

TESTIMONY BEFORE THE STATE BOARD OF EDUCATION ON HIB REGULATIONS
PREPARED BY THE COALITION FOR AN EFFECTIVE ABR

October 5, 2016

Susan Martz, Chief Learning Supports and Special Services Officer/ Assistant Commissioner
Division of Learning Supports and Special Services
New Jersey Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

Dear Assistant Commissioner Martz, Acting Commissioner Harrington, and Honorable Members
of the State Board of Education,

The undersigned organizations are committed to the establishment of safe and healthy learning
environments for New Jersey's students and have joined together as the Coalition for an
Effective ABR to develop recommendations for improving implementation of New Jersey's
Anti-Bullying Bill of Rights.

We have attached a document with revisions and additions to the proposed regulations that we
are urging the State to propose for adoption, and we have set forth our rationale for these changes
below. We firmly believe that all of these enhancements and modifications to the existing
proposal are necessary to achieve the legislative goal of a safe and civil school environment in
which students can learn.

Please note that we continue to examine the State's proposal to identify additional issues and
may submit additional written comments prior to the November 5th deadline. Moreover, we
expect that our efforts to strengthen the law and its impact will be an ongoing effort, as we hope
will be the case for the State.

Definition of Bullying

To ensure an appropriate definition in the regulations, the following critical changes are needed:
1) bullying should be characterized as "hurtful," rather than "unwanted" behavior; 2) power
imbalance should be defined and emphasized as a possible, but non-required, element of the
statutory definition of HIB; and 3) distinguishing characteristic should be defined. Our rationale
for these changes is set forth below:

1. Hurtful Behavior

"Hurtful" is more accurate than "unwanted" because: 1) it is more in keeping with evidence-
based definitions of bullying; and 2) "unwanted" incorrectly implies that the target's response to
the behavior is a criterion. The statute itself focuses on the predictable effect of the behavior as
judged by a reasonable observer, not on the target. Because of the nature of bullying, a target
may not want to say that the behavior is "unwanted"; nor should the target have to say this (and

face possible retaliation) in order to be protected from hurtful behavior. Similarly, the offender should not be allowed to get away with hurtful behavior simply because the target does not explicitly object. The hurtfulness of the behavior, not the admissions of the target, should be the focus of the bullying definition.

2. Power Imbalance

We are recommending that a definition of power imbalance be added to the regulations and that “may” in N.J.A.C. 6A:16-7.7(a)(2)(iii), be changed to “might or might not” to accomplish the following: 1) make it explicitly clear that a power imbalance is not a required element of the statutory definition of HIB; 2) correctly reflect the Task Force recommendation that if a power balance is observed in an incident, then the power imbalance itself is not a characteristic, but rather a tool by which the distinguishing characteristic can be identified; and 3) recognize that distinguishing characteristics that might be identified through an observed power imbalance are only one way to satisfy the “distinguishing characteristic” criterion in the statute; distinguishing characteristics that are not identified through an observed power imbalance also meet the statutory criterion.

We propose that the term “power imbalance” be defined in N.J.A.C. 6A:16-1.3 as follows:

“Power imbalance” is a concept used in some research on bullying to distinguish bullying from other forms of hurtful behavior. The concept reflects the following aspects of bullying: (1) the tendency for those engaged in bullying behavior to direct that behavior toward targets who are vulnerable, (2) the target’s feelings of powerlessness that enhance the harmful impact of bullying, and (3) the inability of the target to effectively end the bullying, and, therefore, the importance of adult intervention into bullying situations. In keeping with evidence-based definitions of bullying, the imbalance of power in a bullying situation may be real or perceived by either the perpetrator or the target; it may be an imbalance in physical, social, intellectual, or psychological power; it may be an imbalance that stems from factors either inside or outside the school, e.g., societal stigma; it may develop as a consequence of victimization; and it may not be visible to observers. The concept of “power imbalance” should be used to enhance understanding of bullying; it is not a required criterion for identifying incidents of bullying or “Harassment, Intimidation, or Bullying.”

3. Distinguishing Characteristic

There is great variability in school’s interpretations of what constitutes an “other distinguishing characteristic.” Some schools have placed limitations on such characteristics that are not warranted by the statute, such as requiring that the characteristics be actual (not perceived), visible or permanent. Including this definition in the regulations will help promote consistency in application of the statute across schools – ensuring that students receive comparable protections across the state -- and will improve the comparability of EVVRS reporting across schools and districts.

We propose that the term “distinguishing characteristic” be defined in N.J.A.C. 6A:16-1.3 as follows:

“Distinguishing characteristic,” including “other distinguishing characteristics,” may include actual or perceived characteristics that may or may not be permanent or visible in nature and which may include, but are not limited to, characteristics of a physical, psychological, emotional, intellectual, social, or familial nature.

Preliminary Determination

We object to the authorization of a preliminary determination process, proposed at N.J.A.C. 6A:16-7.7(a)(2)(ix), which fails to include any procedural requirements for this process. As written, the proposed regulation amounts to a “get out of investigation” free card for districts that wish to avoid investigations or reduce their number of reported HIBs. While we know that many preliminary determinations will be made with integrity, the only way to deter those schools who are not inclined to do the right thing is to enact procedural requirements that make it difficult for an administrator to dismiss cases without good faith consideration and that provide students whose cases were wrongly dismissed with a right of appeal, and with access to the information necessary to frame that appeal. Requiring documentation and explanation of a negative determination will enhance accountability and will ensure that no student is denied the right to file an HIB complaint without due process.

Sensitive Information

The Anti-Bullying Task Force recommended that the Department issue guidance on the handling of sensitive information, including information about a student’s sexual orientation, gender identity, or gender expression, in response to concerns that the required notification procedures under the ABR could result in the “outing” of LGBT students who were victims of anti-LGBT HIB to peers and parents, potentially causing greater risk to these students at school and at home, rather than protecting them from that risk. The regulations should remind schools of their responsibility to handle information carefully so that implementation of the ABR will protect, and not endanger, students who are targets of HIB, and should provide a framework for the issuance of comprehensive, specific guidance on this point. Moreover, the regulations should direct districts to follow the significant guidance that has already been issued by the U.S. Departments of Justice and Education in the form of the May 13, 2016 “Dear Colleague Letter on Transgender Students,” as well as state guidance that we anticipate will be issued on the handling of sensitive information, including information about a student’s sexual orientation, gender identity, or gender expression. Finally, we are recommending the inclusion of a regulatory provision that all school staff receive training regarding sensitive issues that affect students in school such as sexual orientation, gender identity and gender expression and that such training include accurate information on certain specified topics.

Remedial Action

The New Jersey Anti-Bullying Bill of Rights and New Jersey case law mandate remediation for both the victim and the person who committed an act of harassment, intimidation or bullying (HIB). In particular, N.J.S.A. 18A:37-15(b) (4) and (7) mandate that a person who engages in HIB be provided with consequences and remediation. However, neither the current or proposed

regulations clearly mandate remedial action for the person who commits HIB. The current regulations should be changed to comply with statutory requirements and case law as set forth below.

Proposed section N.J.A.C. 6A:16-7.7(a)(2)(v) describes the minimum requirements for what a school district's written policy on HIB should state regarding remedial action for a student who engages in HIB. It states:

"The appropriate remedial action also may include the following: (1) A behavioral assessment or evaluation, including, but not limited to, a referral to the child study team, as appropriate; and (2) Supportive intervention and referral services, including those at N.J.A.C. 6A:16-8."

We propose the following language in lieu of the above sentence:

"A statement that appropriate remedial action for a student who commits an act of harassment, intimidation, or bullying consists of action that is effective to curb the student's behavior and that makes clear the range of possible responses to an incident. The response to HIB must include an appropriate combination of the following: referral to the child study team, counseling for the student who committed the act, counseling for the student who was targeted by the act, behavioral contract and other positive behavioral support measures for the student who committed the act, support services, intervention and referral services including those at N.J.A.C. 6A:16-8, and other programs, as defined by the commissioner. The response to HIB may also include the list of possible remedial measures referred to in the New Jersey Department of Education's Model Policy and Guidance for Prohibiting Harassment, Intimidation and Bullying on School Property, at School-Sponsored Functions and on School Buses. In general, conflict mediation or conflict resolution strategies are not considered appropriate evidence-based remedial responses to bullying situations."

There are several reasons for the above proposed language. First, the proposed language is consistent with N.J.S.A 18A:37-15(b) (4) and (7), and with L.W. v. Toms River Regional Schools Board of Education 189 N.J. 381 (2007) which concluded that the Law Against Discrimination required "school districts to implement effective preventative and remedial measures to curb severe or pervasive discriminatory mistreatment." Second, anecdotal evidence suggests that many times, students who are suspended for HIB are not being provided with effective remedial services, if any. This may be due in part to the lack of clear regularity requirements – the current language of N.J.A.C. 6A:16-7.7(a)(2)(v) could be interpreted to only require school districts to consider providing remedial services. Third, the proposed language is consistent with current statewide initiatives to reform school discipline policies to utilize therapeutic means to address behavior problems. Fourth, the proposed language follows the guidance contained in the New Jersey Department of Education's Model Policy and Guidance for Prohibiting Harassment, Intimidation and Bullying on School Property, at School-Sponsored Functions and on School Buses ("Model Policy") which contains a non-exclusive list of possible remedial measures. Finally, the proposed language makes clear that conflict mediation is not an

appropriate response to HIB. This term does not encompass the type of mediation that may be used by personnel who are appropriately trained in restorative justice practices.

In addition, we propose that the term "remedial action" be defined in section of N.J.A.C.: 6A:16-1.3 as follows:

"Remedial Action" means effective measures for the victim and for the student or staff member who has committed an act of HIB, which corrects the problem behavior of the student or staff member who committed an act of HIB, prevents another occurrence of the problem, and protects and provides support for the victim of the act.

The proposed definition implements N.J.S.A. 18A:37-15(b) (4) and (7) as well as the standards established by the L.W. case. Including a definition of remedial action in the regulations will help provide needed clarity regarding school district responsibilities in HIB cases and also provide students and parents with notice regarding students' rights to appropriate services when HIB occurs.

We make two further recommendations with regard to remedial action. First, we think it is important to include the language used by the Appellate Division in the L.W. case that remedial measures must be designed to alter the behavior of harassers, not the person harassed. Too often, as in the L.W. case, school districts take steps that punish the target of bullying, such as isolating the target at lunchtime under the guise of protecting the student from bullying. However, the regulations should also make clear that this language does not prevent a school district from transferring a target to another classroom or school when that move is made at the request of the target's parents.

Second, we recommend that both school districts and parents be made aware that school districts may be held liable for school tuition if timely notice of the harassing conduct is provided to the district, and the district fails to take reasonable steps against bullying. We understand that tuition reimbursement has been approved only as an exceptional remedy by the Commissioner (see M.P. v. Delran, 1985 S.L.D. 1817, adopted by Commissioner 1985 S.L.D. 1832). However, we have all seen cases where the only viable remedy, consistent with ensuring a thorough and efficient education, is the removal of the targeted child from a hostile environment. We would urge the State Board not to limit the payment of tuition to circumstances where a parent removed his or her child from school for safety reasons and is seeking reimbursement for placement of the child at another public or private school. The remedy of a transfer at school district expense must be available to students whose parents cannot afford to place the student elsewhere and subsequently sue for reimbursement.

Due Process

The proposed regulations need further clarification regarding the board decisions of an HIB complaint. The timeframe requires the district to inform the parents of the results of the investigation within five school days after the results are submitted to the board of education. Under the statute, the board of education must review the investigation and issue a decision regarding the investigation. There is no precise timeframe as to when the board must complete its review of the investigation and issue a decision, other than by its next meeting. However,

while the board's review is pending, the parents must decide whether to file an appeal of the investigation. Depending how quickly the parents are able to act, their request for an appeal may come either before or after the board has reviewed the investigation. This overlap of the board's initial review and the parent's request for an appeal needs to be clarified in the regulations to ensure that the board hold a hearing and issue a new decision even if it has already conducted an initial review. If a hearing is held following the board's issuance of an initial decision, the regulations must make clear that the board decision issued after the hearing is the final board decision, for purposes of appeal to court.

Another problem with the timing for appeal is that the statute now requires that the board appeal take place within 10 days of the date the parents request the appeal, without ensuring that the parents have all the information necessary to handle their appeal. In practice, Districts often refuse to provide parents with the investigation file unless they request an appeal. This results in the investigatory file being provided, if at all, as late as the day before the hearing or even on the very day of the appeal itself. This is a serious infringement on the Due Process rights of the parents to properly prepare for appeal, to determine what witnesses might need to be brought to the appeal, or whether to engage an attorney. Early provision of the investigatory file will also help parents in deciding whether their appeal is worth pursuing, and could save both the family and the board from unnecessary expenses and waste of resources. Therefore, it is imperative that the regulations provide that the District shall provide a copy of the full investigatory file to the parents or guardian within two days of any request by a parent or guardian for an appeal to the Board. However, it is equally imperative that provision of the file be done in accordance with the board's procedure for maintaining student privacy established pursuant to N.J.A.C. 6A:16-7.7(a)(2)(ix)(3).

In addition, we request that the parent have ninety days to appeal to the board. Currently, there is no time limit imposed by statute or regulations. The proposed time limit of forty-five days is insufficient time for parents to move forward with an appeal when their first priority will be ensuring that their child's emotional needs are being met.

Furthermore, we request that the statutory requirements for the appeals process to the board be set forth in the proposed regulations so that there is clarity especially when an individual or school district is relying solely on the regulations for guidance. Also, regarding the appeals process to the board, we recommend that all due process protections in discipline matters be applied to alleged perpetrators.

The proposed regulations do not set forth any timeframes for the board to issue its decision either after its initial review of the investigation or following the appeal. We recommend that the board must issue its decision within five school days following its review and within five school days following a parental appeal. This time frame is consistent with the current regulatory time frame for the board to issue its decision following a disciplinary hearing.

Finally, the proposed regulations fail to set forth the parental right to appeal a final board decision to the Commissioner of Education. We recommend that the regulations set forth the right of the parent to file an appeal with the Commission of Education within 90 days following the Board of Education's decision.

Private Schools for Students with Disabilities

We are pleased that the Department of Education has expanded the HIB regulations to include private schools for students with disabilities. However, we are concerned regarding the appeals process as set forth in the proposed regulations. Under the proposed regulations, when an HIB investigation is completed, it is forwarded to the sending district's board of education. Any appeal to the investigation results must be completed by the sending district's board of education in collaboration with the private school. However, there is no guarantee that any of the individuals with knowledge from the private school will be present at the hearing, which limits the parent's right to challenge the findings of the report. In addition, because the sending district's board of education has no authority over the private school, there is a concern that the board of education's findings will not be adhered to by the private school.

In addition, there is a concern that the private school may choose to discipline the child by removing the child from the school. As there is no appeal right within the private school, by the time the board of education hears the appeal, the child may already have been removed, and the school board will have no authority to return the child to the private school should the board overturn the findings or the discipline imposed on appeal. To address these concerns, we recommend that these regulations be revised to require that the parent have an additional right to appeal within the private school and/or to compel the private school: 1) to produce individuals with knowledge at the district board of education hearing; and 2) to comply with the district board of education's findings and conclusions following its hearing, including the return of the student to the private school, if so determined.

We have not proposed specific language for the revisions that are recommended, and ask the Commissioner and State Board to suggest how these concerns can best be addressed.

Coordinating Roles of Anti-Bullying Coordinator and Affirmative Action Officer

Within school districts, the "anti-bullying coordinator" and the "affirmative action officer" have similar roles, with both having an obligation to investigate HIB cases involving protected classifications. However, some schools are so focused on implementing the ABR that they forget to involve the affirmative action officer when the distinguishing characteristic is a protected classification. To remedy this omission, and for the additional reasons set forth below, we recommend that, to the extent practicable, districts be required to appoint the same person to fill the roles of "anti-bullying coordinator" and "affirmative action officer," to use identical teams to support both roles, and to mirror this integration at the school level. This accomplishes several important goals: the LAD and HIB laws and regulations are appropriately followed and understood by the team; duplication and confusion are reduced; and elimination of conflict in assessing which law and set of regulations apply to each incident, and, at least at the district level, assessment of adult HIB and discriminatory behavior by adults in the school are appropriately assessed without any conflict of interest.

School safety/climate team

We propose that the following definition of school climate be added to the regulations to assist the members of the school climate team in defining their task:

“School climate” means the collective perception of how well a school provides suitable conditions for learning, for positive social, emotional, and character development, for all staff to grow professionally, and for parents, families, and community resources to become engaged in the school. School climate includes not only the general climate of the school, but also awareness of any differences in school climate as experienced by students with different identities related to race, ethnicity, religion, disability, sexual orientation, gender identify, and gender expression.

The regulations should encourage school climate teams to meet more frequently than the statutory minimum to allow increased time for analyzing incidents for gaps in culture/climate and then guiding school efforts to address those gaps, including preventive work (without notice of incidents) to assess (using school student survey data, and other assessments) and address predictable gaps (e. g, insufficient support for school minorities, proactively (without incidents having occurred) increasing support and protecting societally stigmatized populations.

In addition, the regulations should ensure that the school safety/school climate team has full access to information relevant to school safety, culture, and climate, including the reports of all incidents, whether confirmed or not.

The regulations should also avoid excluding parent from activities of the school climate team, because files can be redacted to allow parental participation.

We are finally proposing that the regulations provide specific guidance to districts regarding the selection, preparation, and function of the parent on the school safety/climate team.

Student Records

HIB documents are “student records” within the meaning of N.J.A.C. 6A:32-2, as they are “information related to an individual student gathered within or outside the school district.” The regulations should make it clear that parents are entitled to the records and information. Districts need to be reminded that OPRA provides yet another avenue for access to student records.

We recommend that a definition of “written notice” be included in the regulations to set forth clearly the information that must be provided to parents, and to ensure that the information provided is consistent across school districts. This definition should clarify that a student’s distinguishing characteristic need not be included in the required written notice, when necessary to protect a student’s sensitive information. Such information must, of course, be available to parents upon request, but, to protect the interests of the student, should not be disclosed unless requested.

When they request same, parents should be entitled not only to written notice, but to the HIB investigation report itself. We recommend that the same report sent to the board of education be released to the parents of the target and perpetrator, with all personally identifiable information of other students redacted, and in a manner consistent with district policy and state and federal law regarding the handling of confidential and sensitive information, upon request by either or both of those parents.

Complaint Investigation

Since the statute, at N.J.S.A. 18A:37-25, requires the Commissioner to establish a formal protocol for investigating complaints of violations, we think it is critical that the regulations alert the public to the existence of this enforcement mechanism. We urge the Commissioner to develop a form, as has been done for special education complaints, which can be used to ensure that HIB complaints contain all necessary information. Because HIB complaints must be addressed in a timely manner – and we are aware of at least one instance in which the office of the executive county superintendent of schools has let an entire school year pass without issuing an investigation report in response to a complaint --, we also recommend that a 60 day deadline be set for the completion of investigations and issuance of reports. A robust complaint investigation process will ensure that violations of HIB law can be brought to the Department's attention by pro se parents who may be incapable of litigating a hearing under the Controversies and Disputes rules.

Bullying Prevention Fund

We strongly urge the State Board and the Commissioner to seek a regular annual appropriation from the Legislature to ensure that sufficient funds are available to support the effective implementation of the ABR and to prevent any future challenges to the ABR as an unfunded mandate. Our recommendation is that an appropriation of three million dollars per year be allocated to support three regional training centers, in north, central, and south New Jersey to provide consultation and technical assistance to schools in their respective regions on bullying-related issues. This money should also be used to support the establishment and maintenance of a hotline (housed at one of the regional centers) to answer bullying-related calls from school staff, parents, and community members.

We are not proposing specific regulatory language for the Bullying Prevention Fund at this time, but recommend that regulations be developed once the appropriation has been secured.

We thank you for your careful consideration of these collective comments, and any future comments that we submit. We stand ready to assist in any way we can.

Coalition for an Effective ABR

By: Elizabeth Athos, Education Law Center

Coalition members: Nina Peckman, Advocates for Children of New Jersey; Paula Rodriguez Rust, Ph.D., Alliance for Comprehensive & Effective Strategies for Bullying Prevention; Catherine Nti, M.Ed., and Daniel Oscar, Center for Supportive Schools; Carol Watchler and Christine Hamlett, Central New Jersey Chapter of the Gay Lesbian Straight Education Network; Mary Ciccone, Esq., Disability Rights New Jersey; Elizabeth Athos, Esq., Education Law Center; Aaron Potenza, M.A., M.Phil., Garden State Equality; Michael B. Greene, Ph.D., Senior Fellow, Rutgers University School of Criminal Justice; Daniel Fernandez, HiTops Adolescent Health and Well-being; John Rue, Esq. and Michelle Cummins, Esq., Innisfree Foundation; Jerry Tanenbaum, Esq., Mattleman, Weinroth & Miller; Stuart Green, DMH, LCSW, New Jersey Coalition for Bullying Awareness and Prevention; Amy Fabrikant, Northern New Jersey Chapter of the Gay Lesbian Straight Education Network; Diana Autin, J.D. and Maria Docherty, Statewide Parent Advocacy Network; Julie Warshaw, Esq., Warshaw Law Firm.

The following organizations endorse these comments and accompanying proposed regulatory changes:

Advocates for Children of New Jersey

Alliance for Comprehensive & Effective Strategies for Bullying Prevention

American Civil Liberties Union – New Jersey

Center for Supportive Schools

Central New Jersey Chapter of the Gay Lesbian Straight Education Network

Disability Rights New Jersey

Education Law Center

Garden State Equality

HiTops Adolescent Health and Well-being

Innisfree Foundation

Mattleman, Weinroth & Miller, PC

New Jersey Coalition for Bullying Awareness and Prevention

Northern New Jersey Chapter of the Gay Lesbian Straight Education Network

Statewide Parent Advocacy Network

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