inquiries concerning Title IX may be referred to the Title IX Coordinator or to OCR (34 C.F.R. § 106.9(a)(1)), and must be published prominently in a recipient's on-line and printed publications to students, employees, and applicants for admission and employment (34 C.F.R. § 106.9(b)).

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<sup>7</sup> OCR's survey did not request the names of students providing responses, making follow-up regarding specific responses impracticable.

Section 504, at 34 C.F.R. § 104.8(a) and (b), requires a recipient that employs 15 or more persons to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of disability in violation of Section 504 and its implementing regulations. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to 34 C.F.R. § 104.7(a). If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include the notice of nondiscrimination in those materials or publications. A recipient may meet the publication requirement by either adding the notice as an insert to existing publications or by revising and reprinting the materials and publications. The notice of nondiscrimination must be accessible to disabled individuals and disseminated prominently in a recipient's on-line and printed publications, including course catalogs, application forms, bulletins, or newspapers and magazines, to students, employees, and applicants for admissions and employment.

Title II, at 28 C.F.R. § 35.106, requires a public entity to notify students, employees, applicants, and others of the regulatory provisions in a manner that OCR would find necessary to inform students and others of their protections against discrimination under the statute and regulations.

### *Findings of Fact*

The HDOE website home page has a footer labeled "Nondiscrimination Policy." When an individual clicks on that link, as of December 2017, it connects to the CRCO home page which provides a link to HDOE's Notice of Nondiscrimination. The notice states that HDOE does not discriminate based on "race, sex, age, color, national origin, religion, or disability." The notice makes clear that this mandate against discrimination covers all programs and activities, including employment and admissions. The notice directs questions regarding discrimination to the CRCO or OCR. The same document also contains HDOE's Anti-Harassment Statement. The statement specifically directs students and parents with complaints of harassment against employees based on race, sex, or disability to contact the Director of the CRCO. For complaints of harassment against students based on race, sex, or disability, students or parents are directed to contact their school administrator.

In a memorandum dated November 19, 2015, HDOE required all principals to post a copy of the notice on each school's website. The memo states: "We believe that the dissemination requirement can be satisfied, by placing it on your school's web page." If a school did not have a website, HDOE directed the school to print and send a copy of the notice home with each student for his or her parents or guardians. HDOE also instructed principals to print and provide a copy of the notice to each faculty and staff member, and to keep a copy of the notice at each school's front desk. Individual schools are inconsistent with regard to prominently publishing the notice in the student handbooks or other print publications. As of December 2017, 15 of the 29 schools of focus had published the notice on their website, seven of the schools had not, and seven schools did not have a website that OCR could locate.<sup>8</sup> OCR also reviewed a number of print publications and found that some, including student handbooks, did not contain the notice.

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<sup>8</sup> Two school's websites published an older version of the notice.

HDOE has web pages and a brochure regarding its Employee and Applicant Nondiscrimination Policy (nondiscrimination brochure) that it does not label as notices of nondiscrimination, but each contains language that could be construed as a notice of nondiscrimination. On the CRCO home page, HDOE describes the CRCO mission as committed to enforcing compliance with federal laws that prohibit discrimination, including harassment and retaliation, based on race, sex, disability, and other protected classes “as it relates to students, employees, and members of the public who access our services, programs, and activities.” The mission statement also specifically identifies Title VI, Title IX, Title II, and Section 504, includes the names and titles of CRCO staff with a phone number for the CRCO, and a link to the OCR website. The CRCO home page also has a link to the nondiscrimination brochure, dated June 2017, which provides employees and applicants for employment with information about the HDOE’s nondiscrimination policy and assists such individuals with understanding their civil rights. The nondiscrimination brochure states that discrimination, including harassment, in the workplace based on race, sex, disability, and other protected classes is prohibited, but does not identify specific federal statutes by name. The nondiscrimination brochure also explains that complaints alleging discrimination may be filed with the CRCO or OCR and various other federal and state agencies. At the bottom of the HDOE home page for “job opportunities,” the HDOE has the following statement:

### **Equal Opportunity**

The Department of Education does not discriminate in its educational policies, programs, and activities on the basis of sex, race, color, religion, national origin, age, and disability in accordance with Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Age Discrimination Act of 1975, and Americans with Disabilities Act of 1991. The Department of Education does not discriminate in its employment policies, programs, and activities on the basis of sexual orientation, arrest and court record, and National Guard participation, as well as on the basis of sex, race, color, religion, national origin, age, and disability, in accordance with Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Americans with Disabilities Act of 1991, Equal Pay Act of 1963, and Chapter 378, Part I, Hawaii Revised Statutes.

The home page for “job opportunities” also contains a link to the June 2017 brochure described above for employees and applicants for employment.

### *Analysis and Conclusion*

OCR has determined that HDOE is not in compliance with the regulations implementing Title VI, at 34 C.F.R. § 100.6(d), Title IX, at 34 C.F.R. § 106.9(b), Section 504, at 34 C.F.R. § 104.8(b), and Title II, at 28 C.F.R. § 35.106, for failing to publish broadly and prominently its Notice of Nondiscrimination.

While there is a link to the Notice of Nondiscrimination on HDOE’s website home page, for the 22 of the 29 schools of focus for which OCR was able to locate websites, seven still did not have the notice posted on-line as of December 2017. The November 2015 memorandum sent by HDOE to all principals requiring them to post a copy of the notice on each school’s website mistakenly states that HDOE “believe[s] that the dissemination requirement can be satisfied, by placing it on your school’s webpage.” The regulations for Title IX and Section 504 specifically require the notice to be published

in print publications. OCR found that several print publications, such as student handbooks, did not contain the Notice of Nondiscrimination.

Because OCR has determined that the Notice of Nondiscrimination has not been posted on numerous school websites and has not been regularly published in prominent print publications such as student handbooks, OCR finds that the Notice of Nondiscrimination has not been published prominently or in a manner necessary to inform students and others of their protections against discrimination, as required by the various regulations for Title VI, Title IX, Section 504, and Title II.

#### **IV. GRIEVANCE PROCEDURES**

##### *Legal Standards*

The regulation implementing Title VI does not explicitly require policies prohibiting harassment and grievance procedures for addressing harassment. However, the existence of both a policy and grievance procedure applicable to racial harassment (depending upon its scope, accessibility and clarity) is relevant in the investigation of racial harassment. If the recipient has a policy or grievance procedure applicable to harassment, it must be clear in the types of conduct prohibited in order for students to know and understand their rights and responsibilities.<sup>9</sup>

Title IX, at 34 C.F.R. § 106.8(b), requires that a recipient adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by Title IX. The regulation implementing Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints; however, a recipient's grievance procedures for handling discrimination complaints must provide for the prompt and equitable resolution of student and employee complaints alleging actions which would be prohibited by Title IX. Grievance procedures must contain the following elements to achieve compliance with Title IX: (a) notice to students and employees of the procedures, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (b) application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties; (c) provisions for adequate, reliable, and impartial investigations, including an equal opportunity to present witnesses and evidence; (d) designated and reasonably prompt timeframes for major stages of the grievance process; (e) notice to parties of the outcome; and (f) an assurance that the recipient will take steps to prevent further harassment and to correct its discriminatory effects on the complainant and others, if appropriate. Title IX, further, prohibits a recipient and others, including students, from retaliating against any individual "for the purpose of interfering with any right or privilege secured by [Title IX]," or because that individual "has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title IX.<sup>10</sup> Though it is not required to address the prohibition of retaliation in written grievance procedures, if it does, a recipient may not make inaccurate statements regarding Title IX's prohibition of retaliation.

Section 504, at 34 C.F.R. § 104.7(b), requires a recipient that employs 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and that provide for the

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<sup>9</sup> See 59 FR 94-5531, March 10, 1994.

<sup>10</sup> See 34 C.F.R. § 100.7(e) (incorporated by reference through 34 C.F.R. § 106.71).

prompt and equitable resolution of complaints alleging any action prohibited by Section 504. Such grievance procedures need not be established for complaints from applicants for employment.

Title II, at 28 C.F.R. § 35.107(b), requires a public entity that employs 50 or more persons to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by Title II.

### *Findings of Fact*

HDOE provided OCR with the following administrative rules, policies, and procedures that it represented as constituting its grievance procedures for responding to bullying and harassment complaints based on race, sex, or disability.<sup>11</sup>

#### Chapter 19 – Discipline Code Used for Addressing Student-on-Student Harassment

HDOE’s primary mechanism for responding to student-on-student harassment is contained in Chapter 19, as identified by HDOE in response to OCR’s 2011 data request, confirmed consistently by school staff during OCR’s 2013 onsite, and described by HDOE on the web page of its website concerning how it responds to student harassment. Chapter 19 is HDOE’s student discipline code and it describes student misconduct and potential disciplinary action for misconduct.<sup>12</sup> Chapter 19 is distributed to students and families annually. Subchapter 1 of Chapter 19 contains general provisions expressing the philosophy of HDOE and its desire to: “(1) Promote and maintain a safe and secure educational environment...(2) Teach and acknowledge proper behavior...(3) Deter students from acts which interfere with the purpose of education...and (4) maintain proper student conduct to ensure that educational activities and responsibilities remain uninterrupted.” Subchapter 1 of Chapter 19 also contains definitions, including for “sexual offenses” or “sexual assault” and harassment.<sup>13</sup>

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<sup>11</sup> OCR’s compliance review determined that HDOE has an administrative rule titled “Civil Rights Policy and Complaint Procedure” at Title 8, Chapter 41 of HAR, effective since 1986 and amended in 1995 (Chapter 41). HDOE provided no information regarding Chapter 41 in responding to OCR data requests. Interviews of HDOE administrators, teachers, and staff during OCR’s May 2013 onsite universally confirmed that schools do not use Chapter 41 to address harassment complaints. As of December 2017, a search of the HDOE website for “Chapter 41,” and related terms, produced no results. In May of 2016, the Director of the CRCO advised OCR that HDOE is in the process of revising Chapter 41 but that it will not complete that process for a year or more. The HDOE Board’s website (which is different from HDOE’s website) includes a draft of an amended Chapter 41 which would limit Chapter 41 to complaints against employees and refers complainants to the CRCO (similar to Policy 305.10 and SP 0211 (see pp. 16-17), but does not provide any information regarding the status of amendments to Chapter 41.

<sup>12</sup> Chapter 19 provides, generally, that the chapter provisions apply to all enrolled students. Subchapter 1 of Chapter 19 indicates that the HAR “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.” HAR § 8-19-3. HAR rules applicable to students with disabilities are contained in Chapter 60 and they afford students with disabilities additional procedural protections when a change of placement is appropriate for violating Chapter 19. These are consistent with the requirements of Section 504 and Title II in that they establish that students with disabilities may not be punished or disciplined for behavior that is caused by or is a manifestation of their disabilities and mandate that schools hold a “manifestation hearing” before suspending a student with a disability for more than 10 cumulative days during a school year. Those procedural protections also include provisions addressing parental notification, interim placements, appeals from manifestation hearings, expedited hearings and other procedural protections that are consistent with those imposed under Section 504 and Title II.

<sup>13</sup> Chapter 19 also has definitions for bullying and cyberbullying which do not mention any of the protected classes.

“‘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.”

The only other definition in Chapter 19 that mentions protected classes is the definition of harassment which states, in relevant part:

“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:...(3) Making verbal or non-verbal expressions 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 adversely affects the educational opportunity of a student or students...”

While there are two other subparts in the definition of harassment that address physical conduct, and four others also addressing verbal conduct, that might all constitute harassment under federal anti-discrimination laws, none of these subparts mention protected classes.

Subchapter 2 of Chapter 19 is titled “Student Misconduct and Discipline During the Regular School Year.”<sup>14</sup> That subchapter lists prohibited student conduct by class of offense, Class A, B, C, and D, with Class A including the most severe offenses, and Class D including the most minor offenses. “Sexual offenses” is listed as a Class A offense and “harassment” is a Class B offense. Chapter 19 states that “disciplinary action shall be taken for all class offenses in grades kindergarten through twelve” and lists 16 disciplinary action options that may be imposed. Several of the disciplinary action options must be approved by a complex area superintendent (suspensions exceeding ten school days, disciplinary transfers, dismissals, and extensions of crisis removals) before being imposed. The remaining disciplinary action options may be approved by the school principal or designee (e.g., crisis removals or suspensions of ten school days or less). Chapter 19 states that, in determining disciplinary action, the principal or designee must 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.” Chapter 19 also requires that an intervention to teach a student appropriate behavior must be instituted when disciplinary action is imposed, and requires a student be counseled in addition to disciplined. Chapter 19 also provides for “crisis removals” that allow a principal or designee to remove “a student immediately based upon preliminary inquiry and findings that the student’s conduct presents a clear and immediate threat to the physical safety of self or others or is so extremely disruptive” that a removal is necessary to preserve educational rights of other students. Chapter 19

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<sup>14</sup> Subchapter 3 of Chapter 19 contains a different procedure for disciplining students during summer school. This subchapter also lists “sexual offenses” as a Class A offense, and “harassment” as a Class B offense. For a student who commits either a Class A or Class B offense, the subchapter states that the student will be dismissed from summer school, without any description of an investigation procedure, except stating that the summer school director will notify and meet with the accused student and their parent prior to dismissal from summer school and will file a report with the complex area superintendent, with a copy to the parent. See HAR § 8-19-13(c).

lists offenses and possible disciplinary action options. Except for crisis removals, Class D offenses, and cutting class and truancy, it does not generally provide guidance on what type of discipline should be imposed for the classes of offenses, instead providing flexibility for the principal to make that determination.<sup>15</sup>

Chapter 19 has separate subchapters describing the investigatory procedure when a disciplinary event is reported by an HDOE employee, and describing the investigatory procedure when the principal initiates a crisis removal or may suspend a student. In Subchapter 5, Chapter 19 states that any teacher, official, or other HDOE employee who witnesses a Class A or Class B offense, or has reasonable cause to believe a Class A or Class B offense has been or will be committed against a student, teacher, official, or other employee, shall promptly report the incident to the principal, or else be subject to potential employment discipline. The principal is required to initially conduct an investigation to determine whether the behavior requires a call to the police or “whether the behavior can be handled through the school disciplinary procedures.” The principal is required to input the incident into the HDOE electronic database system within five days of the reported offense.<sup>16</sup> The principal must notify the reporting teacher, official, or other employee of any disciplinary action taken within five school days after the incident is reported. If the teacher, official, or other employee is dissatisfied with the disciplinary action or no disciplinary action has been taken within ten school days after the report of the incident, he or she may appeal in writing to the complex area superintendent. Within five school days of receiving the appeal, the complex area superintendent or designee must notify the appellant in writing of the disciplinary action taken.

Another investigation process is described in Subchapter 2 of Chapter 19, which requires a school principal to conduct an investigation when the principal reasonably believes that the disciplinary action will include a suspension or crisis removal. The investigation must be conducted “immediately” and be “thorough” and “completed as quickly as possible.” If the accused student or the parent denies the charge, the school principal must present them with the evidence against the student, and give them an opportunity to provide the accused student’s version of the events. If the disciplinary action is a suspension of any length, the parent must receive verbal and written notice of the suspension, and the written notice must include the allegations of the acts committed by the student, the allegations that were substantiated, a statement of the disciplinary action, and a statement of a date, time, and place offered by the school administration to meet with the parent. Chapter 19 does not include a requirement to notify a victim or the victim’s parents of the outcome of the disciplinary investigation.

Subchapter 2 of Chapter 19 contains additional due process procedures that apply when a principal recommends imposition of “serious discipline,” except crisis removals. When the principal makes such a recommendation, the principal must immediately notify the complex area superintendent and obtain verbal authorization from the complex area superintendent to initiate disciplinary proceedings.

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<sup>15</sup> Chapter 19 states that students committing class D offenses cannot receive “serious discipline,” which is defined as dismissals, disciplinary transfers, crisis removals, and suspensions which exceed ten school days, and students cutting class or truant shall not be suspended or receive serious discipline.

<sup>16</sup> According to the HDOE website, the eCSSS, which stands for “electronic Comprehensive Student Support System,” is used by HDOE to track students who receive supports and services. It is described as an integrated system and the single source for documenting student support activity of all types and service levels, including referrals and incidents. The system has a drop down list for incident data input that includes offenses (including offense classes), witnesses, victims and suspects. The system is a web-based application that allows secure user access at any time from multiple locations.

Within three school days of receiving authorization from the complex area superintendent, the principal shall mail a written notice with the HDOE appeal form to the parent. The written notice must state the disciplinary action and the allegations that were substantiated. The student or parent may submit an appeal, which must be in writing and received by the complex area superintendent by the close of business of the seventh school day from the date of the written notice. On appeal, the parent may present evidence, call and cross-examine witnesses, and be represented by legal counsel. The student may attend school during the appeal, except extracurricular activities, unless the principal finds that the student's presence at school creates a substantial risk to self or others or disrupts other students' rights to an education.

The complex area superintendent must schedule an appeal proceeding within ten school days of receiving the appeal. Written notice of the appeal proceeding date, time, and place must be mailed to the parent and principal at least 15 calendar days before the appeal proceeding. The appeal must be conducted by the complex area superintendent or an impartial designee. The procedure provides a list of standards for appeals, including the following: (1) the appeal is closed to the public unless the student or parent requests it to be public; (2) the parent and principal have the right to present evidence, cross-examine witnesses, and submit rebuttal testimony; (3) parent and principal have the right to legal representation; (4) the complex area superintendent or the impartial designee does not need to follow the formal rules of evidence; (5) the complex area superintendent or impartial designee must impartially weigh the evidence; and (6) the appeal shall be recorded or transcribed and the parent can record or obtain a copy of the HDOE transcript or recording at his or her expense only if requested for purpose of a court review. The complex area superintendent must make a written decision within seven school days from the close of the appeal including the actions to be taken and the bases for such actions, and provide the decision to the parent, attorneys, and the school.

The parent may appeal the complex area superintendent's decision to the superintendent of education within seven school days of the complex area superintendent's written decision. The parent may request a hearing from the superintendent of education. If no hearing is requested, the superintendent of education will review the parent's appeal information and record and issue a final decision. If the student is excluded from school during the appeal, the superintendent of education shall make her decision within 21 days of receiving the appeal. Otherwise, upon receipt of the written appeal from the parent, the entire record from below will be delivered to the superintendent of education within ten calendar days. Once the superintendent of education has the record, she will review the evidence and render a decision within 14 days, which will then be hand-delivered or mailed to the parent or his or her attorney. The parent then has the right to submit written exceptions and request to present argument to the superintendent of education. This request must be made within five calendar days of the superintendent of education's decision. Within two school days, the superintendent of education will schedule a time and place for the parent to present arguments. "The date for the 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." Within 14 calendar days of the date of the presentation of argument or receipt of the parent's written exceptions, the superintendent of education must mail a written decision to the parent or his or her attorney.

Chapter 19 does not specifically address retaliation, except in the definition for “fighting” in Subchapter 1, which states, in part: “Fighting includes, but is not limited to: ... (3) Retaliating physically for teasing, harassing, threatening, or intimidating behavior; verbally inciting [sic]...”

In August 2011 and August 2012, HDOE sent several documents to parents, legal guardians, and students with information about Chapter 19. The documents included a one-page summary of the procedures set forth in Chapter 19 relating to student-on-student harassment (summary procedure) and a one-page complaint form (complaint form), along with a copy of Chapter 19. OCR has not been able to locate any evidence that HDOE directed the summary procedure and complaint form to be distributed to students and parents in subsequent years, and OCR’s requests for harassment complaints from HDOE schools revealed that the complaint form has not been used in HDOE schools. None of the 29 schools for which OCR reviewed discipline records provided OCR with the complaint form as the method used to make a complaint about harassment.

#### Policy 305.10 - Procedures Regarding Employee Harassment of Students

HDOE identified Policy 305.10 (formerly titled Policy 4211) to OCR in November 2011 as the policy used when an employee harasses a student. Policy 305.10 prohibits discrimination, including harassment, by any employee against a student based on various protected classes, including race, sex, or disability. It further states that “a student shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination under any program, services, or activity” of HDOE. It lastly states that retaliation against anyone engaging in a protected activity is prohibited. Protected activity is defined under the policy as follows: filing a complaint of harassment, bullying, or discrimination; participating in complaint or investigative proceedings dealing with harassment, bullying, or discrimination under the policy; inquiring about one’s rights under the policy; or otherwise opposing acts covered under the policy.

HDOE submitted to OCR a Standard of Practice Document No. 0211 (SP 0211), released March 8, 2008, which is the document implementing Policy 305.10.<sup>17</sup> OCR was not able to locate SP 0211 on HDOE’s website, and HDOE has provided no information indicating that it has released SP 0211 to students or their parents.<sup>18</sup> SP 0211 applies to all HDOE employees and designates principals, vice principals, complex area superintendents, CRCO specialists and/or director, and other management personnel as the parties responsible for maintaining a learning environment free of harassment, bullying, and discrimination. Any principal, vice principal or complex area superintendent who witnesses or receives a report or reports of harassment, bullying or discrimination is required to “take immediate and appropriate action reasonably calculated to end the harassment, bullying and/or discrimination” by immediately contacting the CRCO to initiate an investigation into complaints stemming from allegations that fall under the policy.

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<sup>17</sup> SP 0211 still refers to the former Policy 4211, but the language of Policy 305.10 and former Policy 4211 is the same; only the policy number changed.

<sup>18</sup> A Standard of Practice Document (SP) is an “official guidance” document for HDOE employees. On its website, HDOE explains that many SPs are interactive documents with links to resources that are located on HDOE’s intranet and unavailable to the public. The SP series of which SP 0211 is a part is not available on the web page of HDOE’s website concerning SPs. See <http://www.hawaiipublicschools.org/ConnectWithUs/Organization/SOP/Pages/default.aspx>.

SP 0211 defines bullying as an act that an employee exhibits towards a student that is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the student. The document defines cyberbullying as a type of bullying that includes electronically transmitted acts that an employee has used to exhibit inappropriate conduct toward a student that is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening, or abusive educational environment. Harassment is defined as “unwelcome conduct that is sufficiently severe, persistent or pervasive; and limits a student’s ability to participate in or benefit from an educational program or activity; or creates a hostile or abusive environment based on the identified protected classes.”

Employees under SP 0211 have a responsibility to refrain from engaging in any behavior that violates student rights under Policy 305.10 at school or during school-related functions. Those found to have violated the policy after investigation may receive disciplinary action deemed appropriate by an administrator.

Parents or legal guardians of a student, or a student with the knowledge of his or her parent or legal guardian, may file complaints with school administrators, complex area superintendents, or the CRCO by using HDOE’s Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Students by Employees Form. SP 0211 states that complaints not made using the form should also be investigated. Employees who witness or have knowledge of an incident that falls under Policy 305.10 may also file a complaint by using the form or informing a responsible administrator.

The “Frequently Asked Questions” (FAQ) section of SP 0211 states that all complaints will be forwarded to a CRCO investigator to “investigate the complaint within a reasonable time period depending on the complexity of the case.” The investigator will notify the complainant and respondent when the investigation is concluded and provide a report to “the decision-maker for appropriate action.” According to the FAQ, if a violation of the policy is found, the decision-maker should work with their Personnel Regional Officer and State Office administrators to decide on appropriate action. The FAQ also states that complaints may be filed with OCR, or any other applicable federal or state agency.

HDOE also has an “Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Students by Employees Policy Complaint Form” for complaints under Policy 305.10. Of the 29 schools for which OCR reviewed discipline data, only one school (Honokaa High School) provided OCR with a copy of this form used for a student complaint of harassment against an employee.

HDOE publishes an EEO brochure on its website that summarizes the procedures in Policy 305.10, and references that procedure (*see p. 7*). As of December 2017, the HDOE website also included a “Report an Issue” page, including a section on reporting civil rights violations to the CRCO with a link to the CRCO home page, which includes a link to Policy 305.10 and its complaint form.

### *Analysis and Conclusion*

HDOE submitted several documents in response to OCR’s request for its grievance procedures for responding to complaints of harassment based on race, sex and disability. OCR has determined that

none of the documents comply with the standards required for grievance procedures under Title VI, Title IX, Section 504, and Title II.

### Chapter 19

Chapter 19 is a discipline code and does not comply with the requirement under Title VI that any grievance procedure applicable to harassment must be clear in the types of conduct prohibited in order for students to know and understand their rights and responsibilities. In its definition of “harassment,” only subsection (3) addressing “verbal and non-verbal expressions” references the protected classifications of race, color and national origin. Subsections (1) and (8), addressing physical conduct, do not reference these protected classes; nor do subsections (2), (4), (5) and (6), all addressing verbal conduct in other forms than those specifically addressed under subsection (3). The omission of any reference to race, color and national origin in subsections (1), (2), (4)-(6) and (8) leaves it unclear whether they, like subsection (3), specifically prohibit conduct based upon race, color and national origin as required by Title VI.

Regarding Title IX, Chapter 19 does not provide notice to students, families, and third parties of where complaints may be filed and instead only provides notice of where teachers, officials, or other HDOE employees may file complaints. Chapter 19 does not apply to complaints filed by students or on their behalf alleging sexual harassment carried out by employees or third parties. It does not provide a complaint process for student victims and instead only provides a disciplinary process for students who commit harassment. Chapter 19 allows an accused student and the principal or designee to present evidence during an appeal, but not the alleged student victim of harassment. As such, the appeal process does not satisfy the requirement that both parties have the opportunity to present witnesses and other evidence. Chapter 19 contains time frames for the accused student appeal process. However, there are no designated time frames specified for the other major stages of the grievance process for students such as completion of the investigation. Chapter 19 has only a general statement that discipline investigations should commence “immediately” and be “completed as soon as possible.”

Chapter 19 does not require notice of the outcome of the principal’s investigation under Subchapter 2, except for notice to the accused student’s parents, and does not require notice of the decision by the complex area superintendent concerning an appeal, except for notice to the accused students’ parents, the attorneys, and the school. The alleged victim of the harassment (unless it is a teacher who reported the alleged incident under Subchapter 5 of Chapter 19) does not receive notice of the outcome of the investigation or any appeal. Chapter 19 does not address retaliation except to identify that fighting with someone in retaliation for being harassed is prohibited. Finally, Chapter 19 provides some assurance that HDOE will take steps to prevent recurrence of any sexual harassment by expressing a philosophy and intent to maintain a safe school environment.

Regarding Section 504 and Title II, Chapter 19 does not provide a grievance procedure that incorporates appropriate due process standards and fails to provide for the prompt and equitable resolution of disability discrimination complaints, including complaints of disability-based harassment. As noted above with regard to noncompliance with Title IX, there are many inequitable aspects to Chapter 19. Chapter 19 only provides for the discipline of a student who commits disability-based harassment. It does not provide a complaint resolution procedure for a student or parent wanting to raise concerns about disability-based harassment at a school.

Accordingly, for all the reasons detailed above, Chapter 19 is not a compliant grievance procedure under Title VI, Title IX, Section 504, or Title II.

Policy 305.10/Standard of Practice Document 0211

Policy 305.10 and its implementing document SP 0211 do not comply with Title VI, Title IX, Section 504, or Title II requirements for a grievance procedure. Regarding Title VI, the policy and practice documents do not comply with the requirement that any grievance procedure applicable to harassment must be accessible and clear in order for students to know and understand their rights and responsibilities. SP 0211 contains information implementing Policy 305.10, including details on the complaint procedure. However, OCR was unable to locate SP 0211 on HDOE's website and OCR has no evidence that HDOE made the policy accessible to students sufficient to ensure clear notice of prohibited conduct.

Regarding Title IX, Policy 305.10 and SP 0211 do not set forth procedures addressing complaints alleging sexual harassment carried out by other students or third parties. Policy 305.10 and SP 0211 apply to allegations against employees only. Because Policy 305.10 does not provide any details about how the CRCO conducts investigations, and SP 0211 contains only minimal descriptions of a complaint investigation process, they do not provide for adequate, reliable, and impartial investigations of complaints, including the opportunity for both parties to present witnesses and other information. The policy and the practice document taken together do require that notice of the outcome of an investigation be provided to the parties, do provide an assurance that schools will take steps to prevent recurrence of harassment and correct discriminatory effects, and do prohibit retaliation. While SP 0211 does contain the notice of the procedures and description of where complaints can be filed, OCR could not find SP 0211 on the web page of HDOE's website relating to SP documents and could not find SP 0211 on its website generally after searching for the document's title and related terms. As such, the policy and practice document do not provide sufficient notice of the complaint procedures and where complaints may be filed.

Regarding Section 504 and Title II, Policy 305.10 and SP 0211 do not provide a grievance procedure that incorporates appropriate due process standards and fail to provide for the prompt and equitable resolution of disability discrimination complaints, including complaints of disability harassment. As noted above with regard to noncompliance with Title IX, there are many inequitable aspects to Policy 305.10 and SP 0211. SP 0211 provides minimal descriptions of its complaint investigation process in its FAQ section, but does not describe how evidence will be presented or heard, does not state whether or how the complainant and respondent will be involved in the complaint investigation, and could not be found on HDOE's website. Furthermore, neither Policy 305.10 nor SP 0211 provides for a complaint process for student-on-student harassment complaints. Therefore, Policy 305.10 and SP 0211 do not provide a compliant grievance procedure under Title VI, Title IX, Section 504, or Title II.

Accordingly, none of the procedures used by HDOE are sufficient to comply with the grievance procedure requirements under Title VI, Title IX, Section 504 and Title II.

OCR also notes that the survey evidence OCR gathered regarding incidents of harassment at HDOE schools indicates that the lack of proper grievance procedures for students experiencing harassment may likely have impacted the educational environment for students. In 14.6% of all responses from

students who indicated both being harassed and having reported it to school officials, the students indicated that school officials took no action in response. Of those students who indicated being harassed but who indicated they did not report it to school officials, nearly two-thirds (5,601, or 61.3%) indicated they did not make a report because they did not believe the school would do anything in response, that it would make the bullying and harassment worse, or both.

More generally, the survey evidence OCR gathered suggests that Chapter 19, beyond specific shortcomings, has not proven effective as a means of systematically addressing the presence of bullying and harassment in HDOE schools. In responding to OCR's survey, more than 27,000 students across HDOE, or approximately two out of five, indicated that they were "somewhat" or "very" concerned about bullying or harassment that had occurred at their current school during the 2014-2015 school year. More than 20,000 students, or about a third, indicated having been personally bullied or harassed. Of the students who indicated having been harassed, almost two-thirds, or almost 13,000, indicated they believed that they were harassed because of their race, sex and/or disability. Moreover, of the students responding to OCR's survey, over half reported having personally witnessed bullying or harassment at school or school-related functions during the 2014-2015 school year. Of the incidents witnessed, students reported that over three-fourths were because of the victim's race, sex, and/or disability. Taken together, the survey data paints a picture of a school system that is failing to systematically address incidents of protected-class harassment in an effective way.

The discipline records OCR reviewed also indicate that Chapter 19's deficiencies as a harassment grievance procedure may have had negative effects for HDOE students. Chapter 19, for example, contains no requirement that victims of harassment, or their parents, be notified of the outcome of a principal's investigation regarding an incident of harassment. Consistent with this, 83.2% of the incidents for which OCR reviewed records contained no indication that school officials took affirmative steps to follow up with victims or their families in the aftermath of addressing a harassment incident. Chapter 19's limited reference to preventing retaliation against individuals involved in incidents of harassment is also likely connected to the absence of any record of efforts on the part of school officials to address the possibility of retaliation in 82.2% of all incidents for which OCR reviewed records. While OCR's findings of fact set forth above are limited to Chapter 19 as written, the parallels between the deficiencies with Chapter 19 as a grievance procedure and the concerns identified with the HDOE discipline records speaks to the likelihood that Chapter 19's deficiencies under Title VI, Title IX, Section 504 and Title II have amounted to real-world impacts on HDOE students.

The disparity between the number of student-on-student incidents of harassment that occurred during the 2014-2015 school year at the 29 schools for which OCR reviewed discipline records (113) and the number of student-on-student incidents of harassment that students, in responding to OCR's survey, indicated they reported to school officials at the same schools during the same school year (1,284) also suggests that Chapter 19 has proven inadequate to fully address incidents of harassment in HDOE schools. The evidence gathered by OCR strongly suggests that HDOE's failure to adopt and publish a grievance procedure that is compliant with Title VI, Title IX, Section 504 and Title II, is being reflected in the experience of HDOE students subjected to incidents of harassment by their peers.

V. **CONCLUSION**

HDOE has entered into the enclosed Resolution Agreement (Agreement) to address the compliance issues identified in this matter. Under the Agreement, HDOE has, among other things, agreed to:

- a requirement that HDOE's designated compliance coordinators have expert knowledge of HDOE's Title IX and Section 504/Title II grievance procedures and oversee the handling of all complaints of sex and disability discrimination within all of HDOE's programs and activities. The coordinator(s) will be responsible for coordinating HDOE's efforts to comply with and carry out its Title IX and Section 504/Title II responsibilities, will retain oversight and responsibility for any deputy coordinators designated to assist him or her, will oversee the provision of initial and ongoing training of any deputy coordinators, and will retain oversight and responsibility for providing information to students and employees regarding their Title IX and Section 504/Title II rights and responsibilities;
- revise all relevant policies, procedures, regulatory web pages, and publications to include the title, office address, telephone number, and e-mail address of the individual(s) designated to coordinate its efforts to comply with the regulations enforced by OCR;
- ensure that its Notice of Nondiscrimination is disseminated in each announcement, bulletin, catalog, or application form which it makes available to students, parents, employees, applicants for employment, and any or all unions or professional organizations holding collective bargaining or professional agreements with HDOE;
- create and disseminate grievance procedures that contain certain minimum agreed-upon provisions, to ensure that it provides for the prompt and equitable resolution of complaints of harassment based on race, sex, and disability; and to review any other policies, procedures, state laws or regulations that may apply to harassment of students based on race, sex and disability, to ensure consistency with its newly developed procedures;
- provide training to all employees, contractors and volunteers responsible for recognizing and reporting incidents of race, sex, and disability discrimination (including but not limited to, teachers, administrators, counselors, psychologists, athletic coaches, transportation staff and contractors, student resource officers and health personnel); and
- develop a plan for monitoring future compliance with Title VI, Title IX, Section 504 and Title II to ensure that the policies, procedures, and practices developed pursuant to this Agreement are being consistently and effectively implemented in all HDOE schools. The plan will include community input regarding the effectiveness of HDOE's responses to incidents of racial, sexual, and disability harassment in HDOE schools and a method to assess the effectiveness of HDOE's responses to such incidents through, e.g., the review of school records, collecting information from students and staff through school climate surveys and creating or revising a record-keeping system that allows HDOE to effectively monitor school responses to harassment incidents.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this compliance review as of the date of this letter. When fully implemented, the Agreement is intended to address the findings and compliance issues identified in this investigation. OCR will monitor the implementation of the Agreement until HDOE is in compliance with the statute(s) and regulations at issue in the case. OCR's determination in this matter should not be interpreted to address HDOE's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in this OCR compliance review. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. Please be advised that HDOE may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR appreciates the cooperation of HDOE that has been afforded to OCR throughout OCR's investigation and in resolving this case, especially the cooperation received from the Director and staff of the HDOE CRCO. If you have any questions regarding this letter, please contact Timothy L. Sell at (206) 607-1639 or via e-mail at [timothy.sell@ed.gov](mailto:timothy.sell@ed.gov) or David Kauffman at (206) 607-1603 or via e-mail at [david.kauffman@ed.gov](mailto:david.kauffman@ed.gov).

Sincerely,

Linda Mangel  
Regional Director

Enclosure