



NJPSAFE

— LEGAL ONE —

*Law, **E**thics and **G**overnance for **A**ll **L**eaders, including an
Overview of **N**ew and **E**merging Issues*

Keansburg: HIB Law Update for Parents/Caregivers

March 27, 2023

John Worthington, Esq.,
LEGAL ONE Education Law Specialist

©Copyright 2023 Foundation for Educational Administration, Inc. – LEGAL ONE

DISCLAIMER

This presentation is intended as a summary of law only and is not meant as legal advice. Please consult your attorney to obtain legal advice.



Participants are authorized to use the LEGAL ONE materials provided in this training to offer turnkey training within the respective participant's school district or place of employment, provided that participants provide proper credit to LEGAL ONE for having developed said materials and further provided that such turnkey training is offered at no charge.

Presentation Materials

Today's document(s) can be accessed at

<https://tinyurl.com/LO-KB-032723>



This folder can be accessed for 30 days from the session date.

Please download all files before the link expires.

Overview

- HIB Definition and Laws
 - Bullying v. Conflict
 - School Safety/Climate Team
 - Legislative Update
- LGBTQ Students and Free Speech Issues
- Receiving Allegations and Launching an HIB Investigation
- Case Law

HIB DEFINITION

HIB Defined

- Can include gestures, written, verbal & physical acts, & electronic communication
- May be single or series of incidents
- Can take place on school property, school-sponsored function or school bus, or off school grounds

HIB Defined

- **The gesture, act or communication is reasonably perceived to be motivated by any actual or perceived characteristic:**
 - Race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, mental, physical or sensory disability or any other distinguishing characteristic
 - ***“Other Distinguishing Characteristic” is broadly interpreted***
 - *Vegetarianism, lice, quiet, new kid, parents, etc.*
 - *HOWEVER, need evidence to support conclusion regarding characteristic, can’t simply check “Other”*

New Jersey Case Law – Can't Assume Characteristic

C.S. o/b/o J.S. v. Bd. of Ed. of the Twp. of Lacey *Commissioner 10/16/19*

- Commissioner reversed BOE determination that student committed an act of HIB when she plugged her ears and made gestures about needing earplugs while another student was singing a solo in music class. “I’m going to need ear plugs to get through this part of the concert.” Conduct did not meet statutory definition of HIB.
- Petitioner claimed that she had trouble with noise hypersensitivity, and that her actions had nothing to do with the other student.
- **Alleged conduct appears to stem from the students’ past personal relationship and was not motivated by any actual or perceived distinguishing characteristic.**

New Jersey Case Law - Characteristic

C.S. o/b/o J.S. v. Bd. of Ed. of the Twp. of Lacey

Commissioner 10/16/19

- Board set forth two potential distinguishing characteristics; perceived sexual orientation and weaker and more vulnerable female. **Insufficient evidence presented.**
- Nothing in conduct during chorus class raised the issue of sexual orientation or “a perception related to a sexual characteristic”, nor were the alleged words and/or actions related to the “perceived status of a weaker and emotionally vulnerable female.”

HIB Defined

The Gesture, Act or Communication:

Substantially disrupts/interferes with the orderly operation of school or rights of other students

- Substantial disruption only has to be for one student. Can be dramatic or more subtle (change in demeanor, increased fear/anxiety)
- Needs to be more than a momentary annoyance

HIB Defined

- One of these three:
 - Has effect of--or creates reasonable fear of-- physical/emotional harm to student or damage to student's property, or
 - Has effect of insulting/ demeaning any student or group of students, or
 - Creates a hostile educational environment for the student by interfering with student's education or by severely or pervasively causing him/her physical or emotional harm.

The Road to HIB May be Paved with Good Intentions!

- The Road to HIB may be paved with good intentions! (K.C. v. Montgomery Twp. SD, Aug. 11, 2016) –
 - Students were concerned about a friend and thought she might have a possible eating disorder
 - When student denied having a problem, her friends then went to her boyfriend
 - Determined that student's friends committed HIB despite their good intentions
 - Future implications?

Some Students Are More Resilient

- If the target is resilient, the behavior may not be HIB (D.K. v. Readington SD , Nov. 11, 2016)
 - School spirit day, student did not wear yellow
 - Another student commented on this and made negative comment that alluded to the student being Asian
 - Other students on the bus called the student a “no it all” and said they hoped the student would fall and get brain damage
 - Found NOT to be HIB, no substantial disruption for comment about being yellow, and comments on bus were part of ongoing student conflict

Case Law – Access to Records

Letter to Wachter, December 7, 2017

- Pennsylvania school district was advised by the U.S. Department of Education Office of the Chief Privacy Officer that a parent had a right to inspect video footage showing her son's role in an on-campus hazing incident, even though the parents of other students did not consent to disclosure of their child's images in the video.

FERPA—Permissible Release of Education Records Without Consent

- Education records may be released **without consent** in the K-12 context:
 - **To school officials with legitimate educational interests.**
 - *Note:* A contractor, consultant, volunteer or other party to who the school has outsourced institutional services may be considered a school official *if* the person performs an institutional function or service for which the school would otherwise use employees; is under the direct control of the school with respect to use and re-disclosure of records; and is subject to FERPA's requirements governing use and re-disclosure of personally identifiable information
 - To schools in which a student seeks to enroll.
 - To certain government agencies for specific purposes, and other purposes specified in federal regulations.
 - 20 U.S.C. §1232g; 34 C.F.R. §99.31.

Unpacking the HIB Definition

Bullying v. Conflict

- During a conflict, name-calling, threats and other conduct that might look like bullying can occur. However, a conflict and bullying are very different.
- Unlike bullying, during a conflict people are equally involved in some type of disagreement. Conflict is considered mutual, meaning everyone is more or less evenly involved.
 - HIB is primarily one-sided, but not always 100% one-sided
 - Incident may be HIB first, then become conflict or vice versa

HIB & Adults

- HIB is not:
 - Adult v. Adult
 - Issues for the Human Resources Department and/or AAO.
 - Student Aggressor v. Adult Victim
 - Code of Conduct Violation / Possible HR/AAO Issue
- HIB may exist if:
 - Student v. Student
 - Student Victim v. Adult Aggressor
 - Remember both may also require AAO Involvement and/or be Code of Conduct Violations

Reporting Suspected Bias-Related Acts and the Link to Suspected HIB

- Must report to local law enforcement and bias investigation officer for county prosecutor's office whenever school employees "develop reason to believe a bias-related act has been committed or is about to be committed."
- "Bias-related act" means any act "that is motivated in whole or in part by racial, gender, disability, religious, sexual orientation, or ethnic prejudice."
- Note that the reference to "gender" extends to acts motivated by prejudice related to gender identity or gender expression.
- Does NOT have to rise to level of a crime.
- Includes **any** allegation of HIB involving one of the above protected classes.
- See N.J.A.C. 6A:16-6.3(e)

What If ...

- Student brings issue to the district's attention but asks them NOT to investigate?
- What if a parent asks the district NOT to investigate?
- What if student (or parent) refuses to provide any written information? Refuses to cooperate in any interview?
- Why might a district be given information by a student or parent AND then asked NOT to investigate?

Communicating with Parents

- Critical to communicate throughout the process
- Notice that their child may have been involved in incident
- Explanation of investigation process
- Notice when investigation completed, and when the BOE will be advised
- Explanation of due process rights
- Review parental rights to access info from investigation
- HOWEVER, no right to be present for student interviews – See Goss v. Lopez

Upon Learning of Alleged Incident

- Principal informs parent verbally
- Ideally before the student goes home
- Parent should be informed if:
 - Student was alleged victim or aggressor
 - Actual or perceived characteristic
- Explain HIB Investigation and Appeal Process

If Parent Has Relevant Information

- Witnessed or aware of incidents outside of school involving students in question
- Witnessed or aware of social media/electronic communications
- Knowledge of other possible witnesses
- Impact on student demeanor during and since alleged incident to help determine if there was substantial disruption

After BOE is informed

- Must provide written notice to parent within 5 school days of the BOE being informed (before BOE votes)
- Advise parent of right to request, within the next 60 days, a hearing before the BOE
- Provide hearing within 10 calendar days if requested to do so by parent

BOE Hearing for Parent

- Closed session
- Opportunity for parent to present any evidence it wishes BOE to consider
 - Factual evidence on alleged incident
 - Mitigating factors/Context
 - Evidence regarding investigation process
- No requirement to allow parent or attorney to cross examine witnesses

Recently Approved Legislation, P.L. 2021, c.338 – S1790

- Drafted in response to tragic death of 12-year-old student by suicide
- Signed into law on **January 10, 2022**
- Significantly improved based on work of NJPSA's Government Relations Team
- Impacts parental rights and responsibilities, district protocols and reporting obligations, defines range of potential responses to acts of HIB and creates new State-level position

S1790

- If student commits crime of “cyber-harassment,” creates option for municipal court to order that a minor, under age 16, along with a parent or guardian, attend a class or training to reduce tendency towards such behavior or raise awareness of dangers associated with cyber harassment.
- Provides that parent or guardian may be fined up to \$100 for a first offense, and up to \$500 for subsequent offenses for failing to comply with court order
- Creates potential for parent or guardian to be liable in a civil action if parent demonstrates willful or wanton disregard in the exercise of supervision of minor

S1790 (cont'd)

- If school district policy permits preliminary determination to be made on whether to launch HIB investigation, then:
 - Data on the number of times an incident was determined to be outside definition of HIB and not investigated
 - NJDOE shall review data as part of state monitoring process
 - Supt must be notified in writing of each determination and has authority to order HIB investigation

S1790 (cont'd)

- Provides parameters for responding to first, second or subsequent acts of HIB by a student
 - 1st offense – copy of investigation results placed in student record, student may be subject to remedial measures (counseling, behavior intervention services, discipline determined by principal in consultation with appropriate staff)
 - 2nd offense – Same as 1st offense
 - 3rd offense – Same as 1st offense PLUS school principal required to develop individual student intervention plan which shall be approved by superintendent (may require parent and student to complete a class or training program)
 - Supt. and principal shall consult with law enforcement regarding reporting obligations under MOA

S1790 (cont'd)

- Requires districts to include on website the current version of the NJDOE document – Guidance for Parents on the Anti-Bullying Bill of Rights
- Creates position of School Climate State Coordinator in NJDOE

S1790 (cont'd)

- District must keep written record of date, time and manner whenever district notifies parent or guardian about alleged HIB incident
- Written reports of alleged HIB filed by staff member or contracted service provider shall be filed on a numbered form developed by NJDOE
- NJDOE also required to develop form that students, parents or guardians may be able to use to report incidents confidentially
- Form submitted promptly by principal to superintendent EVEN IF preliminary determination made not to do HIB investigation
 - Kept on file at school, NOT part of student record unless incident results in discipline for other reasons or otherwise required to be maintained (educationally relevant)
 - Must make forms available for online submission as part of anonymous reporting

S1790 (cont'd)

- **Redacted copy of the form** that removes all student identification information shall be **confidentially shared with the BOE** after the conclusion of the investigation, **if a hearing before the BOE is requested by a parent or guardian.**
 - Clarifies that Incident Report Form must be shared with BOE if hearing is requested AND must be redacted
- School district shall provide means for parent or guardian to complete an **online numbered form developed by the NJDOE to confidentially report** an HIB incident.

