



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS
SEATTLE OFFICE

December 31, 2008

Ms. Tina Mohr
73-4787 Halolani Street
Kailua-Kona, Hawaii 96740

Re: Hawaii State Department of Education
OCR Reference No. 10051060

Dear Ms. Mohr:

This is to notify you that the Office for Civil Rights (OCR) has completed its investigation of your above-referenced complaint against the Hawaii State Department of Education (HDOE). Specifically, the complaint alleged that:

1. students at Kealakehe Intermediate School (school) were subjected to race, sex, and disability harassment during the 2003-2004 and 2004-2005 school years;
2. students were subjected to retaliation after they reported incidents of race and sex harassment to school officials; and
3. HDOE did not enable parents to utilize its grievance procedures to address the complaints of sex, race, and disability harassment.

OCR conducted its investigation of race harassment and retaliation under the authority of title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the bases of race, color, and national origin. Title VI also prohibits retaliation against any individual for the purpose of interfering with any right or privilege secured by Title VI, or because an individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VI.

OCR has authority to investigate complaints of harassment on the basis of sex and retaliation under title IX of the Education Amendments of 1972, and to investigate complaints of harassment on the basis of disability and retaliation under section 504 of the Rehabilitation Act of 1973 and title II of the Americans with Disabilities Act of 1990.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Also, the regulations under Title IX, Section 504, and Title II require the designation of a person responsible for ensuring compliance with those acts and the establishment of grievance procedures that provide for prompt and equitable resolution of complaints of discrimination under those acts. HDOE is a recipient of federal financial assistance from this Department and is a public entity.

The issues investigated were:

1. Whether students were subjected to a hostile environment because of harassment on the basis of race, sex, or disability, or in retaliation for reporting such harassment and, if so, whether HDOE knew about race, sex, and disability harassment and retaliation and failed to promptly and effectively address it.
2. Whether HDOE failed to maintain a grievance procedure that provided the opportunity for a prompt and equitable resolution to complaints of sex and disability harassment and retaliation.

With regard to the issue of harassment on the basis of disability, our investigation did not substantiate the allegations of disability harassment and retaliation under Section 504 and Title II. OCR obtained information regarding several isolated instances of harassment or name-calling based on disability; however, we have determined that these reports are not sufficient to establish that a hostile environment based on disability harassment existed at the school during the time period in question.

With regard to the issue of whether students were subjected to harassment on the basis of race and sex and subjected to retaliation, we have concluded that HDOE failed to comply with Title VI and Title IX because school officials failed to take prompt and effective steps to stop harassment that school officials knew or should have known about. Also, with regard to HDOE's grievance procedures under Title IX, Section 504, and Title II, we have concluded that HDOE's procedures did not afford a prompt and equitable resolution for complaints of discrimination, harassment, and retaliation. After notifying HDOE of the compliance concerns that we identified, OCR entered into discussions with HDOE regarding a Settlement Agreement that would serve to voluntarily resolve those concerns. HDOE has made a commitment in the agreement to undertake action that, when completed, will fully address the compliance concerns identified by OCR.

Our findings of fact and conclusions (in which you are referred to as the complainant) are based on information provided by you and interviews with you, students, former students, parents, information provided by HDOE, and interviews with HDOE staff and former staff.

Findings of Fact - Issue No. 1

OCR investigated whether students were subjected to harassment on the basis of race, sex, or disability, or in retaliation for reporting such harassment and, if so, whether HDOE knew about the harassment and failed to promptly and effectively address it.

A. Hostile Racial and Sexual Environment

The evidence established that a racially and sexually hostile environment existed at the school during the 2003-2004 and 2004-2005 school years. OCR obtained substantial evidence that students experienced racially and sexually derogatory name-calling on nearly a daily basis on school buses, at school bus stops, in school hallways, and other areas of the school. Students were called names such as “f*****g haole,” “stupid haole,” “haole b***h,” “haole c**t,” “haole whore,” “micro,” “Jap,” and such students were told “go home,” “you don’t belong here,” and “we don’t want you here,” in conjunction with the term “haole” and racially derogatory terms relating to their race (primarily Caucasian, but also Asian) and sex. The term “haole” is commonly understood to mean a white or Caucasian person and, depending on the context in which it is used, it is sometimes disparaging.

