



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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February 16, 2018

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

Re: Hawaii State Department of Education  
OCR Reference No. 10161008

Dear Superintendent Kishimoto:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the referenced complaint against the Hawaii Department of Education (HDOE). The complainant alleged that that the HDOE discriminated against a student at XXXXXXXX Middle School (school) on Oahu, by failing to take prompt and effective action when the school was notified that the student was being subjected to harassment on school grounds based on sex, and race or color beginning in July 2015. Specifically, the complaint alleged that the student (Student A):

1. was subjected to verbal and physical harassment since the beginning of the 2015-2016 school year because of race or color; and
2. was subjected to verbal and physical harassment based on sex, including female students calling her derogatory names and male students poking, tickling, and otherwise touching her inappropriately.

OCR investigated the complaint under its authority to enforce Title VI of the Civil Rights Act of 1964 (Title VI) and Title IX of the Education Amendments of 1972 (Title IX). These federal civil rights laws prohibit discrimination on the bases of race, color and national origin (Title VI), and on the basis of sex (Title IX), respectively, in programs and activities receiving federal financial assistance. Because HDOE receives federal financial assistance from this Department, it must comply with these laws.

OCR has determined that the findings in the investigation support a conclusion that the HDOE failed to comply with Title VI and Title IX. The findings and conclusions, set forth below, are based on a review and analysis of written information provided by the student's parents<sup>1</sup> and the HDOE, interviews with the parents and school administrators and staff and OCR's review of HDOE and school policies and procedures with respect to its response to any concerns that were brought to the

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<sup>1</sup> Other references to "parents" in this letter refer to Student A's mother and stepfather.

attention of school or HDOE officials regarding the allegations investigated in this individual complaint.<sup>2</sup>

The HDOE entered into a signed Resolution Agreement (“agreement”) with OCR on January 12, 2018. When fully implemented, the agreement will address the finding of non-compliance noted above.

### Findings of Fact

Student A, who is a female Caucasian, was enrolled in the 6<sup>th</sup> grade at the school beginning on July 29, 2015, until she was withdrawn from the school by her parents on September 24, 2015.

According to the parent, before the 2015-2016 school year, Student A, who had attended school in California, had always been an excellent student with almost straight A’s every school year, had not been subjected to any disciplinary action and had not missed a day of school or been tardy during her first 5 years of school. The parent told OCR that during the first couple of weeks of school, Student A was very excited to start a new school and was looking forward to making new friends. The parent told OCR that after Student A started at the school, Student A told the parent that the boys were fascinated with Student A because of her fair skin, blonde hair, and green eyes and that they would frequently comment on how pretty she was. The parent told OCR that, as a result of this attention, some of the other girls at the school started calling Student A names, including “haole bitch” and “cunt.”<sup>3</sup> The parent told OCR that, in addition to name-calling, there was physical bullying that included students rifling through and taking items from Student A’s school bag, and taking items from the outside pockets of her school bag, while she was wearing it, as she made her way from the edge of the school grounds across a basketball court into the school.

The parent told OCR that the name-calling got to the point during the early part of the school year that Student A was crying nearly every day and did not want to go to school. The parent also told OCR that Student A called or texted her several times from the school’s after-school program asking the parent to pick Student A up early. The parent’s position is that, based on the sexual and racial nature of the name-calling, Student A was being subjected to constant name-calling and harassment on account of her light complexion, hair color, and the color of her eyes and her sex.

The parent met with Student A’s counselor and the vice principal for the first time regarding her concerns on August 20, 2015. The parent told OCR that she met with them for nearly 2 hours and that she was in tears in the school office. The parent’s position is that she specifically told the counselor and the vice principal that Student A was being called “haole bitch” and “cunt” by other girls at the school, and about the incidents involving items being taken from her backpack. She also told them that Student A was refusing to go to school, and that she hated it at the school on account of the harassment that she was experiencing. The parent told OCR that she also had continuing telephone

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<sup>2</sup> OCR recently concluded a compliance review of the HDOE, OCR Ref. No. 10115003, in which it reviewed the HDOE’s compliance, state-wide, with Title VI, Title IX, Section 504 of the Rehabilitation Act of 1973 and Title II of the American with Disability Act of 1990, with respect to addressing harassment based on sex, race, color, national origin, and disability. In that matter, the HDOE entered into a resolution agreement that addresses compliance concerns identified by OCR with respect to procedural aspects of addressing and preventing protected class harassment. OCR’s findings in this complaint are limited to those necessary to make a determination and seek a remedy on behalf of the student and the resolution agreement obtained in this matter is limited to an individual remedy.

