**COMMENTS ON THE PROPOSED REGULATIONS**
**FOR THE "ANTI-BULLYING BILL OF RIGHTS."**

OCT. 5, 2016, Hearing testimony by Dr. Paula C. Rodríguez Rust
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**Background Information on the Speaker.** I am a sociologist and educational consultant. I am the founder of the Alliance for Comprehensive and Effective Strategies (ACES) for Bullying Prevention, and the owner of Spectrum Diversity, LLC, through which I provide consulting and professional development services to New Jersey schools on topics related to bullying, school climate, cultural competence and equity. I have more than 30 years of experience doing teaching and research in this area, including twelve years of university level teaching during which I received tenure at two different institutions. I gave up tenure both times, and now focus on providing training for New Jersey professionals. I also provide continuing education for social workers through the Department of Social Work at Rutgers University, and I am co-authoring the training curriculum that will be used to train the approximately 6,000 employees of the New Jersey Division of Children and Families on sexual orientation and gender identity diversity.

**Topic of Testimony:** The proposed regulations for the "Anti-Bullying Bill of Rights," N.J.A.C. 6A:16-7.7.

**Testimony:**

**Coalition for an Effective ABR:** I am a member of the Coalition for an Effective Anti-Bullying Bill of Rights, the working group that was mentioned by Liz Athos of the Education Law Center in her comments. The Coalition for an Effective ABR is an ad hoc working group that represents individuals and organizations with a wide range of perspectives and interests pertaining to the topic of bullying in schools; our one common interest is in ensuring that this law continues to protect student safety in schools, as well as parental rights, and many of us are also very sympathetic to the issues faced by schools as they comply with the ABR. As Liz Athos mentioned, we have compiled a list of concerns regarding the proposed regulations, and we have also drafted suggested revisions for the proposed regulations that would address these concerns. She has already provided you with copies of the documents we have collectively drafted over the past few months.

As a consultant who works with schools and is sympathetic to the burdens faced by school administrators and ABSs, I have participated actively in the drafting of these documents, and I fully share every concern, and support every recommendation in them.

**Introduction of Other Supporters in the Room:** There are some people in attendance today who are not signed up to speak, but whom I wish to point out because they are here to urge you to take our concerns, and our recommendations, very seriously. (Please raise your hand or stand) These individuals are:

- Julie Warshaw, Esq., of the Warshaw Law Firm.
- Daniel Fernandez, Health Educator, at HiTOPS
- Dr. Michael Greene, Senior Fellow at the Rutgers School of Criminal Justice

Among those of us who will speak today, each of us will emphasize certain specific issues that are raised in the documents that have already been provided to you. The first topic I will address is the proposed preliminary determination procedure.

NOTE: In my oral testimony, I will speak about these topics in reverse order, #3 first, then #2, then #1.

**Specific Topic #1: Accountability in the Preliminary Determination Procedure**

The proposed regulations would establish a preliminary determination procedure for HIB complaints. The proposed wording simply says that a district may "set forth" in their policy "a process by which the principal… in consultation with the anti-bullying specialist, makes a preliminary determination as to whether a reported incident or complaint is a report of an act of HIB." I'd like to point out that the entire purpose of the HIB investigation, that is already required by the ABR, is to discover whether or not an HIB complaint is founded, because the information available in the complaint itself might be insufficient to make such a determination. A "preliminary determination procedure," in effect, would supplant the investigation that is required by law. However, unlike the investigation procedure required by law, the proposed preliminary determination procedure contains no procedural requirements, no safeguards, and no provisions for accountability. The language does not require the principal or the ABS to document, justify, explain, or communicate their determination to any other party. In effect, it amounts to a "get out from under the ABR for free" card. This effectively nullifies the entire law, because it relieves schools of the burden of having to comply with a law that protects students.

The clear purpose of the proposed preliminary determination procedure is to relieve the burden of the ABR on administrators and school staff. I find the fact that the three organizations cited as recommending this new procedure—the NJPSA, the NJASA, and the NJSBA—all represent the interests of school administration and staff, and not the interests of students and parents, very telling. I understand the burden that the ABR places on schools; a great deal of my work is with schools, helping them implement the ABR in ways that are feasible. I also understand that many school districts will implement the preliminary determination procedure with integrity; they will examine the elements of the statutory definition of HIB, compare it to the information they have, gather missing information, and make reasonable good faith determinations. However, the ABR did not come into existence for the benefit of the schools that are already doing the right thing. It was passed because of the school districts that are not already motivated to protect their own students. Establishing a preliminary determination procedure that has no procedural requirements, with no requirements to document, explain, or communicate the results of the procedure, and with no accountability, effectively undermines the law entirely. We might as well take the law off the books altogether, because this will do more damage than good, because it will allow schools whose hearts are not in the right place to claim that they have responded as required under the law, thus leaving bullied students with no recourse whatsoever.