Some school staff reported to OCR that racially and sexually derogatory name-calling was a serious problem and that there were frequent reports made to them by students or their parents. Some school staff testified that they were not aware of the serious nature and extent of the harassment reported to OCR but that they would not be surprised to hear that students were called names involving the use of racial terms.

The evidence established that a number of harassing incidents involved assaults or other physical harassment. Students and parents testified that students who were perceived to be Caucasian were assaulted, taunted into fighting, and pushed or tripped by other students who called them racially or sexually derogatory names and that they were subjected to other acts of harassment when other students would steal their book bags, backpacks, or other bags and, in some instances, dump or throw their bags out of school bus windows. The evidence also established that:

- most, but not all, of the students who were victimized were Caucasian;
- in most instances the primary perpetrators were “local” or non-white students;
- younger, smaller students who were light-skinned, blonde, or who otherwise were apparently Caucasians were more likely to be picked on than other students;

- terms such as “haole” were frequently used in conjunction with various derogatory terms and that such incidents occurred almost daily over a lengthy period of time;
- in some instances, derogatory terms (racial or sexual) were used in conjunction with physical assaults, theft, or destruction of property and such terms were used in a manner that was meant to convey that the person was unwelcome and unwanted;
- racially and sexually harassing incidents frequently took place in hallways, on school buses and at school bus stops, in restrooms, and in other areas;
- on school buses, other students would not let Caucasian students sit near the front of the bus where they could be closer to the driver; and
- one Caucasian student was repeatedly assaulted with a needle used for ear piercing and this type of harassment was reported by other students.

The evidence established that after reports of racial or sexual harassment were made to school officials, students who were the victims of the race and sex harassment were frequently subjected to retaliation by other students and that many students or parents stopped reporting such incidents because racial and sexual harassment would become even more severe after it was reported. The evidence also established that students and parents stopped reporting such incidents because, based on retaliation experienced following a report of harassment, they believed that school officials were not responding effectively. The evidence established that, in a number of instances, students were assaulted or threatened after reporting such harassment.

B. Notice to School Officials

We next considered whether HDOE officials had actual or constructive notice of the racially and sexually hostile environment and whether school officials had notice of retaliation by students against students who reported such harassment. We considered whether: (1) students or parents filed grievances or complained to school staff or other appropriate personnel about racial or sexual harassment; (2) responsible employees may have witnessed harassment; and (3) school officials may have received notice in an indirect manner, from sources such as a member of the school staff.

The evidence established that HDOE officials who had a responsibility to take steps to prevent harassment had actual notice of many of the incidents that occurred during the 2003-2004 and 2004-2005 school years and that were subsequently reported to OCR. A school administrator testified to the receipt of numerous reports from parents and students

of racially or sexually harassing conduct during this time period. The administrator testified to feeling powerless to take action to prevent the harassment because it was so prevalent and because some offending students believed that they would not be severely disciplined for the conduct. Another administrator testified that the school environment, during the 2003-2004 school year, was very bad and that staff morale was low. She stated that although the school had a zero tolerance policy for such harassment in effect, the reality was that such harassment was not dealt with effectively. Another former administrator testified that, during the 2003-2004 school year, racial and sexual harassment occurred so frequently that it was hard to control and that while the administration had a policy that called for disciplining students for such conduct, he could not think of an instance in which a student was disciplined for making a racial slur.

The evidence established that a number of students and/or their parents reported one or more incidents of race or sex harassment but that, because the students were retaliated against by the offending students or their peers for reporting these incidents, they stopped reporting the conduct to the school. The evidence also established that district officials investigated a physical assault in which a classmate of a student who was disciplined for racial and sexual harassment retaliated against the student who reported the harassment by pushing her down some stairs. The evidence established that such retaliation was commonplace and that, if school officials had been reasonably diligent in making a timely schoolwide inquiry, they would have concluded that such retaliation was common and that it contributed to the racially and sexually hostile environment that existed during the period in question.

The evidence established that school officials were aware that racial and sexual harassment was particularly severe on school buses and at school bus stops. During the 2003-2004 school year, bus service was provided by private companies under contract with the district. During the 2004-2005 school year, the district operated some school buses and the balance were operated by private companies. Several school witnesses testified that both HDOE and the private companies had difficulty finding school bus drivers and that the bus drivers were very reluctant to report disciplinary incidents on the buses. School officials also testified that their ability to respond to harassment concerns on school buses and at school bus stops was hampered by administrative obstacles and a shortage of staff resources.

The evidence established that school officials did not make a schoolwide inquiry regarding race and sex harassment and that, if they had done so, they would likely have learned of many incidents that went unreported to school officials and would have learned the extent to which many incidents of harassment related to race and sex. The evidence established that a proper schoolwide inquiry would have made it apparent to school officials that these incidents were racial and sexual in nature and that a hostile environment existed as a result.

The school maintains information on a database called Safe School Information System (SSIS) regarding disciplinary referrals. OCR reviewed SSIS data and disciplinary records from the school for the 2003-2004 and 2004-2005 school years. The evidence established that there were 45 referrals for conduct that involved sex or race harassment during the 2004-2005 school year and a similar number of referrals during the 2003-2004 school year. The school conducted a survey in January 2005 in an effort to determine how widespread the problem of bullying was. The survey did not specifically ask for information about bullying based on race, sex, or disability harassment. The school principal testified that he was concerned that some of the bullying that he had heard about might be based on protected class status and that he initiated the survey in an effort to establish a baseline for the scope of the problem. The survey indicated that approximately half of all students reported that they were bullied often, that 80-90% of the students reported seeing other students bullied at school, and that 15-20% reported that they were sometimes afraid to come to school because they feared being bullied.

The evidence also established that a relatively high number of students withdrew during the 2004-2005 school year to attend private schools and that a number of 5th grade elementary school students who were expected to enroll at the intermediate school as 6th graders did not enroll for that school year. OCR obtained information from a number of parents that students were withdrawn because of a racially or sexually hostile environment. The evidence established that a disproportionately high number of students who withdrew from the school or elected not to attend the school following elementary school were Caucasian.

The evidence established that HDOE has a procedure for obtaining information from parents at the time that they withdraw their children from school but that the procedure was not widely used. The evidence did not establish that school officials were specifically notified that a student was being withdrawn on account of race or sex harassment, but the evidence did establish that significantly fewer students were enrolling at the school or remaining at the school than the number projected by the district based on the school population in the area. The evidence established that no effective steps were taken by school officials to identify the reasons that students were withdrawing or to otherwise make diligent efforts to contact these families to determine why they withdrew.

C. Response by School Officials

OCR considered the response by school officials to the harassment by examining reasonableness, timeliness, and effectiveness of the response. We also reviewed whether the response was tailored to redress fully the specific problems experienced at the school and whether the response was reasonably calculated to prevent recurrence and ensure that affected participants were not restricted in their participation or benefits as a result of a hostile environment at the school. We reviewed the school's disciplinary policies, grievance policies, and any applicable anti-harassment policies and attempted to evaluate whether the

response was consistent with any established institutional policies or with responsive action taken with respect to similar incidents.

The evidence established that during much of relevant time period, the school was staffed by two vice principals, one of whom was in his initial year as an administrator and had virtually no experience dealing with race or sex harassment.

Parents and students reported that harassment on buses and at bus stops was rarely addressed effectively or promptly. Several reported that school administrators did not respond to their concerns at all or, when they did so, the response was not effective.

Several school employees, including school administrators, testified that they did not have the tools to deal with some of the harassment because of a school practice that limited discipline for even serious offenses to 10 days of suspension. They testified that HDOE had limited space available in alternative educational settings where serious offenders could attend school and that, as a result, some students were aware that they were unlikely to be expelled or to be severely disciplined.

The evidence established that, in some instances, school officials responded to reports of race and sex harassment by investigating the reports and by taking disciplinary action against the offending students. The evidence established that in many instances the response by the school did not effectively address the problem and that reports to school officials resulted in retaliatory or racially and sexually derogatory harassment that was more severe than the incident that was originally reported.

Prior to December 2004, school officials responded to incidents of racial and sexual harassment on a case by case basis but did not take action to respond to the overall hostile environment that existed at the school. The evidence established that school officials imposed discipline in some cases but that the discipline imposed in relation to individual incidents was not effective in addressing a schoolwide problem. School employees testified that before the current principal was assigned to the school in December 2004, the former principal was frequently absent due to health concerns and that, in general, the school staff suffered from low morale. Several employees testified that the school atmosphere was poor because there was no leadership provided by school administrators.

The evidence established that school administrators believed that they did not have the ability to impose discipline to remove serious offenders from the school because of limited alternative educational settings in the area where the school was located. Several counselors testified that their general approach in handling incidents involving race or sex harassment was to get the victim of the harassment together with the offending student or students and to help them “work it out” and in some instances the victim of harassment was left alone in a room with the offending student to help them work it out. A number of students and

parents of students who reported incidents of race or sex harassment reported a similar response from school officials. The evidence established that this approach for more serious incidents of harassment was not effective in preventing further racial and sexual harassment and retaliation.

OCR has determined that prior to December 2004, there was no coordinated effective systemic response to reports of sexual or racial harassment and retaliation and that, although the environment at the school since December 2004 has improved, HDOE did not promptly and effectively respond to concerns about race and sex harassment and retaliation that were reported to HDOE staff or that HDOE staff should have known about.

Analysis and Conclusions - Issue No. 1

OCR has determined that a racially and sexually hostile environment existed at the school during the 2003-2004 school year and during much of the 2004-2005 school year, that school officials with a responsibility to prevent such harassment knew or should have known about the hostile environment, and that such officials did not take prompt and effective action to respond to the environment.

In making this determination, we evaluated whether HDOE created or was responsible for a racially or sexually hostile environment, i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that was sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by a recipient. We evaluated whether students were discriminated against by HDOE on the basis of race or sex because HDOE effectively caused, encouraged, accepted, tolerated, or failed to correct a racially or sexually hostile environment of which it had notice.

In evaluating whether a hostile environment existed, we considered the severity of incidents that were reported to OCR. We considered: (1) the characteristics and circumstances of the victims, especially the victims' race, sex, and age; (2) the severity and the nature of the incidents and the regular and persistent nature of the incidents; (3) the fact that, in certain instances, students suffered injury to their persons and injury or loss of property in conjunction with the harassing conduct; (4) the size of the recipient and the location of the incidents; and (5) the fact that the conduct in some instances was perpetrated by a group of students rather than by an individual student. Based on these factors, we determined that a racially and sexually hostile environment existed at the school during the relevant time period.

We also determined that school officials with a responsibility to take steps to prevent racial and sexual harassment knew or should have known of the existence of the racially and sexually hostile environment. We based our determination on the overall number of

incidents reported, the testimony of several administrators that they were notified of a number of incidents of racial and sexual harassment, and the testimony of students and parents that they notified school officials of such harassment.

Having determined that a racially and sexually hostile environment existed and that school officials had notice of such an environment, we next evaluated whether the school officials took prompt and effective action in response. We determined that they did not.

We considered whether the response by HDOE included the imposition of appropriate disciplinary measures, the development or dissemination of HDOE policy prohibiting racial and sexual harassment, notice to affected students or parents of HDOE grievance or complaint procedures, the implementation of racial and sexual harassment awareness training, and the provision of counseling for the victims of racial and sexual harassment.

The evidence established that HDOE took some steps beginning in January 2005 to address the issue of race and sex harassment. The current school principal testified about the race and sex harassment awareness training conducted at the school, his efforts to create disciplinary options for serious offenders, and his efforts to obtain information about the extent of the problem by conducting a bullying survey.