Other Legislation Impacting HIB

- Report Card, demographic data tracking
- Student Suspension
- Student Surveys
- Curriculum Mandates

New Legislation – Reporting Discipline Data on School District Website

- **P.L. 2021, c.387** – Requires School Report Card to include information on the number, percentages, and demographics of students who receive one or more suspensions, **or are subject to physical restraint or seclusion techniques**, or who were reported to or arrested by law enforcement pursuant to the MOA between Education and Law Enforcement.
- *Note Comprehensive Equity Plan for 2022-25 must be in place prior to July 1, 2023 **if** district took option of extending CEP by 1 year. **Can be extended to Jul1 2024 if the district makes a request.***

New Legislation – Student Suspension

- **P.L. 2019, c. 479 (1/21/2020)** - Requires principal convened meeting between student and appropriate **school personnel** after multiple suspensions or proposed expulsion from public school to identify behavior or health difficulties. Effective immediately.
 - **Personnel** - school psychologist, school counselor, school social worker, student assistance coordinator, or member of the school's intervention and referral services team.
 - Principal may convene meeting after first suspension if deemed appropriate.

New Legislation – Student Suspension

P.L. 2019, c. 479 (1/21/2020)

- Purpose of the meeting shall be to identify any behavior or health difficulties experienced by the student and, where appropriate, to provide supportive interventions or referrals to school or community resources that may assist the student in addressing the identified difficulties.
- Requirements DNA to removal from regular education program pursuant to Zero Tolerance for Guns Act or other instance in which the safety and security of other students or school staff requires the student's immediate removal.

Role of School Safety/Climate Team

- Develop, foster, and maintain a positive school climate by focusing on the ongoing, systemic processes and practices in the school and to address school climate issues such as harassment, intimidation, or bullying

Role of SST (Continued)

- 1) receive any complaints of harassment, intimidation, or bullying of students that have been reported to the principal;
- 2) receive copies of any report prepared after an investigation of an incident of harassment, intimidation, or bullying;
- 3) identify and address patterns of harassment, intimidation, or bullying of students in the school;
- 4) review and strengthen school climate and the policies of the school in order to prevent and address harassment, intimidation, or bullying of students;

Role of SST (cont'd)

- 5) **educate the community**, including students, teachers, administrative staff, and parents, to prevent and address **harassment, intimidation, or bullying** of students;
- 6) participate in the training required pursuant to the provisions of P.L.2002, c.83 (C.18A:37-13 et seq.) and other training which the principal or the district anti-bullying coordinator may request;
- 7) **collaborate with the district anti-bullying coordinator** in the collection of district-wide data and in the development of district policies to prevent and address harassment, intimidation, or bullying of students; and
- 8) execute such other duties related to harassment, intimidation, and bullying as requested by the principal or district anti-bullying coordinator.

LGBTQ STUDENTS AND FREE SPEECH ISSUES

Cases Dealing with LGBTQ+ Status

- Greater likelihood to be target for HIB
- Issue complicated by need to avoid potential “outing” of student to parents, others
- Need to address aggressors who claim First Amendment right to express religious views

Landmark NJ Supreme Court Case

- L.W. v. Toms River case – NJ Supreme Court made clear that NJLAD protects students as well as staff. Case involved student bullied over several years as student moved from elementary school, to middle school, to high school, due to perceived sexual orientation. District held liable for failure to take measures **reasonably calculated to end the harassment when it knew or should have known of the harassment.**
- Note that plaintiff does not have to prove INTENTIONAL discrimination or even deliberate indifference.

Taking Into Account the Circumstances of Incident when Contacting Parents

Best Practice

- When applicable, inform parent or guardian that the alleged HIB involves perceived sexual orientation or gender identity/expression, **but do not share actual sexual orientation or gender identity/expression as part of HIB notice**
- Be aware of other sensitive issues that may arise (interracial relationships, disputes related to religion, etc.)
- Ask the student about any issues in the home that the district should be aware when notifying parents and consider student requests regarding parental notice

Transgender Students and Staff

New Jersey law (NJLAD) applies to students and staff members

- Individuals shall be admitted to sex-restricted dressing rooms and restrooms based on their gender identity or expression. N.J.S.A. 10:5-12(f)(1)
- An employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression. N.J.S.A. 10:5-12(p)

DOE Transgender Student Guidance

- NDOE Guidance:
 - <https://www.nj.gov/education/safety/sandp/climate/docs/Guidance.pdf>
- Definitions
- Student Gender Identity – Parent consent, court order name change not required; parent notification
- Name and pronoun use, student ID, student dress
- Safe and Supportive Environment – staff training, equal access, HIB, social and emotional learning
- Confidentiality and Privacy
- Student Records – gender identity v. birth name
- Student Activities
- Restrooms and locker rooms

Transgender Guidance Challenges

- Terminology – e.g., nonbinary, gender identity, sexual orientation, use of “they”
- Records – No need for legal name change to change records, including transcript, IEP, diploma, etc.
- Parents – No parental consent required, no disclosure to parent if child does not want parent to know
- Restrooms/Locker Rooms – right to access based on gender OR if **student prefers** offer option of gender-neutral restroom / changing area
- Athletics – Right to participate based on gender

Gregory Janicki v. Washington Twshp SD – 8/31/2021

Facts:

- Conduct Unbecoming Charges & Other Just Cause Charges filed against tenured Music Teacher.
 - Allegations that he skipped training sessions/meetings re: LGBTQ issues, and other unprofessional behavior in relation to the SD's LGBTQ policies. He also engaged in conduct that is “antagonistic and discriminatory towards students and coworkers in the LGBTQ community, causing turmoil with staff members, and putting the SD at risk for violation state/federal anti-discrimination laws and directives.”
 - Progressive Discipline demonstrated – Increment Withholding
 - See also 3/25/21 Prior Arbitration Decision – MTD granted

Decision: Sustained. Teacher Dismissed.

P.L. 2021, c.32 - What the Statute Says

C.18A:35-4.36a Curriculum to include instruction on diversity and inclusion.

1. a. Beginning in the 2021-2022 school year, each school district shall incorporate instruction on diversity and inclusion in an appropriate place in the curriculum of students in grades kindergarten through 12 as part of the district's implementation of the New Jersey Student Learning Standards.
 - b. The instruction shall:
 - (1) **highlight and promote diversity, including economic diversity, equity, inclusion, tolerance, and belonging in connection with gender and sexual orientation, race and ethnicity, disabilities, and religious tolerance;**
 - (2) examine the impact that unconscious bias and economic disparities have at both an individual level and on society as a whole; and
 - (3) encourage safe, welcoming, and inclusive environments for all students regardless of race or ethnicity, sexual and gender identities, mental and physical disabilities, and religious beliefs.
 - c. The Commissioner of Education shall provide school districts with sample learning activities and resources designed to promote diversity and inclusion.
2. This act shall take effect immediately. Approved March 1, 2021

New Legislation – AAPI Instruction

- **P.L. 2021, c.416** – Requires boards of education to include instruction on the history and contributions of Asian Americans and Pacific Islanders in an appropriate place in the curriculum grades K-12. Must adopt inclusive instructional materials and seek input from Commission on Asian Heritage. Goes into effect for the 2022-23 school year.

Student Discipline – First Amendment Rights

B.L., a minor, by and through her father Lawrence Levy and her mother Betty Lou Levy v. Mahanoy Area School District, Third Circuit C of A, June 30, 2020, U.S. Supreme Court, Decided 6/23/2021

- A frustrated cheerleader after having only made the JV team posted a picture to “snapchat” with a caption “F**k school f**k softball f**k cheer f**k everything.”
- The post circulated at least among her 250 “friends” on her feed.
- Someone ultimately took a screenshot of the post and circulated it further — eventually making its way to the coaches, who then removed her from the team, claiming a violation of a school policy relative to extracurricular activities.
- Student challenged the discipline, school district upheld the discipline.
- Student brought action against school district, alleging that suspension based on her social media post, made on a Saturday, violated her First Amendment rights.

Student Discipline – First Amendment Rights

B.L., a minor, by and through her father Lawrence Levy and her mother Betty Lou Levy v. Mahanoy Area School District, Third Circuit C of A, June 30, 2020, Petition for Certiorari granted 1/8/2021, Oral Argument 4/28/2021

U.S. Supreme Court

- Affirmed Decision that the student's Free Speech Rights were violated
- Provided a different rationale than the 3rd Circuit Court of Appeals

What If ...

- Levy had posted on social media a comment that “I am way better than half the students who made varsity”?
- Levy alleged that the cheerleading coach “plays favorites” with “certain girls, especially if they are blonde”?
- Levy stated that one of the students who made the varsity cheerleading squad is “an ugly loser”?

Religious Expression SCOTUS

- [Kennedy v. Bremerton SD](#) (June 27, 2022)
- Case involved coach who engaged in prayer immediately after games on the 50-yard line
- District determined not to renew coach due to his failure to follow district policy and continuing to engage in religious speech in violation of Establishment Clause
- U.S. Supreme Court determined that district violated rights of coach under First Amendment

Religious Expression (cont'd)

- Court stressed that speech was during time that other staff members were allowed to engage in personal business
- Court stressed there was no evidence of coercion of students
- Court rejected claim that reasonable observable would conclude that prayer amounted to state endorsement of religion

What If a staff member...

- Wishes to wear jewelry with religious connotations
- Wishes to incorporate discussion of religion into the social studies curriculum
- Wishes to share personal information with students in class about attending a family ceremony with religious connotations
- Wishes to serve as a club advisor for a religious student club
- Wishes to lead students in prayer prior to an athletic event

Staff Speech Issues

“Pickering Balancing Test”

- Did the statement concern a matter of general public concern?
- Was the employee speaking as a private citizen or during the course of his duties?
- Was the statement likely to disrupt a close working relationship?

RECEIVING ALLEGATIONS AND LAUNCHING AN HIB INVESTIGATION

Investigation Steps



- **KNOW YOUR STANDARD OPERATING PROCEDURES!**
- HIB complaint filed (Staff must report incident on day it occurs, follow up in writing)
- Principal initiates investigation and responds to Code of Conduct issues (Key Q - Is this an allegation of HIB?)
- ABS leads investigation (10 school days to complete)
- ABS writes HIB Report (within 2 school days of completing investigation)
- Superintendent signs off on HIB response
- Board informed of incident
- Parent/Guardian notified of outcome, right to hearing (within 5 days of school board being informed)
- Hearing occurs if requested
- BOE votes to affirm, reject or modify
- Parent retains rights to appeal, pursue other legal avenues

Receiving HIB Allegations & Launching an HIB Investigation

- What was said or written?
- Who said or wrote it?

What was Said or Written?

