

Harassment, Intimidation, Bullying & Student Discipline in a Virtual World

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Overview of HIB

- ▶ Anti-Bullying Bill of Rights Act, P.L. 2010, Ch. 122, N.J.S.A. 18A:37-14 et seq., (“Act”)
- ▶ Regulations Implementing the Act - N.J.A.C. 6A:16-7.7 and 7.8.
 - ▶ Regulations were amended in 2017 and 2018 with noteworthy changes.
 - ▶ N.J.A.C. 6A:16-7.7(a)(2)(iii) - Board policy must include a statement that bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance of power.
 - ▶ N.J.A.C. 6A:16-7.7(a)(2)(ix)(1) and (ix)(1)(a) - Permits Principals, in consultation with the ABS, to exercise discretion (aka “Principal’s discretion”) to make an initial determination as to whether a reported incident falls within the scope of the Act. **Must be pursuant to Board Policy.**
 - ▶ In making the determination, the Principal must assume the allegations are true.
 - ▶ The parent/guardian may appeal the decision not to initiate an investigation to the Board, and then to the Commissioner of Education.
 - ▶ N.J.A.C. 6A:16-7.7(a)(2)(ix)(2) and (ix)(2)(a) - Board policy must include HIB investigation procedures for students attending PSSDs.
 - ▶ The sending District conducts the investigation in consultation with PSSD.
 - ▶ PSSD must cooperate with the District (N.J.A.C. 6A:16-7.8).

Overview of HIB (cont.)

- ▶ N.J.A.C. 6A:16-7.7(a)(2)(ix)(3) - To protect the victim, the investigation procedure also shall take into account the circumstances of the incident when communicating with parents.
 - ▶ For instance, disclosure of students' sexual orientation and/or gender identity/expression.
- ▶ N.J.A.C. 6A:16-7.7(a)(2)(ix)(4) - Investigations of complaints concerning adult conduct shall not be conducted by a member of the same bargaining unit as the individual who is the subject of the investigation.
- ▶ N.J.A.C. 6A:16-7.7(a)(2)(xi)(1) and (xi)(2) - Sets forth a sixty (60) “calendar days” deadline to request a hearing before the Board and provides ten (10) “business days” to hold the hearing.
- ▶ N.J.A.C. 6A:16-7.7(h) - Clarifies requirements for the school safety/school climate team.
 - ▶ Members shall consist of: the Principal or designee, teacher, the ABS, parent of a student, and *other* members determined by the Principal. Chaired by the ABS.
 - ▶ Parents and *other* members not authorized to access student records cannot participate in any activity that compromises confidentiality.

Definition of HIB

- ▶ “Harassment, intimidation, or bullying” means *any gesture, any written, verbal or physical act, or any 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*, such as:
 - Race;
 - Color;
 - Religion;
 - Ancestry;
 - National origin;
 - Gender;
 - Sexual orientation;
 - Gender identity and expression;
 - A mental, physical, or sensory disability; or
 - Any other distinguishing characteristic.
- The protected categories are similar to the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-12.

Definition of HIB (cont.)

- ▶ Takes place on school property, at any school-sponsored function, on a school bus, or off school grounds, that ***substantially disrupts or interferes 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 the 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.

“Distinguishing Characteristic”

- ▶ Typically something that is objectively distinguishing and readily apparent.
 - ▶ Easy examples: personal appearance or intelligence. Most, but not all, are appearance-based.
 - ▶ Possible examples: social standing, socio-economic status, grade level, political affiliation, dietary restrictions/choices.

Most Likely Yes	Possibly Yes	Probably Not
Hair Color	Grade Level	Comparative strength between students
Piercings	Political affiliation	Comparative age between students
Braces	Social standing	Comparative popularity between students
Glasses	Popularity	
Intelligence	Socio-economic status	
Weight		
Physical features		

- ▶ Not simply based on a relationship between the parties. Just because Student A is physically stronger than Student B, it does not make “weakness” a distinguishing characteristic of Student B. Actual or perceived “weakness” must be the motivating factor.
- ▶ Always consider the circumstances.

Investigation Procedures and Timelines

REPORTING

Immediately: Upon receipt of a complaint or reliable information of an alleged act of HIB, or upon having witnessed an act of HIB, the incident must be reported immediately (same day) to the building Principal, who will notify the parents/guardians of all students involved in the alleged incident.
If a staff member is accused of HIB, the staff member must also be notified.

If the allegations were sent to a Board employee or service provider via email or correspondence, then same should be forwarded to the Principal.

Within Two (2)
School Days
following the
verbal report:

Following the verbal reporting (or forwarding of any emails or correspondence containing the allegations), the employee or service provider who witnessed or received the reliable information regarding the alleged act of HIB, must memorialize the details of the incident(s), in writing, and submit same to the Principal within two (2) school days.