With regard to whether HDOE imposed appropriate disciplinary measures in response to the incidents of which they were aware, the evidence established that in some instances, the school imposed discipline on the basis of individual incidents, including counseling to the offending students and their parents, short suspensions, or other discipline. The evidence established that the discipline imposed, given the nature of the incidents, was not effective in preventing further harassment and was not part of a broader plan that was calculated to prevent further harassment.

The evidence established that the measures taken were not sufficient to promptly and effectively prevent continuing incidents of race or sex harassment or retaliation. We have determined that given the severity and scope of the harassment, the fact that it involved assaults or other physical harassment, the frequency of occurrences, and the fact that the harassment continued over a long period of time, the school did not take prompt and effective steps to end the harassment. Certain responses that were warranted given the scope of the problem were not instituted by HDOE. HDOE did not offer psychological counseling to any affected students and no steps were taken to improve the tracking or monitoring the number of racial or sexual harassment incidents. HDOE has not taken other steps that would likely have been effective in addressing the environment that has existed at the school.

In addition, school employees, in particular school counselors, administrators, or the school safety and security officer have not received any significant training or education relating to the issue of preventing race or sex harassment. Finally, although some steps have been taken to address the serious concern about harassment on school buses or at school bus stops, HDOE's efforts to address harassment in those venues has been inadequate and school administrators have testified that they do not have the resources necessary to take more active steps to address their concerns.

With regard to whether school officials had notice that student-on-student retaliation was occurring, the evidence established that school officials had actual notice of several incidents of such retaliation and that if school officials had made a reasonable inquiry, they would have known that such retaliation was common.

Because the school did not take prompt and effective action to respond to a racially and sexually hostile environment of which school officials had actual or constructive notice, we have determined that HDOE did not comply with the requirements of Title VI and Title IX in this regard. Likewise, because students were routinely retaliated against and were frequently afraid to report incidents of race or sex harassment after reporting an initial incident, we have determined that HDOE did not comply with requirements of Title VI and Title IX in preventing such retaliation by students against other students.

Findings of Fact - Issue No. 2

OCR investigated whether HDOE failed to utilize grievance procedures that provided for prompt and equitable resolution of complaints of harassment and retaliation.

HDOE has a civil rights policy and complaint procedures that are published on its website by reference to Chapter 41 of the state's Administrative Rules. Chapter 41 prohibits discrimination on the bases of race, sex, and disability, prohibits retaliation, and contains a specific prohibition of harassment based on race, sex, or disability that is consistent with federal law.

The Chapter 41 procedures establish a complaint board for each school district, and require that a timely written complaint, on the HDOE complaint form, be filed with the district superintendent. The procedures require the district board to investigate and conduct a hearing on each written complaint and to provide the complainant and respondent a written decision within 10 days of concluding its hearing on the complaint. The procedures also permit individuals to pursue complaint relief with the federal or state government or to discuss concerns about discrimination with the school principal.

The two HDOE website references to Chapter 41 are in sections that are intended for new employees. There is no direct reference on the HDOE website for the complaint procedures and no reference to the identity of the individual who is responsible for coordinating the district's efforts to comply with federal civil rights laws or to an address or telephone number for any individual or office responsible for investigating such concerns.

The school website has been modified, since OCR initiated its investigation, to include information about race and sex harassment. Information regarding the individual who is responsible for coordinating HDOE's efforts to comply with Title IX, Section 504, or Title II was not included in the section on prohibited conduct, or in the section that refers to the state procedures under Chapter 41 relating to civil rights.

HDOE has an office called the Civil Rights Compliance Office (CRCO). There was no reference in Chapter 41 or on the HDOE or school websites to the CRCO, except in the employees section of the HDOE website. That reference identified CRCO as a source for information on employment-related concerns that have to do with civil rights. According to a representative of the CRCO, district superintendents who are notified of civil rights complaints under Chapter 41 usually contact the CRCO. She indicated that the CRCO could bypass the Chapter 41 process. She also indicated that the CRCO had not received any information regarding concerns about race or sex harassment against students during the 2003-2004 or 2004-2005 school years, except the concerns brought to their attention by the complainant.

The complainant testified to discussing reports of race and sex harassment with school officials on numerous occasions beginning in May 2004 (because of an incident at the local elementary school) until she withdrew her daughters from the intermediate school in January 2005. She testified that the first time any HDOE official informed her of HDOE's procedures under Chapter 41 was in December 2004 and that she was otherwise unaware of the HDOE complaint process. She also testified that the information came from the ombudsman's office at HDOE and that no school employee provided her with information about the process.

Several school employees testified that they were not familiar with HDOE's civil rights complaint procedures and that they had never received any training from HDOE regarding the investigation, identification, or prevention of race or sex harassment. One school administrator testified that information was provided to some parents regarding the state's procedures and that parents reported that they believed that the state would not investigate their concerns and that if they did, they would not take steps to prevent ongoing harassment or retaliation.

Analysis and Conclusions - Issue No. 2

With regard to the issue of whether HDOE failed to adopt and implement grievance procedures that provide for prompt and equitable resolution of complaints of harassment on the basis of sex or disability or complaints of retaliation, the regulations under Title IX, Section 504, and Title II require the designation of a person responsible for ensuring compliance with those acts and the establishment of grievance procedures that provide for prompt and equitable resolution of complaints of discrimination under those acts.

The Section 504 regulations, at 34 CFR 104.7(a), require recipients employing more than 15 people to “designate at least one person to coordinate its efforts to comply with this part.” Section 34 CFR 104.7(b) requires such recipients to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part.

The regulations under Title IX, at 34 CFR 106.8(a), requires a recipient to “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.” Section 34 CFR 106.8(b) requires a recipient to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.”

The Title II regulations, at 28 CFR 35.107(a), require a “public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.” Subsection 35.107(b) provides that such public entities “shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.”

Because HDOE policies and procedures did not contain information regarding the individual who is designated to coordinate and carry out its responsibilities to ensure compliance with federal civil rights laws, we have determined that HDOE did not comply with Title IX, Title II, and Section 504 in this regard. Also, because the policies and procedures in effect within the district and at the school during the 2003-2004 and 2004-2005 school years did not provide adequate notice of the procedures for the prompt and equitable resolution of complaints of violations of federal laws prohibiting harassment on

the basis of sex and disability, and because local level school officials were not sufficiently familiar with those procedures in order to direct complainants to other means for resolving such complaints, we have determined that HDOE did not comply with Title IX, Title II, and Section 504 with regard to this issue.

The enclosed agreement addresses the compliance issues that OCR identified in its investigation and, upon full implementation of the agreement, OCR will consider HDOE to be in compliance with Title VI, Title IX, Section 504, and Title II with respect to those issues. Based on the enclosed agreement, which OCR will monitor, OCR is concluding its investigation of the complaint as of the date of this letter.

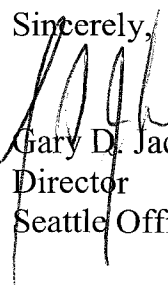
Please be aware that irrespective of our findings, pursuant to section 203 of Title II, you may file a private suit.

With regard to our determination on the allegation of disability harassment, if you have any questions or concerns about our determination, please consider raising them with the OCR staff person who handled your complaint, Timothy L. Sell. If you continue to have concerns after speaking with Mr. Sell, you may send a written request for reconsideration within 60 days of the date of this letter. Your reconsideration request should be directed to:

Gary D. Jackson, Director
U.S. Department of Education
Office for Civil Rights
915 Second Avenue, Room 3310
Seattle, WA 98174.

You are encouraged but not required to contact Mr. Sell before filing a request for reconsideration. Contacting Mr. Sell does not extend the 60-day timeline for filing a written request for reconsideration. A request for reconsideration should be as specific as possible, focusing on factual or legal concerns that could change our determination.

If you have any questions about his letter, please contact Timothy L. Sell, attorney, by telephone at (206) 220-4780 or by e-mail at timothy.sell@ed.gov.

Sincerely,

Gary D. Jackson
Director
Seattle Office

Enclosure: Settlement Agreement