- Did the reporter specifically allege that a student was “harassed,” “intimidated,” or “bullied”?
- If so, does the school district have a local policy that allows for an Initial Threshold Assessment?
- Even if the words “harassment,” “intimidation,” or “bullying” were not used, does the description of the alleged incident (if true) meet or potentially meet the criteria for HIB under NJ law?

Receiving Allegations

- Students
- Parents
- Staff Members
- Law Enforcement
- Others (shared time schools, APSSDs, community organizations, other school districts)
- Anonymous

Students

- May report to any staff member or volunteer
- May report incident verbally and/or in writing
 - Always try to get a written student statement
- May describe allegations without using the words “harassment” “intimidation” or “bullying”
- **No deadline on making a report**
- May report incident anonymously

Anonymous Student Reports

- Must have an option for anonymous reporting in every school
- Students need to be made aware of this option
- May have physical option and/or Apps that allow for anonymous reporting
- Cannot conclude that HIB occurred based solely on anonymous report
- Some anonymous reports may be too vague to pursue
- If a school or district has not received any anonymous reports over an extended time period, may raise questions about whether a viable system exists

Parents

- Should be encouraged to submit written allegations, but can't be required to do so
- If parent describes alleged behavior that meets HIB definition, investigation must be launched, even if parent doesn't want that to occur
- Parents should be advised about the law, district policy and their due process rights
- Information should be prominently displayed on website on how to report alleged HIB

Staff Members

- Must report incident verbally to the principal the same day it occurs
 - E.g., alleged incident occurs during evening school function, needs to be reported to principal or designee that evening, not the next day
 - Ideally verbal report should happen in short time span, not waiting many hours (district is allowed to have higher standard if it chooses)
- Must follow up in writing within 2 school days of the verbal report
 - Ideally written statement should be provided same day or next day
- Cannot report anonymously
- May trigger required report by district to law enforcement

Law Enforcement

- Under MOA, law enforcement is expected to report information it learns to schools regarding potential HIB incidents
- If incident involves potential criminal offenses, law enforcement has right to take the lead in investigation and require district to stay its HIB investigation
- Must be notified about any bias-related act (local law enforcement and county prosecutor's office)

2019 Revised Memorandum of Agreement

4.4.6 Coordination of HIB and Criminal Investigations

- HIB investigations should be suspended or “stayed” when deemed appropriate and requested by LE
 - Must be an affirmative request from LE
 - SD must immediately memorialize the request in writing
 - SD must advise parent/guardian of alleged victim/perpetrator:
 - Of Law Enforcement’s request to stay
 - That time limit to file a complaint with OCR is not delayed due to LE’s request for a stay
 - If parent/guardian objects, LE must “seek appropriate legal assistance from the County Prosecutor’s Office to obtain a formal Court Order compelling the stay.”

Role of Approved Private Schools for Students with Disabilities (APSSDs)

Prior Regulation

- Indicates that APSSDs are governed by student discipline rules that apply to all public schools and holds PSSDs to same requirements as all boards of education.

New Regulation

- Provides specific HIB rules for APSSDs and requires adoption of HIB policy.
- Requires sending district BOE of the alleged victim to take the lead in investigating incidents involving APSSD students when incident occurs:
 - On BOE school bus,
 - At school-sponsored function and/or
 - Off school grounds.
- Requires APSSD staff to cooperate with sending district in investigation.

Role of Approved Private Schools for Students with Disabilities (APSSDs)

Best Practice

- Review data on number of reported cases
- Confirm that APSSDs have an ABS in place and that they understand their obligations
- Require appropriate personnel from APSSDs to be present and participate when questioning students
- When questions exist as to whether or not the alleged HIB started in school at the APSSD OR started on the bus or off school grounds conduct a joint investigation, rather than separate parallel investigations

Others

- Vendors
- Shared time schools
- Other placements for students under IDEA
- Community /private organizations
- Other school districts
- Other witnesses

CASE LAW

New Jersey Anti-Bullying Case Law

New Jersey Staff Speech Issues on the Internet

- Union Twp case - Knox - Homosexuality breeds like a cancer
- Paterson case – In re O’Brien - Warden to future criminals
- Czaplinski case – Security guard sued after being fired for racist comments regarding shooting of police officer

New Jersey Anti-Bullying Case Law

Dickerson v. Wallkill Valley Regional Bd. of Ed., U.S. Dist. Ct. N.J., 6/1/2020

- Allegations that BOE, principal and superintendent violated NJLAD, U.S. Civil Rights Act and N.J. Civil Rights Act. Defendants motion to dismiss denied.
- HS basketball game at which it was alleged that spectators made monkey sounds, shouted the “n” word and “monkey” at student during the game. Student allegedly suffered psychological distress, PTSD, anxiety and depression.
- **Principal/superintendent’s failure to respond to fans and decision to eject student’s father may have been so unreasonable so that one could infer that principal/superintendent acted with deliberate indifference.** BOE/adm allegedly not HIB compliant.

New Jersey Anti-Bullying Case Law

**Dickerson v. Wallkill Valley Regional Bd. of Ed.,
U.S. Dist. Ct. N.J., 6/1/2020**

- Third circuit has not ruled conclusively on issue of whether there is a clearly established 14th amendment right protecting a student from an administrator's deliberate indifference to racial harassment by other students.
- **Argument that principal/superintendent knew of an incident of HIB and failed to take sufficient action to minimize or eliminate the HIB; principal/superintendent may be subject to disciplinary action. *N.J.S.A. 18A:37-16***
- Principal/superintendent may have individual NJLAD liability. Was aware of racially motivated harassment, present while it was ongoing and he did nothing to put an end to it; was deliberately indifferent. Duty as superintendent to respond.