Investigation Procedures and Timelines

INVESTIGATION

Within One (1)
School Day
following the
verbal report:

The investigation shall be initiated by the Principal or the Principal's designee within one (1) school day of receiving a verbal report of the incident.

The written report that is received from the employee or service provider will be considered part of the investigation, when received.

The investigation shall be conducted by an Anti-Bullying Specialist ("ABS"). The Principal may appoint other personnel to assist in the investigation.

During the course of the investigation, all relevant parties must be interviewed.

Persons accused of HIB must be made aware of the specific allegations during their interview. The investigation report should document the fact that the specific allegations were shared and discussed with the accused.

Investigation Procedures and Timelines

INVESTIGATION (cont.)

Within Ten (10)
School Days
following the
written report:

The investigation shall be completed as soon as possible, but no later than ten (10) school days from the date of the written report of the incident HIB.

In the event there is information relative to the investigation that is anticipated but not yet received by the end of the ten (10) school days period, the ABS may amend their report of the results of the investigation to reflect the information.

Important Tips for Investigating:

- Know the definition of HIB and all of the factors that must be met.
- Ask the questions to ensure that information identifies whether all parts of the definition have been met.
- Analyze all of the information gathered in light of the HIB factors.

Investigation Procedures and Timelines

SUPERINTENDENT'S REVIEW

Within Two (2)
School Days
following
completion of
investigation:

The results of the investigation (the ABS's Report) shall be reported to the Superintendent within two (2) school days of the completion of the investigation.

The Superintendent may decide to provide intervention services, impose discipline, order counseling, or take or recommend other appropriate action.

Although not required under the law, the ABS may send information to the parents/guardians and/or staff members regarding the investigation results.

At the Next Board
Meeting following
Superintendent's
receipt of the
ABS's report:

The results of each investigation shall be reported by the Superintendent to the Board no later than the next scheduled Board meeting after the investigation has been completed and shared with the Superintendent.

Investigation Procedures and Timelines

SUPERINTENDENT'S REVIEW (cont.)

Within Five (5)
School Days
following report
to the Board:

Within five (5) school days after the results of the investigation have been reported to the Board, the parents/guardians of the students and/or the staff members who are parties to the investigation must be provided with the following information in writing:

(1) the nature of the investigation; (2) whether the District found evidence of HIB; and (3) whether discipline was imposed or services provided to address the incident of HIB.

This “Five-Day Letter” is the “Superintendent’s Decision” relating to the HIB incident. Therefore, the correspondence should set forth the information above and state whether the Superintendent concurs with the findings and results of the investigation.

The correspondence shall also notify the parents/guardians and/or staff members of the right to request a hearing before the Board, and may include a statement on the recipients’ right to representation.

Investigation Procedures and Timelines

BOARD'S REVIEW

At the Next
Board Meeting
following report
to the Board:

At the next Board meeting following receipt of the report of the investigation from the Superintendent, the Board must vote to affirm, reject, or modify the Superintendent's Decision.

The Board must issue a written decision to the parents/guardians and/or staff members. The Board's Decision must include information on the parents'/guardians' and/or staff members' right to appeal the Board's determination to the Commissioner of Education.

Best practice is to issue the Board's Decision within a day or two of the Board Meeting where the vote to affirm, reject, or modify the Superintendent's decision took place.

A copy of the Board's Decision must be mailed to the parties.

Investigation Procedures and Timelines

BOARD'S REVIEW (cont.)

If a Board hearing is requested by the parents/guardians and/or staff member

Within Ten (10)
Business Days of
receipt of request
for a Board hearing:

Following receipt of the Five-Day Letter, *i.e.*, the Superintendent's Decision, a parent/guardian and/or staff member may request a Board hearing. The hearing must be held within ten (10) business days of the receipt of the parent/guardian or staff member's request, and shall take place in executive session.

The hearing timeframe can be extended by consent or mutual agreement.

Following the hearing, the Board must issue a written decision to the parties. It is recommended that the Board decision resulting from a hearing contain details and specific findings, in addition to whether the Board is affirming, rejecting or modifying the Superintendent's decision.

The Board's decision should include information on the parents'/guardians' and/or staff member's right to appeal the decision to the Commissioner of Education.

Best practice is to issue the Board's Decision within a day or two of the hearing.

A copy of the Board's decision must be mailed to the parties.

Investigation Procedures and Timelines

BOARD'S REVIEW (cont.)

If a Board hearing is requested after the Board has made a determination

The New Jersey Department of Education, pursuant to N.J.A.C. 6A:16-7.7(a)(2)(xi), recently established a sixty (60) calendar day deadline for parents/guardians and/or staff members to request a hearing before the Board.