It also undermines parents' rights, because it provides parents with no right of access to information about the preliminary determination procedure, nor about the reasons for the decision if the complaint is determined to be unfounded, so it effectively denies parents and students of their right to appeal.

In the transcript of the comments made to the Board in a meeting that occurred on May 4, 2016, one commenter asked about the preliminary determination procedure. In the response, the Board states that "the proposed rule is in response to a recommendation from three Statewide organizations whose members are responsible for implementing the *Anti-Bullying Bill of Rights Act* (New Jersey Principals and Supervisors Association, New Jersey Association of School Administrators, and New Jersey School Boards Association) to clarify the principal's role when there is a reported incident or complaint of an alleged HIB act. The proposed rule is necessary since the facts presented to the principal sometimes do not meet the minimum standards set forth in the *Anti-Bullying Bill of Rights Act* and the principal could handle the matter as a code of student conduct issue rather than conducting an HIB investigation." First of all, as I've already stated, discovering whether or not the "facts presented to the principal do not meet the minimum standards" is exactly the purpose of the investigation procedure that is already set forth in the law itself; there is no need to institute another procedure if that is the purpose of this new procedure. I assert that the real purpose of this preliminary determination procedure is to reduce the burden on administrators, and as I've said, I sympathize with this goal. However, when I look at the names of the three organizations that are cited as recommending this proposed procedure, it strikes me immediately that there is a similarity of interest among those groups, and that none of them represent the interests of parents and students. The purpose of this law is to protect students. The job of the administrator is to protect students. We might want to lighten the burden if possible without diminishing student safety, but we should not do that by excusing administrators from the burden of protecting students.

**Specific Topic #2: Handling of Sensitive Information**

The ABR is intended to protect vulnerable students. However, there are provisions in the ABR which can result in greater risk, rather than greater protection, for a particular part of the student population: those who identify as lesbian, gay, bisexual, or transgender, or who are harassed because they are perceived to be LGB, or T.

I testified at length on this specific topic at the hearing on Sept. 7. In a nutshell, unlike many other vulnerable groups, LGBT youth have to go through a process of "coming out." Young people who are LGBT are not told they are LGBT when they are growing up; this is something they have to discover for themselves in a process called "coming out." They then have to decide whether, when, and how to tell the other important people in their lives.

Young people often think long and hard about whether, and how to tell their parents. They think about the different ways their parents might react, they plan how they are going to bring up the topic, how they are going to explain it to their parents, and when and where they are going to do it.

When their child comes out to them, some parents respond very negatively. Some respond with emotional or physical abuse, and some throw their children out of the house.

The suicide rate among young LGBT is three times the suicide rate of heterosexual, non-transgender youth[1] and this is largely because of the negative reactions of significant others, primarily a youth's parents. Among homeless youth, 40% identify as LGBT; this is because, in addition to running away from home for the same reasons heterosexual youth run away, LGBT youth also run away to escape parental abuse because they are LGBT, and they are often *thrown away* by parents who want nothing to do with them because they are LGBT.

If a youth is forced to come out to their parents before they are ready, this can be psychologically damaging to the youth, and could put the youth at serious risk of abuse from their parents. The youth might not even be ready to accept their LGBT identity in their own mind, much less be ready to have others know about it, or have to explain it to their parents.

When an incident that might be HIB is reported to a school, the required procedure involves a notification to the parents by the principal, and referral to the Anti-Bullying Specialist, who then conducts an investigation which might involve interviewing other students and staff members.

For LGBT students, this presents a very threatening prospect. Will the phone call home "out" them to their parents? Will the investigation process "out" them to other students? Someone at school reported that they were being harassed for being LGBT; because the school has complied with a law that is supposed to protect them from anti-LGBT harassment, are they now going to have to face worse harassment in their home and in school? I will not go into further detail about the many ways in which ABR procedures might out a student. I know other speakers today will cover this topic in greater detail. However, I have provided you with a copy of the testimony I gave on Sept. 7, and also with a handout that I use in professional development workshops, which explains all the ways that the ABR procedures might out a student, so that you have these details in writing.

LGBT students used to get through middle and high school by holding their breath, and finding a supportive adult with whom they could talk once in a while, for support. Now, under the ABR, if they tell that adult about harassment they are experiencing in school, that adult must report it, which might lead to an "outing" of the student, both at school and at home, and therefore greater risk, not greater protection, for that student.