New Jersey Case Law – Equally Mean Coach

J.B. o/b/o J.B. v. Bd. of Ed. of the No. Valley Reg. H.S. District,
Commissioner 4/13/2021

- Parent **alleged that soccer coach bullied her son because of his commitment to academics.** After review of the ABS report which found no HIB violation, the Board concluded that the HIB investigation failed to demonstrate that the student was a protected class member or possessed an actual or perceived distinguishing characteristic which served as motivation for the alleged bullying. Parent asserted that student's commitment to academics and his status as a student were distinguishing characteristics.

New Jersey Anti-Bullying Case Law

J.B. o/b/o J.B. v. Bd. of Ed. of the No. Valley Reg. H.S. District,
Commissioner 4/13/2021

- ALJ determined that the facts in this case failed to reveal that the coach targeted the student for his academic commitment; **now-former coach's questionable treatment of his players was largely universal**; not all aggressive, harmful, or demeaning conduct constitutes a HIB.
- Student's **status as a student alone is not a distinguishing characteristic under ABRA.**
- ALJ concluded that the Board did not act in an arbitrary, capricious, or unreasonable manner in finding that no HIB occurred. Commissioner agreed and dismissed the petition.

New Jersey Anti-Bullying Case Law

Melanie Sohl v. Board of Education of the Town of Boonton, Morris County, 5/18/2021, (#106-21)

Facts:

- Tenured Teacher allegedly said to an overweight student who was walking slowly to the front of the classroom, “[i]f there was a cupcake up there, you would move faster” in addition to other food-related comments.
- Student reported the Teacher’s comments
- Defenses:
 - Petitioner maintained that she had a good relationship with the student in question and did not commit an act of HIB.
 - Teacher claimed that she “did not realize that the student might have taken the comment to mean anything other than a motivating comment to get them to the board quicker.”
 - Further, she contended that the Board failed to comply with the due process requirements
- Teacher appealed SD’s determination of HIB violation
 - She received a letter of reprimand & Sensitivity Training

New Jersey Anti-Bullying Case Law

[Melanie Sohl v. Board of Education of the Town of Boonton, Morris County, 5/18/2021, \(#106-21\)](#)

Commissioner Holding

- Teacher's Due Process Rights had not been violated
- Agreed with the ALJ that the Teacher was not entitled to a trial-type adversarial hearing with the opportunity to cross-examine witnesses.
- Remanded to OAL for a hearing on the merits
 - Grievance issues re: Discipline

New Jersey Anti-Bullying Case Law

L.G., on behalf of minor child, J.A. v. Board of Education of the Borough of Metuchen, Middlesex County, 4/29/2021, (#97-21)

- SD determined that student had committed an act of HIB when he called a Black Student the “N-word.”
- **Parents suggested that their son’s confession of making the comment was coerced**
- Student that the alleged comment was aimed at was angered by the comment
- ALJ determined:
 - Student admitted using a racial epithet and that the Board’s HIB investigation showed that the epithet was directed at an African American student;
 - Student’s comments and actions **were reasonably perceived as being motivated by a distinguishing characteristic**; and
 - Petitioner has failed to prove that the Board acted in an arbitrary, capricious or unreasonable manner in determining that the student’s behavior constituted HIB.
- Commissioner Affirmed the ALJ Decision

New Jersey Anti-Bullying Case Law

W.H. o/b/o Z.A. v. BOE of the City of Beverly, Commissioner 10/21/2021

- **Parents appealed BOE finding that fifth grader was not the victim of HIB. Other students said mean things to student after his absences from school caused them to lose an attendance contest and miss out on a pizza party. Students made comments about a smell in the cafeteria that Z.A. felt were directed toward him.**
- **ALJ found that investigation into the alleged incidents of HIB was properly carried out by the Superintendent/Principal. There was a “back and forth” of unkind words between Z.A. and the other students regarding the effect of his absences on the class’ standing in the March attendance contest; no evidence that Z.A. was targeted due to a distinguishing characteristic about him, his race, his gender, his ethnicity, or any element of the HIB statute. Evidence showed that the incident regarding Z.A.’s attendance represented a conflict between students that did not constitute HIB.**

New Jersey Anti-Bullying Case Law

W.H. o/b/o Z.A. v. BOE of the City of Beverly, Commissioner 10/21/2021

- No evidence to dispute Board finding that “smell” comments were unsubstantiated based on surveillance video and interviews with witnesses.
- ALJ concluded that the petitioner did not meet her burden of demonstrating that the Board’s determination of HIB was arbitrary, capricious, or unreasonable. Accordingly, the ALJ denied petitioner’s appeal.
- **Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination.**

New Jersey Anti-Bullying Case Law

Janan Wehbeh v. Bd. Of Ed. of the Township of Verona, Commissioner 2/4/2020

- Tenured chemistry teacher found to have committed an unintentional act of HIB through conversation with student about enrollment in AP Chemistry program.
- Teacher's recommendation was that student not enroll in the course, but left decision up to the student; key factors - course difficulty and student's prior performance in honors chemistry course taught by teacher
- Student diagnosed with anxiety and panic disorder; had 504 plan.