What does this mean?

If the request for a hearing is received after the Board's vote and issuance of the written decision, the Board must conduct a hearing and issue another decision.

The *new* Board decision supersedes the *prior* Board decision, and the timeline to appeal to the Commissioner of Education runs from the issuance of the *new* Board decision.

Investigation Procedures and Timelines

APPEAL TO THE COMMISSIONER OF EDUCATION

Within Ninety (90) Days following issuance of the Board Decision, a parent/guardian and/or staff member may appeal the Board's determination to the Commissioner, in accordance with the procedures set forth in N.J.A.C. 6A:3 et seq.

HIB in a Virtual World

- Procedural timelines have NOT been waived or extended as a result of the pandemic.
- Many school districts have experienced a decrease in the number of HIB complaints.
- As expected, most HIB incidents during the pandemic and in the remote setting have been through social media and/or other electronic means.
- Access to students and staff, and interviews with alleged victims and perpetrators have been challenging.
- Tips:
 - To ensure student cooperation, work with the parents and teaching staff members.
 - Walk students/parents of the process.
 - Emphasize the need for confidentiality of those involved and the importance of maintaining the integrity of the investigation.
 - Creative intervention methods and/or consequences should be considered.
 - Follow-up with the victim and the perpetrator.

Student Discipline: Causes for Suspension and Expulsion

- ▶ N.J.S.A. 18A:37-2 et seq.
 - ▶ Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school
 - ▶ Such conduct includes, but is not limited to:
 - ▶ Continued and willful disobedience
 - ▶ Open defiance of the authority of any teacher or person having authority
 - ▶ Conduct that constitutes continue danger to the physical well-being of other pupils
 - ▶ Physical assault on another pupil
- ▶ Regulations Implementing the statute - N.J.A.C. 6A:16-7.2, 7.3, 7.4 and 7.5.

Student Discipline: Suspension and Due Process Rights

- ▶ **N.J.A.C. 6A:16-7.2**: Short-term suspensions
- ▶ A district that suspends a student for 1 but not more than 10 consecutive days is required to
 - ▶ Provide an oral or written notification to the student, as soon as practicable
 - ▶ Prior to suspension, conduct an informal hearing giving the student an opportunity to present his or her version of the events
 - ▶ The hearing is conducted by a school administrator or designee
 - ▶ Oral or written notification to the student's parents of the student's removal prior to the end of the school day
 - ▶ Appropriate supervision of the student while waiting for the student's parents
 - ▶ Academic instruction either in school or out of school that addresses NJ Student Learning Standards
- ▶ The suspending principal

Student Discipline: Suspension and Due Process Rights

- ▶ N.J.A.C. 6A:16-7.3, Long-term suspensions
- ▶ A district that suspends a student for more than 10 consecutive days
 - ▶ Notification to the student regarding the charges prior to his removal
 - ▶ Prior to suspension, conduct an informal hearing giving the student an opportunity to present his or her version of the events
 - ▶ Immediate notification to the student's parents of the student's removal
 - ▶ Appropriate supervision of the student while waiting for the student's parents
 - ▶ Written notification to the parents by the chief school administrator or his designee, within 2 days of the suspension stating: 1. the specific charges, 2. the facts which the charges are based 3. the student's due process rights
 - ▶ A list of witnesses and their statements or affidavits five days prior to formal hearing

Student Discipline: Student's Suspension Due Process Rights

- ▶ **N.J.A.C. 6A:16-7.3**, Long-term suspensions (continued)
- ▶ A district that suspends a student for more than 10 consecutive days
 - ▶ For a student with a disability, a manifestation determination shall be conducted pursuant to N.J.A.C. 6A:14-2.8
 - ▶ Inform the student of the right to obtain an attorney
 - ▶ In or out of school educational services that are comparable to the those provided in public schools
 - ▶ A formal hearing before the district board of education
 - ▶ A written statement to the student's parents regarding the district board of education's decisions within five school days
 - ▶ If it is found the student did not commit the offense, the student shall immediately return to school
 - ▶ At the completion of a long-term suspension, the student shall return to general education program

Student Discipline: Expulsion and Due Process Rights

- ▶ **N.J.A.C. 6A:16-7.4**, Expulsions
- ▶ A district that may expel a general education student only after providing:
 - ▶ The due process rights under N.J.A.C. 6A:16-7.1(c)3 and 7.3, subsequent to a long-term suspension
 - ▶ An appropriate educational service under N.J.A.C. 6A:16-7.3(f)
 - ▶ The program shall be consistent with N.J.A.C. 6A:16-9.2
 - ▶ Educational services shall be comparable to those provided in public schools
- ▶ A student may appeal the board's decision for expulsion to the Commissioner
 - ▶ If appealed, the district shall continue to provide educational services until a final determination has been made.
- ▶ A student with a disability shall only be expelled from his program in accordance with N.J.A.C. 6A:14.

Student Discipline: Conduct Away From School Grounds

- ▶ **N.J.A.C. 6A:16-7.5**
- ▶ School authorities have the right to impose consequence on a student for conduct away from the school, and as consistent with the student code of conduct
 - ▶ This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety and well-being for reasons relating to safety
- ▶ Cyberbullying and other similar forms HIB that occurs off school grounds would fall in this category of offenses, especially in a virtual setting.

Student Discipline in a Virtual World

- Procedural timelines have NOT been waived or extended as a result of the pandemic.
- Many school districts have experienced a decrease in the number violations of the student code of conduct.
- As expected, most during the pandemic and in the remote setting have been through social media and/or other electronic means, including during virtual classroom sessions.
- Imposing discipline has been challenging.
- Tips:
 - To ensure student cooperation, work with the parents and teaching staff members.
 - Walk students/parents of the process.
 - Creative methods of discipline, interventions and/or consequences should be considered.
 - Follow-up with the students involved.

Case Review:

C.P. o/b/o L.P. v. BOE of the Twp. of Warren, Somerset County, EDU 13907- 16, Commissioner Decision No. 56-18 (Feb. 16, 2018)

- ▶ Petitioner sought reversal of Board's HIB determination alleging that L.P. was the victim of bullying based on a distinguished characteristic, a student with an IEP.
- ▶ The ALJ held that the alleged actions by the District staff were not motivated by an actual or perceived distinguishing characteristic of L.P.
- ▶ The Commissioner concurred, clarifying that – although having an IEP may be a distinguishing characteristic – there is no evidence to suggest that the alleged actions were motivated by that distinguishing characteristic.

Case Review:

S.A. and C.A. o/b/o G.A v. BOE of the Twp. of Moorestown, Burlington County, EDU 09703-16, Commissioner Decision No. 125-18 (Apr. 23, 2018)

- ▶ Petitioner alleged HIB based on G.A.'s status as a student with an IEP.
- ▶ It was alleged that the Special Education teacher repeatedly pulled G.A.'s papers out of her hands and sought G.A. out at the end of the period in order to give her study guides. This allegedly embarrassed G.A. and made her uncomfortable.
- ▶ The ALJ found that pursuant to the IEP, the teacher was checking G.A.'s work and giving her handouts at the end of class. The teacher's actions could not be reasonably perceived as motivated by the student's disability; the teacher was doing her job.
- ▶ The Commissioner concurred.

Case Review:

L.P. and H.P. o/b/o L.P. v. BOE of the West Morris Reg'l HS Dist., Morris County, EDU 14255-16 & 14256-16, Commissioner Decision No. 98-18 (Mar. 29, 2018)

- ▶ Petitioner alleged that L.P. was a victim of HIB at the hands of her fencing team coach and team members, and that the coach was retaliating against L.P. for filing a separate HIB complaint during the previous school year.
- ▶ Petitioner alleged that the retaliatory act was assigning L.P. to the “B Strip” and removing her from the “A Strip”.
- ▶ The ALJ found that the coach had discretion to change any assignments, and no specific criteria for strip selection exists; rather, the coach made a strip selection based on individual competition.
- ▶ The ALJ found no retaliation and the Commissioner concurred.

Case Review:

R.P. o/b/o A.P. v. BOE of the Twp. of Hamilton, Atlantic County, EDU 09436- 17, Commissioner Decision No.100-18 (March 29, 2018)

- ▶ Petitioner alleged that the Board failed to properly investigate the matter and that A.P.'s behavior was not motivated by any distinguishing characteristic of the other student.
 - ▶ A.P., a male student, made comments and gestures towards a female student that were sexual in nature.
- ▶ The ALJ found that the conduct met the criteria for HIB; specifically, the conduct was motivated by the victim's gender, made the victim upset and uncomfortable, and interfered with the educational environment and the student's rights.
- ▶ The ALJ also found that the District conducted an investigation in accordance with the HIB policy and subsequently took disciplinary action in accordance with the code of conduct and discipline policy.
- ▶ The Commissioner concurred.

Case Review:

J.B. o/b/o M.B. v. BOE of the Boro. of Haddonfield, Camden County, EDU 11464-14, Commissioner Decision No. 170-18 (June 4, 2018)

- ▶ Petitioner sought reversal of the HIB determination, alleging that the Board did not follow the proper investigation procedures.
- ