



**NJPSAFE**

— LEGAL ONE —

*Law, Ethics and Governance for All Leaders, including an  
Overview of New and Emerging Issues*

# HIB Law Update and the Role of the Board of Education

**February 2, 2022**

**David Nash, Esq.,**  
*LEGAL ONE Director*

# 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.*



# Workshop Materials

All session documents can be accessed at

<https://tinyurl.com/LO-Montclair-220202>

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

*Please save your materials before the link expires.*

# Overview

- HIB Definition
- Recent Trends
- Case Law Update
- Legislative Update
- Role of Board of Education
- Q & A

# 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.*

# 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.



# 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

# Role of the Board of Education

- Approve district HIB policies
- Provide necessary staffing, resources, professional learning
- Ensure required data is submitted to NJDOE
- Receive information on each HIB investigation at one board meeting
- At subsequent board meeting vote on whether to approve HIB finding
- Provide closed session hearing for parents upon parental request where there is disagreement with HIB report findings
- Need to be aware of potential School Ethics issues (e.g., conflict of interest) and importance of protecting confidentiality rights of all students

# 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 (cont'd)

- 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)

- 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)

- Provides parameters for responding to first, second or subsequent acts of HIB by a student
  - 1<sup>st</sup> offense – copy of investigation placed in student record, student may be subject to remedial measures (counseling, behavior intervention services, discipline determined by principal in consultation with appropriate staff)
  - 2<sup>nd</sup> offense – Same as 1<sup>st</sup> offense
  - 3<sup>rd</sup> offense – Same as 1<sup>st</sup> 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)

- 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
- 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)

- Provisions on cyber harassment crime go into effect immediately
- Other provisions go into effect in July 2022

# 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

- Supreme Court stated that while it agreed with the outcome of the 3<sup>rd</sup> Circuit Court of Appeal’s Decision, it did not agree with the rationale for reaching that opinion. **Specifically, under the Supreme Court Decision, if the off-campus speech/behavior can be shown to cause a substantial disruption, it is permissible for the School District to discipline.**
- Supreme Court explained that a brief discussion about the incident during a class, and a general feeling of being “upset” by members of the cheerleading squad did not rise to the level of a “substantial disruption” as outlined in the Tinker case.
  - In short, a School District must be able to show an actual “problem” that the off-campus speech caused, and not just that people “didn’t like it” or were “offended by it”.

# 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;
- **Mahanoy analysis.** A.H.'s social media post caused a substantial disruption to the school. While the disruption in *Mahanoy* only consisted of a short 5 to 10 minute discussion in Algebra class, the **social media post at issue here resulted in students becoming very upset and emotional**, creating the potential for altercations such that the principal had to monitor lunch hour for weeks to ensure student safety and to curtail the effects of the students talking about the post throughout the school. Post was made on a platform that enabled many Sayreville Middle School students to see the picture, thus bringing it into the school, where the post caused a substantial disruption and interfered with the school's regular operations.

# 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

- 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

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

ALJ initially determined:

- **Board failed to corroborate its determination that A.K. persisted in questioning, teasing, and threatening N.V. after school staff and her mother told her that this behavior was hurting N.V. and needed to stop.**
- CSA did not provide parents with timely, appropriate information regarding the investigation,
- Investigation was neither thorough nor complete, as required by the Board policy, and caused the Board to make a decision based on incomplete and questionable facts.
- CSA advised board that age was not a relevant factor, an incorrect statement of the law. BOE determination was based on faulty information, making its finding arbitrary and capricious.

Commissioner disagreed.



# 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

- App. Div. remands matter to Commissioner to make explicit findings as to whether the ALJ's assessment of testimony regarding A.K.'s allegedly persistent conduct was arbitrary, capricious, or unreasonable, or was not supported by sufficient, competent, and credible evidence in the record.
- Although a single wrongful act can constitute HIB, it is clear from the Commissioner's final decision that the determination that A.K. engaged in HIB was predicated on the finding that A.K. persisted in questioning N.V. about her gender identity after the initial school bus incident; A.K. engaged in repetitive conduct after being counseled to stop. **That critical finding is contrary to the factual finding made by the ALJ.**

# 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

- **App. Div. determined that the statutory and regulatory framework for adjudicating allegations of HIB, set forth in *N.J.S.A. 18A:37-15* and *N.J.A.C. 6A:16-7.7*, satisfy constitutional due process requirements.**
- Parents argued HIB determination was similar to long-term suspension and should have the same due process requirements including pre-hearing notice of the specific testimony and charges against the student and the right to confront and cross-examine witnesses at a school board hearing.
- **App. Div. declined to substitute its will for the Legislature, which could have included the due process protections set forth for long term suspensions, but chose not to do so.**

# New Jersey Anti-Bullying Case Law

## Melanie Sohl v. Bd. of Ed. of the Town of Boonton, Commissioner 5/18/2021

### Facts:

- Tenured Teacher allegedly said to 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 was upset and embarrassed by the comments and reported them to the principal. HIB investigation ensued.
- Teacher 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 of the ABRA.
- BOE concluded that teacher committed an act of HIB; required to attend sensitivity training as a remedial measure, letter of reprimand issued
- Teacher appealed BOE’s determination of HIB violation

# New Jersey Anti-Bullying Case Law

## Melanie Sohl v. Bd. of Ed. of the Town of Boonton, Commissioner 5/18/2021

### ALJ Determination

- The ALJ remanded the matter so that petitioner could be afforded a new Board hearing, specifically finding:
  1. Pursuant to *N.J.S.A. 18A:37-15b(6)(d)*, the Board should provide petitioner with the opportunity to review the HIB investigatory report, as well as all witness statements and documentary evidence;
  2. The Superintendent's written summary to the Board regarding the HIB investigation should inform the Board of the contents of the HIB report and any discipline imposed, as required by *N.J.S.A. 18A:37-15b(6)(c)*;
  3. The Board, not the Superintendent, should issue a detailed written decision after the hearing, in keeping with *N.J.S.A. 37-15b(6)(e)*; and
  4. The February 4, 2020 letter of reprimand should be removed from petitioner's personnel file.
- **However, the ALJ found that there was no due process violation with respect to petitioner's opportunity to confront and cross-examine witnesses because the ABRA does not require a full adversarial hearing.**

# New Jersey Anti-Bullying Case Law

## Melanie Sohl v. Bd. of Ed. of the Town of Boonton, Commissioner 5/18/2021

### Commissioner Holding

- Reversed ALJ Determination that Teacher's Due Process Rights had been violated
  - Board met the requirements of *N.J.S.A. 18A:37-15b(6)(d)*. Petitioner was informed of the nature of the investigation, specifically of the cupcake comment which she had admitted making, that the district found evidence of HIB, and of the discipline being imposed in the form of sensitivity training and a letter of reprimand.
  - Board met the requirements of *N.J.S.A. 18A:37-15b(6)(c)*; information was properly provided to the BOE.
  - Board met the requirements of *N.J.S.A. 18A:37-15b(6)(e)*; superintendent's letter advised of the board's decision.
- Agreed with the ALJ that the Teacher was not entitled to a trial-type adversarial hearing with the opportunity to cross-examine witnesses; not required by the ABRA
- Remanded to OAL for a hearing on the merits
  - Grievance issues re: Reprimand as discipline, not outcome of HIB process, not necessary for Commissioner to decide

# New Jersey Anti-Bullying Case Law

## Takeaways from Recent HIB Case Law

- Must meet all three elements of the HIB definition to constitute an act of 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.
- Teachers, counselors, coaches and school administrators can commit acts of HIB but cannot be victims.
- Not all aggressive, harmful and demeaning conduct constitutes HIB.
- When incidents occur or are spread on social media, harm is increased

# 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.



*QUESTIONS???*

# 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](mailto:legalone@njpsa.org)

# Professional Learning

Winter/Spring 2022

Visit [www.njpsa.org](http://www.njpsa.org)

 NJPSAFE

[Click here for a printable pdf.](#)

[Click here](#) for a flipbook catalog offerings.

**Hyperlinks** in the flipbook calendar will take you directly to registration pages.



## **Anti-Bullying Specialist Certificate Program**

### **100% Online Version**

As an Anti-Bullying Specialist or Anti-Bullying Coordinator, you need comprehensive professional learning in order to be ready for this challenging role. There is no better team of anti-bullying experts for this type of training than LEGAL ONE's instructors! We have trained thousands of Anti-Bullying Specialists, administrators and others on every aspect of New Jersey's Anti-Bullying Bill of Rights. But we know it can be difficult at times to attend out-of-district professional learning. That's why we are pleased to offer a fully online version of the Anti-Bullying Specialist Certificate Program!

### **Program Components**

The ABS Online Certificate Program offers 16 hours of continuing education. The program consists of an introduction course, three parts (listed below), and a final assessment exam. All components and assessments must be successfully completed in order to earn a program certificate.

- PART I - Bullying Law Update and the Role of the ABS
- PART II - How to Investigate HIB Claims
- PART III - Bullying Response and Prevention
- Bonus Courses and Webinars

Additionally, there are bonus courses and webinars that are not required to earn your certificate. However, our LEGAL ONE team encourages you to explore these school law learning experiences.

Fee: \$500

# 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-Montclair-220202>

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