



NJPSAFEA
— LEGAL ONE —

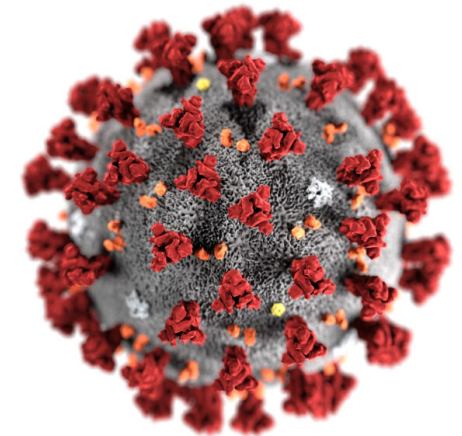
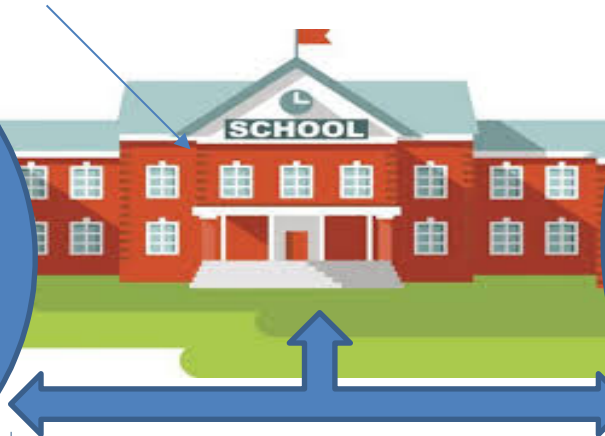
*Law, Ethics and Governance for All Leaders, including an Overview of
New and Emerging Issues*

HIB UPDATE

September 21, 2020

David Nash, Esq.
LEGAL ONE Director

SCHOOLS AT THE CENTER OF THE DUAL PANDEMICS



Massive and Overlapping Challenges

Global Pandemic

Economic Upheaval

Racial Injustice and Police Brutality

Disproportionate Impact on Poor and Minority
Communities

Worldwide Protests, Overwhelmingly Peaceful

An Inflection Point in Our History

The Effects of COVID-19 On Communities of Color

- See CDC Information on [Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities](#)

- Ethnic minorities tend to live in dense urban areas that are often far from appropriate health care facilities.
- Ethnic minorities tend to be multigenerational in one domicile. This does not allow for protection of elderly adults within the same domicile if there was a COVID-19 infection in the home.
- Ethnic minorities experience higher levels of underlying health conditions and often have no access to appropriate health care.
- More ethnic minorities were essential workers, with lower paying jobs, and an inability to receive paid sick leave if they or families members were infected with COVID-19.

New Forms of Bullying

- [Examples](#) of Coronavirus-related bullying of students
- CDC Warning – [Reducing Stigma](#)
- Students being harassed or intimidated through fake coughs, sneezes, touching
- Students are being targeted because of nationality or ethnicity
 - Likely to meet definition of HIB and Bias-Related Act
 - May constitute hate crime

Student First Amendment Rights

- Right to express views on political issues as long as speech does not result in substantial disruption to operation of school or rights of students
- HIB is not protected speech
- Student speech outside of schools that is critical of staff members has greater level of protection than speech targeting other students
- Student protests regarding issues of racial justice could create conflict between student expression and maintaining public health requirements
- Critical to engage with students, find responsible ways to allow for expression

Definition of Harassment, Intimidation, or Bullying

“Harassment, intimidation or bullying” means:

- Any gesture
- Any written, verbal or physical act, or electronic communication
- Whether it be a single incident or a series of incidents
- That is **reasonably perceived** as being motivated either by any **actual or perceived characteristic**
- That takes place on school property, at any school-sponsored function, on a school bus, or off school grounds

Definition of Harassment, Intimidation, or Bullying

The HIB must **substantially disrupt or interfere** with the orderly operation of the school or the rights of other students and:

- A reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- Has the effect of insulting or demeaning any student or group of students; or
- Creates a **hostile educational environment** for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Protected Characteristics

- Employers (including parochial schools and public school districts) may not discriminate against staff or students based on:
 - Race
 - Creed
 - Color
 - National origin
 - Ancestry
 - Age
 - Genetic information
 - Pregnancy
 - Sex
 - Religion
 - Disability
 - Military service
 - Atypical cellular blood trait
 - Nationality
- NJ LAD
 - Marital/domestic partnership/civil union status
 - Affectional or sexual orientation
 - Gender identification or expression
 - Hairstyle

Protocols, Protocols, Protocols

- Reporting HIB Allegations (including anonymous reports)
- Initial Threshold Assessments
- Gathering, Maintaining, Analyzing Evidence
- Communication with Parents
- Writing Reports
- Determining Consequences
- Developing Support Plans
- Addressing Students with Unique Needs
- Leading the School Safety/Climate Team

Adapting to Virtual Environment

- HIB includes conduct away from school grounds if there is potential for substantial disruption in school
- Same timelines apply even if HIB occurred during periods of remote instruction
- Need to investigate even if student or parent cannot be interviewed in person
- Need to be aware others may be present for remote interviews

Legislative Update

- **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.