New Jersey Anti-Bullying Case Law

Janan Wehbeh v. Bd. Of Ed. of the Township of Verona, Commissioner 2/4/2020

- Teacher had no awareness of potential negative impact on student. Student's disability distinguishing characteristic.
- ALJ overturned board decision; held that a person cannot "unintentionally" commit an act of HIB. Commissioner disagreed.
- HIB as an action "that is reasonably perceived as being motivated either by any actual or perceived characteristic . . .", **the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require intent or an analysis of the actual motivation of the actor. A reasonable person should know...**

New Jersey Anti-Bullying Case Law

J.P. o/b/o D.P. v. Bd. Of Ed. of the Gloucester County Vo-Tech School District, Commissioner 3/13/2020

- Commissioner held that board did not act in an arbitrary, capricious, or unreasonable manner when it determined that student committed an act of HIB when he called another student “gay.” **Student admitted using the language but contended that he used the term in a joking manner and did not intend it to be demeaning.** In-school suspension imposed as discipline.
- Record contained sufficient credible evidence to support the Board’s decision that commenting on or misstating another student’s sexual orientation could reasonably be perceived as being motivated by that characteristic. **A board can find an act of HIB even if the individual did not intend to cause harm.** Cites *Wehbeh* case
- D.P.’s comments substantially disrupted A.G.’s education, and were insulting or demeaning.

New Jersey Anti-Bullying Case Law

*W.D. and J.D o/b/o G.D. v. Bd. Of Ed. of Twp. of Jefferson –
Comm. 11/26/18, aff'd App. Div. 9/29/2020*

- App. Div. affirms Comm'r determination that BOE finding of no HIB was not arbitrary, capricious or unreasonable. Board determined that students were mutually engaged in conflict. Record contained sufficient credible evidence supporting the Commr's decision; not arbitrary, capricious or unreasonable.
- **Online exchange among a group of fifth grade female friends; extraordinarily offensive and vile language towards each other; egregious words, sexual references, use of the "N word". Girls, including victim, viewed it as "pranking".**
- No showing of substantial disruption or interference with student's rights or academic program.

New Jersey Anti-Bullying Case Law

B.M. o/b/o, C.M. v. Bd. of Ed. of the Bergen County Vocational Schools, Commissioner 8/2/21

FACTS:

- **At an off-school-grounds Halloween gathering in 2019, a male student allegedly approached a female classmate from behind and grabbed her buttocks with both hands.**
 - Student did not deny touching his classmate's buttocks, but characterized the physical contact as a "poke" rather than a "grab".
- **The ABS determined that the incident behavior was motivated by a "distinguishing characteristic", of N.L., in this case, race, sexual orientation, and weight of the victim, "substantially disrupted or interfered with the orderly operation of the school or rights of other students and insulted or demeaned a student or group of students," C.M. did not seem remorseful.**
- **N.L. feared being in his presence. There was "a history of this type of improper, sexually charged behavior by C.M. towards N.L."**

New Jersey Anti-Bullying Case Law

B.M. o/b/o, C.M. v. Bd. of Ed. of the Bergen County Vocational Schools, Commissioner 8/2/21

FACTS:

- C.M. suspended for 5 days, later removed from his record, and separated from N.L.; removed from the fall school play, removed from classes he shared with N.L., including theater, excluded from the spring play and the class trip to London.
- After hearing, BOE determined HIB had occurred, parent appealed to Commissioner.
- Parent alleged that the male student had been discriminated against during the investigation, causing academic and emotional harm; **victim of a ‘me-too’ movement which resulted in harsher treatment because of his male gender.** Physical behavior with N.L., and the language he used with her and others, should be viewed within the context of what petitioner claims is a **school culture of permissive physical and verbal expression**, and of the long, friend/classmate relationship of N.L. and C.M.

New Jersey Anti-Bullying Case Law

B.M. o/b/o, C.M. v. Bd. of Ed. of the Bergen County Vocational Schools, Commissioner 8/2/21

- ALJ found parent's arguments to be irrelevant. BOE properly found C.M.'s undisputed actions violated the ABRA, were "**reasonably perceived as being motivated either by any actual or perceived characteristic,**" and "a reasonable person should know" that the behavior would "have the effect of physically or emotionally harming" victim or placing her "in reasonable fear of physical or emotional harm," and had "the effect of insulting or demeaning" her.
- **ALJ & Commissioner concurred with SD's findings that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination pursuant to the Act.** Summary Judgment Motion granted.

New Jersey Anti-Bullying Case Law

R.H. and M.H., o/b/o A.H. v. BOE of the Borough of Sayreville, Commissioner 9/23/21

- **Petitioners appealed two BOE HIB determinations. (1) BOE determined that A.H. committed an act of HIB when she created a social media post depicting a friend with a mud mask on her face with the caption, “When he says he’s only into black girls.” a one-day suspension was imposed, and A.H. was removed from student council. (2) BOE determined that A.H. was not the victim of HIB after incidents in which A.H. alleged that she had been called a racist by other students at school. ALJ affirmed both BOE decisions.**
- Threshold requirement for a finding of HIB is that the conduct is reasonably perceived as motivated by an actual or perceived characteristic enumerated in the Act or another distinguishing characteristic, and that the conduct substantially disrupts or interferes with the rights of other students or the orderly operation of the school;

New Jersey Anti-Bullying Case Law

R.H. and M.H., o/b/o A.H. v. BOE of the Borough of Sayreville, Commissioner 9/23/2021

- **A.H.'s conduct in creating a social media post that any reasonable person should know would have the effect of insulting or demeaning African American students, together with the substantial disruption it created in the operation of the school and the fact that A.H. was aware of the racist nature of the post when she created it, met the criteria for a finding of HIB;**

New Jersey Anti-Bullying Case Law

R.H. and M.H., o/b/o A.H. v. BOE of the Borough of Sayreville, Commissioner 9/23/2021

- Speech involved here is distinct from the type cited in Mahanoy, i.e., speech expressing disagreement or criticism; instead, the **speech here was a racist photograph and remark which a reasonable person would perceive as offensive to black students.**
- A.H.'s claim that her classmates bullied her and called her a racist, was not supported by the evidence in the BOE investigation. **While “liked chocolate” comments may have been inappropriate, the evidence did not show that the comment substantially disrupted the school or the rights of A.H.**
- **When a Board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless it is found to be patently arbitrary, without rational basis or induced by improper motives; ALJ determined that BOE did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determinations. Commissioner concurred.**

New Jersey Anti-Bullying Case Law

*L.K. and T.K. o/b/o A.K. v. Bd. Of Ed. of Twp. of Mansfield –
Comm. 4/22/19, rev'd and remanded App. Div. 11/2/2020,
cert. denied, NJ Supreme Ct. 5/21/2021, decision on remand
12/9/2021*

- **Commissioner determined that BOE finding of HIB was not arbitrary, capricious or unreasonable.** Student repeatedly questioned 7 year old student re: name, hair, clothing student wore. Victim identified as a male in the previous year and was now identifying as a female. Student was repeatedly counseled that the behavior was not appropriate and was unacceptable but continued behavior. Student received counseling and one recess detention.
- **Conduct was motivated by victim's gender identity and expression, took place on school bus and school grounds, interfered with victim's rights and rights of other students.** Victim did not want to ride on the same bus with the student. Behavior was demeaning, caused emotional harm and created a hostile educational environment.

New Jersey Anti-Bullying Case Law

Takeaways from 2020 - 2022 HIB Case Law

- **Must meet all three elements of the HIB definition** to constitute an act of HIB. Must demonstrate to the Commissioner that you have gone through all three parts of the analysis.
- **Not all aggressive, harmful and demeaning conduct constitutes HIB.** Mutual non-power based conflict that is not about a characteristic of the targeted student is not HIB.
- **Intent to harm is not required**, only that a reasonable person should know that there would be a harmful effect, not that the actor knows there would be such an effect or intended such an effect.
- Mere status as a teacher does not create an imbalance of power which could be a perceived characteristic. Power imbalance is not a perceived or actual characteristic as defined in the relevant statutes and regulations.
- Student's **status as a student alone is not a distinguishing characteristic** under ABRA.

New Jersey Anti-Bullying Case Law

Takeaways from 2020 - 2022 HIB Case Law

- **Teachers, counselors, coaches** and school administrators can commit acts of HIB but **cannot be victims**.
- Teachers, counselors, coaches and school administrators can be **personally liable** if they do not address acts of HIB.
- Teachers, counselors, coaches and school administrator retirees can see a reduction in pension from HIB violations.
- Teachers, counselors, coaches and school administrators are entitled to **same HIB due process guarantees as students**.
- Commissioner - 90 Day rule; board action, hearing
- **Deference to board of education decision**, ALJ fact determinations, Commissioner decision. Overturning a BOE's finding of HIB presents a high hurdle, requiring clear evidence that the board acted indiscriminately or in bad faith in reaching its determination.

New Jersey Anti-Bullying Case Law

Takeaways from 2020 - 2022 HIB Case Law

- The Anti Bullying Bill of Rights Act does not create an independent cause of action.
- **Statutory and regulatory framework** of the Anti-Bullying Bill of Rights Act for adjudicating allegations of HIB satisfies constitutional **due process** requirements.
- ABRA does not require trial-like adversary due process proceedings; no discovery, no right to confront and cross-examine witnesses, etc.; Legislature could have included such procedures but did not.
- In preparing for a board hearing, parents are entitled to, *“the full record of the HIB allegations ... including the underlying investigative report, [and] any additional written reports or summaries, and the letter from [the victim’s] parents to the superintendent.”* App. Div. J.L. v Bridgewater
- Consider N.J.S.A. 18A:37-15 – nature of investigation, HIB, discipline, services provided; 5 days - CSA report to BOE
- Know your board Anti-Bullying Policy, particularly as to whether it allows for an initial threshold assessment by the principal.

Conclusion

- Thank you for choosing professional development with LEGAL ONE!
- Visit our website for more courses that can support your work at <http://www.njpsa.org/legalonenj/>
- If you have any questions about this presentation or suggestions for future seminars, please send an email to legalone@njpsa.org

Content Library



LEGAL ONE is the leading provider of education law workshops, online courses, and webinars for school leaders and teachers on critical legal issues. New programs will be added throughout the year, so be sure to check out the **LEGAL ONE Content Library** for our latest legal professional learning offerings.

For a full list of all of our upcoming workshops, please visit the
Live Calendar for all of FEA (Including LEGAL ONE)

*Please note that you do not have to be a member to attend our workshops. **Everyone** is welcome to participate and take advantage of our outstanding professional learning opportunities.*

Available in Apple Podcasts, Google Podcasts, and Spotify.



How can you understand your legal rights and responsibilities? Especially with limited time, laws that are constantly evolving, and the fact that you are always on the move? Whether you are a parent, teacher, school leader, college student or just have an interest in school law, the LEGAL ONE Podcast provides a great option for you.

As the leading provider of school law training, the LEGAL ONE team of school law experts is pleased to offer the LEGAL ONE Podcast, a weekly podcast that helps you understand complex legal issues. Each episode will be hosted by a LEGAL ONE attorney, include information on recent developments in school law and provide tips for promoting collaboration between parents and schools.



Listen on
Apple Podcasts



Listen on
Google Podcasts



Listen on
Spotify



<http://njpsa.org/the-legal-one-podcast/>

Certificate & Evaluation

Today's professional development certificate is available to save/download at the end of a **brief** evaluation.

<https://www.surveymonkey.com/r/LO-KB-032723>



Please take a few minutes to let us know what you thought of the session!