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[1] Various research studies show that the rates of suicidal ideation, attempts, and successful suicides among LGBT youth are 2-7 times the rate among heterosexual cisgender youth, because of differences in methodology; the most reliable and representative studies tend toward the finding that the rate among LGBT is 3 times greater than among heterosexual cisgender youth.

Fearing that ABR procedures will out them, some LGBT students are choosing not to report anti-LGBT harassment. A law that was supposed to protect them from harassment has instead removed the one source of support that many of them had, and replaced it with the threat of being outed and faced with greater harassment, not only in school, but also now at home.

When the Anti-Bullying Task Force held six forums throughout the state during their first year, they heard first hand from Student Assistance Counselors who told them that the LGBT students, who used to come to their door to talk and find support, were now avoiding them.

This situation, in effect, requires schools to comply with procedures that might endanger students—that seems to me to be a problem, not only because of the danger to students, but because it raises serious liability issues for schools. Schools are liable for failing to protect students; how liable are they if they engage in actions that actively endanger students?

In a separate effort, organizations representing the interests of LGBT students are asking the DOE to issue guidance to schools on how to implement the ABR in ways that will protect, rather than endanger, LGBT students. In their Jan. 2015 report, the ABTF recommended that the DOE issue guidance on this issue to schools.

What does this have to do with the regulations? I urge you not to pass regulations that will encourage ABR implementations in ways that will further endanger LGBT students, and which fail to help schools navigate the difficult process of trying to comply with the ABR while not causing harm to their LGBT students. In the documents prepared by our working group, there are references to "sensitive information" or "privacy" on pages 15-16, 17, 19, 23-25, and on corresponding pages in the section on PSSDs. For example, on page 16, we suggest that school HIB policies should be required to include provisions for maintaining the privacy of student information collected during an HIB investigation. One might counter-argue that such information is already protected by confidentiality laws, but information about a student's sexual orientation or gender identity is not protected by confidentiality laws, so these students fall into a crack that needs to be filled. Furthermore, the recent Dear Colleague letter on Transgender students (May 13, 2016) issued by the U.S. Department of Education urges schools to treat information about a student's birth sex and gender identity with care, because revealing such information—which is not usually considered confidential—might endanger a transgender student. So this recommendation that the regulations require schools to institute procedures to protect student privacy is in keeping with federal guidance.

Also, by providing schools with regulatory basis for procedures that they might put in place in order to prevent ABR procedures from outing students, it will help schools manage the liability that they might otherwise face when they attempt to protect LGBT students while complying with the ABR.

**Specific Topic #3: Definition of Bullying.**
The proposed regulations would add a statement to district HIB policies that "bullying is unwanted, aggressive behavior that may involve real or perceived power imbalance." We urge you to make two changes to this statement.

First, change "unwanted" to "hurtful." The word "hurtful" is more consistent with the law, and it is also more consistent with evidence-based definitions of bullying. "Unwanted" is a subjective term referring to the mind set of the *target/victim*, which effectively, in the mind of the offending student, makes the target the cause of their discipline. Bullying is *hurtful* behavior, and this is a determination to be made by the *reasonable observer,* as it clearly stated in the law itself.

Second, change "may" to "might or might not." Although the word "may" implies its opposite, i.e., that bullying need not involve a power imbalance, in my work with schools I find that educators have been simplistically over-educated about the role of a power imbalance in bullying. They think that, because they have heard that "bullying involves a power imbalance," that they are supposed to look at a situation, and if they don't see a power imbalance, that they are supposed to conclude that it is conflict, not bullying, and therefore not report it. This is a serious misapplication of the role of power imbalance in the concept of bullying. First of all, researchers do *not* agree that the definition of bullying should include "power imbalance." Second, when a power imbalance exists, it can take many forms, not all of which are visible to an adult observer; thinking that this is a criterion for HIB is a mistake that leads to failure to report HIB, and to failure to use evidence-based practices to address situations that have been mis-classified as "conflict" instead of "bullying." It is fine for the regulations to sensitize school staff to the dynamics of power in bullying, but the regulations should not encourage school staff to continue to make this definitional mistake. In order to make it as explicitly clear that bullying does *not* have to involve an observable power imbalance, as it is clear that it *could* involve a power imbalance, it is important for the language to say that bullying "might or might not" involve a power imbalance, rather than that it "may involve" a power imbalance. The denotation is the same, but the connotation and impact is different and important, and will help educators avoid mis-applications of both the law, and evidence-based practice.

In our suggestions, on page 8, we have also added a definition of "power imbalance" that would further clarify this concept, toward the goal of preventing schools from mis-applying it to the detriment of students.