Legislative Update

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.

COVID – 19 Legislative Update

- **P.L. 2020, c.29 (5/4/2020)** - "Hunger-Free Students' Bill of Rights Act"; requires certain school meal information be provided to students' parents; establishes protocols for identifying eligible students for meal programs; prohibits stigmatizing student with bill in arrears;
 - No requirement to not provide breakfast or lunch.
 - No wristband, hand stamp, separate table, alternative meal
 - No chores or other work
- Process when student owes for more than 5 meals
- School district liaison for the education of homeless children coordinates with school district personnel to ensure that a homeless student receives free school meals and is monitored according to the school district's policies.

Hairstyle Discrimination Prohibited

- [P.L. 2019, c.272](#) – Prohibits discrimination against persons because of traits historically associated with race, particularly focused on discrimination based on hair texture and style, designated as the “Create a Respectful and Open Workspace for Natural Hair Act” or “CROWN Act”.
- “Race” is inclusive of traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles.
- “Protective hair styles” includes, but is not limited to, such hairstyles as braids, locks, and twists.

H.S. Wrestler – AG Settlement/Guidance

- AG announces settlement and new guidance document - <https://www.nj.gov/oag/newsreleases19/pr20190918a.html>
- Referee suspended for 2 years
- NJSIAA rules must be limited to hair length, and cannot be applied in way that discriminates based on hair style
- New AG [guidance](#) clarifies that discrimination on the basis of race includes discrimination based on a trait “inextricably intertwined with or closely associated with race,” including hairstyle.

HIB CASES



New Jersey Anti-Bullying Case Law

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 Anti-Bullying Case Law

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.”

New Jersey Anti-Bullying Case Law

J.B. o/b/o R.B. v. Bd. Of Ed. of the Bergen County Vo-Tech School District, Commissioner 12/17/19

- Parent filed petition alleging that board failed to make accommodations for his daughter's religious observance in violation of board policy. Parent also alleged that guidance counselor's comment, "What's more important to you, your religion or your schoolwork?" constituted an act of HIB.
- Parent advised that board did not investigate his complaint 8/6/18.

New Jersey Anti-Bullying Case Law

J.B. o/b/o R.B. v. Bd. Of Ed. of the Bergen County Vo-Tech School District, Commissioner 12/17/19

- Parent filed petition 7/16/19, well past the 90 day filing deadline. ALJ found filing to be untimely and dismissed complaint.
- Commissioner disagreed, concluding that record did not contain sufficient evidence to make a decision. Reversed and remanded.

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.
- Matter remanded for resolution of disputed issues of fact that must be addressed to determine whether board's decision was arbitrary, capricious or unreasonable.

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.
- D.P.’s comments substantially disrupted A.G.’s education, and were insulting or demeaning.

New Jersey Anti-Bullying Case Law

N.U. o/b/o M.U. v. Board. of Education of the Town of Mansfield, Commissioner 4/24/2020

- Board determined that M.U. committed an act of HIB, when he told a fellow sixth grader, who had just gotten a haircut, that he looked like Donald Trump. An in-school suspension was imposed.
- ALJ determined that petitioner did not meet her burden of proof that the Board acted in an arbitrary, capricious or unreasonable manner in concluding that M.U.'s actions constituted HIB and dismissed the petition.
- Commissioner disagreed and remanded the matter to the OAL, finding that the current record was not an adequate basis upon which to determine whether the Board's actions were arbitrary, capricious or unreasonable.

New Jersey Anti-Bullying Case Law

N.U. o/b/o M.U. v. Board. of Education of the Town of Mansfield, Commissioner 4/24/2020

- A finding of HIB under the Act requires three elements: 1) the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic, 2) the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school, and 3) one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.
- The letter to N.U. from the school's principal, which the Board affirmed in its decision, indicates that the investigation found evidence of the first element – that M.U.'s conduct was reasonably perceived as being motivated by another student's distinguishing characteristic. However, the letter does not provide any information regarding the remaining elements required to prove an act of HIB.

New Jersey Anti-Bullying Case Law

A.J. o/b/o J.J. v. Board. of Education of the Town of Boonton, Commissioner 7/10/2020

- Commissioner held that board did not act in an arbitrary, capricious, or unreasonable manner when it determined that J.J. committed an act of HIB when he said the “n” word to some classmates and was overheard by another student, who complained to one of the school guidance counselors;
- J.J. denied using the “n” word on the morning in question but noted a distinction between two forms of the word, one ending in “er” and the other with “a”; J.J. admitted that he sometimes used the “a” form of the word among close friends, as a term of familiarity or endearment.

New Jersey Anti-Bullying Case Law

A.J. o/b/o J.J. v. Board. of Education of the Town of Boonton, Commissioner 7/10/2020

- Commissioner disagreed with the ALJ determination that J.J. did not say the “n” word, finding that the record contained sufficient credible evidence to support the Board’s decision;
- While the evidence may leave room for two opinions regarding whether J.J. made the statement, it is insufficient to overturn the Board’s decision, which was not arbitrary, capricious or unreasonable; Commissioner is not permitted to substitute his judgment for that of the Board.

New Jersey Anti-Bullying Case Law

A.J. o/b/o J.J. v. Board. of Education of the Town of Boonton, Commissioner 7/10/2020

- The Commissioner determined that the Board was not arbitrary, capricious, or unreasonable when it concluded that the complainant reasonably perceived J.J.'s use of a racial slur as being motivated by the distinguishing characteristic of race; that it interfered with the rights of other students to attend school in a biasfree setting; that it substantially disrupted the complainant's rights; and that it was insulting or demeaning.

New Jersey Anti-Bullying Case Law

J.C. and C.C. o/b/o J.C. v. Bd. Of Ed. of the Ramapo Indian Hills School District, Commissioner 8/20/2020

- Commissioner held that board did not act in an arbitrary, capricious, or unreasonable manner when it found that J.C. committed an act of HIB when he removed the pants and exposed the buttocks of J.K., exposing him, while a third student, G.E. held him down at a student's home. J.C. also exposed himself during the incident while on top of the student.
- A photograph of the incident circulated among students, leading to harassment of both students by others.

New Jersey Anti-Bullying Case Law

J.C. and C.C. o/b/o J.C. v. Bd. Of Ed. of the Ramapo Indian Hills School District, Commissioner 8/20/2020

Board specifically found that:

- (1) the events substantially interfered with the victim's rights and the operation of the school given the number of students involved and the effect on the victim, who subsequently required therapy;
- (2) a reasonable person would perceive that J.C.'s actions in removing the pants of a person who is held down and exposing his buttocks is inherently sexual and motivated by gender; and
- (3) a reasonable person would know that the actions would have the effect of causing the victim emotional or physical harm.

New Jersey Anti-Bullying Case Law

J.C. and C.C. o/b/o J.C. v. Bd. Of Ed. of the Ramapo Indian Hills School District, Commissioner 8/20/2020

- Commissioner adopted the ALJs decision as the final decision. In doing so, the Commissioner noted:
 - A Board’s finding of HIB does not require an analysis of the actual motivation of the actor, only how the actor’s motivation is perceived and whether that perception is reasonable.
 - A Board of Education can find that an individual committed an act of HIB even if the individual did not intend to cause harm.
 - When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was “patently arbitrary, without rational basis or induced by improper motives.”

New Jersey Anti-Bullying Case Law

J.C. and C.C. o/b/o J.C. v. Bd. Of Ed. of the Ramapo Indian Hills School District, Commissioner 8/20/2020

- Commissioner noted that while *N.J.A.C. 6A:16-7.5(a)* requires a nexus to a student's physical or emotional safety, security, and well-being and a material and substantial interference with the operation of the school in order to impose a consequence for student conduct away from school, the Commissioner does not need to decide whether J.C.'s conduct met this definition as the Board did not impose discipline on J.C. since he is no longer a student in the district.

SCENARIO



Scenario – I Had to Sneeze

- Peter, Paul and Mary are neighbors, and walk the same route to get to their elementary school.
- Peter and Paul wait until they get to school before they put their masks on. Mary puts her mask on before she walks out of her front door.
- This morning, just as the 3 students were approaching the school playground, Peter sneezed. Mary told Peter not to sneeze near her like that again, and she moved away from Peter.
- Then, according to Mary, Paul "fake sneezed" in her direction, followed by another sneeze by Peter.
- Mary then ran ahead to get into the school building, and Peter and Paul laughed when Mary started to run away from them.
- Mary told the VP in the hallway about what had happened on the way to school that morning. Mary claims that the boys' actions were making fun of her for wearing her mask all the time, and because she is really afraid of catching Covid-19.
- When Peter and Paul are questioned about the incident, Peter says that he has allergies, and that is why he sneezed. Peter and Paul both deny that Paul sneezed.
- Upon further investigation, you learn that Peter does have a noted seasonal allergy, for which the nurse has allowed him to take his Benadryl in the past.

Scenario – I Had to Sneeze

Discussion Questions

- What, if any, additional information do you need to resolve this situation?
How would you obtain it?
- If you believe Peter that he sneezed because of his allergies, could Peter potentially still get in trouble?
 - What if the evidence shows that rather than turning away from Mary, he moved in her direction during one or both of his sneezes?
- Assuming you believe that Peter really had to sneeze, what happens with Paul?
- If you can show that it is more likely than not that Peter and Paul did "sneeze at" Mary as she complained, what do you do?
- If your investigation does not allow you to determine that Peter and Paul "sneezed at" Mary, what do you say to Mary?
- How do you talk to the parents of Peter, Paul and Mary about this situation?



[Anti-Bullying Specialist Certificate Program](#)

All New 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

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 David Nash, Esq., LEGAL ONE Director, dnash@njpsa.org