<sup>3</sup> “Haole” is a term used in the state of Hawaii to refer to Caucasians or white people and depending on the context in which it is used, may be considered derogatory.

conversations and in-person conversations with the counselor about these issues during the next several weeks.

The school counselor was uncertain about events during her interview with OCR. While she stated she did not specifically recall the parent bringing up the issue of Student A being called sexually or racially inappropriate names during the meeting with the parent on August 20, 2015, she told OCR that the parent may have mentioned the name-calling during their meeting, but she did not consider it racial or sexual at the time. She further acknowledged to OCR the parent reporting to her about Student A having personal items taken from her frequently. She also acknowledged that Student A had some incidents with other girls at the school calling her names to the point where Student A did not want to come to school.

The vice principal, who met with the parent along with the counselor, confirmed that the parent suggested the possibility that the incidents of harassment were happening because of Student A's race. He told OCR, however, that at the time of the reports he did not give consideration to whether these incidents should be treated as racial and sexual harassment.

The counselor reported to OCR that, following the August 20, 2015, meeting with the parent, the school counselor sent an e-mail to Student A's teachers asking the teachers to "keep an eye out" for harassment of Student A in class and between classes. A copy of the e-mail provided to OCR by HDOE indicates that the counselor told school staff only that Student A "has been getting her personal items taken from her frequently" and that Student A had "some incidents with girls at school and people calling her names . . . to the point where [Student A] does not want to come to school." The e-mail asked staff to keep an eye on Student A during class and non-instructional time and asked staff to contact the school counselor or the vice principal if they see or hear anything that might be concerning. The counselor also told OCR that she may have also discussed the issue at a 6<sup>th</sup> grade team meeting but stated that she was not sure.

According to the parent, things seemed to get better after her meeting on August 20, however, by the beginning of September, the parents again began to have concerns. According to the parent, after her first meeting with the counselor and the vice principal, Student A reported to her in September that, beginning around the last week of August of 2015, she began experiencing physical sexual harassment by a male student (Student B). The parent told OCR that just after the Labor Day holiday weekend, September 7, 2015, Student A reported to her that Student B would come up behind her, wrap his hands around her lower hips, and back her up against him and that at other times he would walk by her and smack her on the butt. The parent told OCR that she told her daughter that she had the right to defend her body and that the next time it happened she should kick Student B in the crotch.

The parent's position is that Student A initially reported the conduct of Student B to her school counselor before the Labor Day holiday weekend; the parent told OCR that Student A told the counselor that Student B "would not leave her alone" and that he was constantly touching her. According to the parent, the counselor's response to Student A was "What would you like me to do? I am not [Student B's] counselor."<sup>4</sup> According to the parent, Student A decided to tell the parent about Student B's conduct after she received that response from the counselor. The parent reported

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<sup>4</sup> The school assigned students to school counselors based on their grade and by last name alphabetically. Student B was assigned to a different counselor than Student A's counselor.

to OCR that the last incident with Student B occurred approximately the third week of September. The parent told OCR that Student B grabbed Student A from behind, Student A turned around and kicked Student B in the crotch. The parent also told OCR that Student A told her that there was a school staff member standing nearby who witnessed the incident but did nothing.

The school counselor disagreed with the parent's position and told OCR that she did not say to Student A, "What would you like me to do? I am not [Student B's] Counselor." She stated that she may have told Student A that she would have Student B's counselor speak with him and that it was her understanding that the other counselor spoke with Student B.

According to Student B's counselor, Student A met with her on September 14, 2015, because Student A's counselor was not at the school. She told OCR that Student A reported to her that Student B was staring at her in class and poked her in the side. Student B's counselor stated that she took a statement from Student A regarding who, what, when and where and asked Student A how she felt. She told OCR that Student A stated that it was irritating and that it had only happened once. Student B's counselor stated that Student A told her that she did not feel unsafe that it was just irritating and that she did not report that Student B said anything to her.

Student B's counselor told OCR that she spoke with Student B on September 17, 2015, and asked him what was going on and if he was staring at Student A in class, to which he replied "maybe" and when asked if he had poked Student A, stated that he had. She told OCR that she advised Student B that he needed to stop poking her and staring at her. The counselor told OCR that as far as she knew, Student B's conduct stopped and neither Student A nor anyone else reported to her that this conduct was continuing. Student B's counselor further told OCR that the first time she learned of any possible physical sexual harassment of Student A by Student B was when she met with Student A on September 14, 2015.

The parent also told OCR that during the first 2 weeks of September, Student A would often end up in the counselor's office because of the name-calling and physical harassment, where she would sit and draw, missing class, and that the counselor would say to Student A "Why don't you just stay here; it is safer here; we'll send a note to the teacher that you are here." The parent told OCR that during these weeks, Student A texted her frequently indicating that "they're calling me names" or that "[Student B] won't leave me alone."

Student A's counselor stated to OCR that she thinks that Student A was having difficulty and had incidents with many different students involving name-calling and harassment. She stated that they would solve one and then there would be another and that she was not sure of all that was going on.

On September 10, 2015, the parent e-mailed the counselor letting her know that, "[t]hings have changed again. More rumors, lies, trouble making and false accusations leading to getting [Student A] in trouble." The e-mail also stated that the name-calling had started again. On September 18, 2015, the parent sent another e-mail to the counselor advising her that Student A believed that her school work for two of her classes was taken from her backpack.

After e-mailing the counselor, the parent later met with several of Student A's teachers to talk with them about making up the completed work that was taken from Student A's backpack.

The parent's position is that none of Student A's teachers had been informed of the name-calling and physical harassment that Student A had been experiencing. She told OCR that when she spoke with Student A's teachers about making up work that had been taken from Student A's backpack, both the language arts teacher and science teacher (who was also Student A's advisor) told her that they had no idea that Student A was experiencing harassment. Student A's advisory teacher told the parent that she had noticed that Student A had come into her homeroom a couple times when she appeared red in the face and had maybe been crying but the teacher did not think it was that severe of a problem. According to the parent, the advisory teacher said she was not previously aware of the problems that Student A was experiencing with other girls but that she would keep an eye out for it. She also told the parent that she was going to bring the issue to the attention of the 6<sup>th</sup> grade team, which was scheduled to meet during the following week (September 22). The parent told OCR that she and Student A's advisory teacher discussed a plan where Student A could store her back pack in her classroom. They also discussed rearranging Student A's schedule so that she could avoid problems with other students.

Student A's advisory teacher acknowledged to OCR that she had a conversation with Student A's parent in September during which the parent referred to her daughter being called names, including "cunt" and "bitch." The teacher told OCR that she was shocked and that she told the parent that she would keep an eye out for such incidents. Although the parent told OCR that the advisory teacher claimed she had not heard of the verbal sexual harassment, the advisory teacher told OCR that the school counselor had mentioned something about it to the teachers in August of 2015.

Student A's language arts teacher told OCR that Student A may have been called "haole," but that, in her experience, students at the school do that to any racial minority at the school, e.g., black students and Chuuk students.

Student A's math teacher told OCR that she recalled receiving an e-mail from the counselor dated August 20, 2015, asking the teachers to keep an eye out for Student A between classes and that she also received e-mails dated August 24 and September 14, 2015, regarding a conflict between Student A and another student. She stated that she understood that Student A shared four classes with the other student and that the school was considering changing their schedules.

The parent decided to withdraw Student A from the school effective September 25, 2015, because she felt that the racial and sexual harassment was not being addressed. She stated that Student A's last day at the school was September 24, 2015, because her daughter texted her "Mom, come get me now." The parents enrolled Student A in the Hawaii Technology Academy charter school.

The parent's position is that many of the incidents occurred in the hallways and that the school staff was not providing supervision. She also told OCR that, with one exception, she was not aware of any consequences imposed on offending students. She stated that the only option for recourse ever given to them was several weeks after Student A left the school, when the principal advised them they had the option to file a police report against Student B.

The parent told OCR that she was not getting the type of response she believed was warranted from the school counselor, so she finally wrote to the school principal and sent a copy of her e-mail to the Complex Area Superintendent on September 24, 2015. She told OCR that she had been talking with the vice principal and counselor during the entire course of these events and that it appeared to her that the counselor was just shoving things under the rug; she said she felt that there was nothing passed

on to the vice principal or to the counselor for Student B; that nothing made it out of the counselor's office; and she felt like the counselor never reached out for help from other staff members. She told OCR that she was hoping that if she contacted the HDOE (the Complex Area Superintendent), that something would be done, and other people besides the counselor would step in and take the issue seriously.

The school principal told OCR that she did not start her duties at the school until August 24, 2015, and that she first met with the parents after their September 24<sup>th</sup> complaint to the Complex Area Superintendent (CAS). The principal told OCR that when she came on board she realized it was an escalating situation. She told OCR that she sent the parents a letter describing the actions they were taking to prevent further harassment and school-wide incidents and offered to meet with them. The principal said that she set up a meeting with the parents for October 12, 2015, and that, at the meeting, the school agreed to create a crisis plan to ensure clear communications and follow up on any incidents that may occur on the school campus.

The draft crisis plan was sent to Student A's parent on October 16, 2015, and the principal followed up with the parent on October 26, 2015, however, by that point the parents had determined that Student A would remain at the Hawaii Technology Academy and Student A has not attended the school since she was withdrawn. The parent replied to the principal's e-mail of October 26, 2015, indicating that she had spoken with Student A about the e-mail and crisis plan but that Student A cried and stated that she was not ready to return to the school. The parent wrote that Student A missed her friends but that she was still "scared and very emotional over the ordeal . . . [e]specially at the thought of returning and it continuing."

The parent's position is that the racial and sexual name-calling of Student A and the incidents with Student B were never sufficiently addressed by the school. The parent's position is that, even though she withdrew Student A from the school in September of 2015, Student A is still having a hard time because many of the other students who attended the school also live in the area where she and Student A live. She told OCR that Student A is still being called names, harassed and bullied by the same students from her prior school who live nearby, that no one acknowledges that it is a problem and that she did not have any intention of re-enrolling Student A at the same school during the 2016-2017 school year but will keep her enrolled in her current charter school (Hawaii Technology Academy).

### Analysis and Conclusions of Law

The issue OCR investigated was whether the HDOE discriminated against Student A, in violation of Title VI and Title IX, by failing to take prompt and effective action to address harassment based on sex, race or color of Student A by other students between August and September of 2015.

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), provides that no person shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination based on race, color, or national origin. The regulation at 34 C.F.R. § 100.3(b)(1)(i) provides that a recipient may not deny an individual any service or other benefit provided under the program based on race, color or national origin. Title IX and its implementing regulations, at 34 C.F.R. § 106.31, prohibit discrimination based on sex. Under both Title VI and Title IX, school districts are responsible for providing students with a nondiscriminatory educational environment. Racial or sexual harassment of a student by other students can result in prohibited discrimination when peer harassment based on

sex or race, color, or national origin is sufficiently serious that it creates a hostile environment which denies or limits a student's ability to participate in or receive education benefits, services, or opportunities, and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.

Once a school district has notice of possible harassment between students based on sex, race or color, it is responsible for determining what occurred and responding appropriately. The school district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A school district may violate Title VI or Title IX and their implementing regulations if: (1) the harassing conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program; (2) the school district knew or reasonably should have known about the harassment; and (3) the school district fails to take appropriate responsive action. These steps are the school district's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school district to take action.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the school district must promptly conduct an impartial inquiry designed to reliably determine what occurred. If it determines that the conduct was sufficiently serious to create a hostile environment, the response must be tailored to stop the harassment, eliminate any hostile environment that has been created, and take appropriate steps to end the harassment and to prevent further harassment from recurring, including disciplining the harasser where appropriate. If the school district fails to respond appropriately, and its inaction causes a hostile environment to continue, it may be responsible for remedying the effects of its own inaction.

Regarding the harassment, the evidence established that Student A, a female Caucasian, began attending the school on July 28, 2015. The evidence further established that shortly after school began, Student A was harassed by other students on multiple occasions including verbal name-calling ("haole" "cunt" bitch") and other harassment, which were based on sex, race or color. The evidence also established that Student A was subjected to physical sexual harassment by another student on multiple occasions. With respect to the verbal and other harassment and with respect to the physical sexual harassment, the evidence established that these incidents were sufficiently serious to deny or limit Student A's ability to participate in or benefit from the school's educational program. The evidence suggests that Student A frequently cried about going to school and did not want to go to school. She missed education time by needing to be picked up early from school and by spending time in the counselor's office where she would be "safer," her work was stolen, and ultimately she withdrew from the school as a direct result of the unabated harassment. OCR concludes that Student A was subjected to harassment based on sex and race or color that was sufficiently serious to deny her educational opportunities and create a hostile environment.

Regarding whether school officials had notice of the harassment, the evidence established that school officials with a responsibility to take action knew or reasonably should have known about the harassment. The evidence established that Student A's parent reported verbal and other harassment to the counselor and the vice principal on August 20, 2015, and that Student A reported physical sexual harassment to a school counselor just prior to September 7, 2015. Student A also appears to have frequently visited her counselor's office during the first couple of weeks of September and reported further harassment. The evidence further established that the parent subsequently reported to the

school counselor by telephone on September 16, 2015, that the racial and sexual name-calling had continued, that she was concerned about Student A's safety, and that things seemed to be coming up daily or every other. The evidence also established that the parent reported details of the race and sex based name-calling to at least two teachers when she met with them to discuss the student's stolen class work. The evidence also suggests that school staff may have observed harassment of the student in hallways first hand. Based on the evidence, OCR concludes that the school district had notice of the race and sex based harassment.

Regarding whether the school took timely and appropriate responsive action, the evidence established that the school did not. Although the school counselor e-mailed Student A's teachers asking them to "keep an eye out" for the Student A, the evidence established that neither she nor the vice principal took steps to determine what occurred, who was involved, the full extent and nature of the incidents, and whether the harassment created a hostile environment for Student A. The e-mail sent to staff indicates merely that Student A "has been getting her personal items taken from her frequently" and that Student A had "some incidents with girls at school and people calling her names." The e-mail does not characterize the conduct as race or sex based "harassment" or the extent of the incidents, and does not appear to seek information from the staff about the incidents reported by the parent. Although the school counselor believes that she may have addressed Student A's teachers at a 6<sup>th</sup> grade team meeting, at least one of Student A's teachers indicated to the parent that she was shocked to hear about what was happening to Student A. It was only after the parent met with several of the teachers in September that Student A's teachers told the parent that they would be more attentive to the whether Student A was being harassed. The evidence established that the sex and race based harassing behavior continued throughout Student A's time at the school.

OCR found that the school did not begin to take appropriate action to specifically address the parent's concerns regarding harassment until after the parent e-mailed the principal and the Complex Area Superintendent on September 23, 2015. By that time, however, Student A could no longer tolerate having to attend the school and they decided to withdraw her and enroll her in a charter school. Based on the evidence, OCR finds that the school failed to take reasonable and effective measures designed to end the harassment of Student A, prevent its recurrence, and eliminate the hostile environment created by the harassment.

Because the evidence established that Student A was subjected to physical and verbal harassment based on sex, race and color, school officials knew about or witnessed the harassment and failed to take appropriate responsive action, OCR has determined that the HDOE failed to comply with the regulations implementing Title IX and Title VI.

As noted above, the HDOE entered into a resolution agreement with OCR under which it committed to take actions including:

- sending a letter to the parents and student indicating that it regrets that any of its actions or inactions may have caused the parents to feel that it was necessary to withdraw the student from the school; and
- offering to compensate the student's parents for all reasonable expenses that the parents have incurred as a result of the reports of harassment and the student's withdrawal from the school.

OCR will monitor the HDOE's implementation of the agreement and will terminate its monitoring and close the case when it concludes that the HDOE has fully and effectively implemented the terms and obligations of the agreement. If the HDOE fails to implement the agreement, OCR may initiate administrative or judicial proceedings to enforce specific terms and obligations of the agreement. Before initiating administrative (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings to enforce the agreement, OCR will give the HDOE written notice of the alleged breach and sixty (60) calendar days to cure the breach.

This concludes OCR's investigation of the complaint. These findings should not be interpreted to address the 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 an individual OCR case. 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. The complainant may have the right to file a private suit in court whether or not OCR finds a violation.

Please be advised that the HDOE may not harass, coerce, intimidate, discriminate or otherwise retaliate against any individual because he or she asserted a right or privilege under a law enforced by OCR or filed a complaint, testified, or participated in the complaint resolution process. If this happens, the individual may file a retaliation complaint with OCR.

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, OCR will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

We look forward to receiving the HDOE's first report about its implementation of the agreement. For questions about implementation of the agreement, please contact Timothy L. Sell, Senior Attorney, who will be monitoring the HDOE's implementation of the agreement, by telephone at (206) 607-1639, or by e-mail at [timothy.sell@ed.gov](mailto:timothy.sell@ed.gov).

Sincerely,

Kelli Lydon Medak  
Team Leader

Enclosure: Resolution Agreement

cc: CRCO Director (Via E-Mail)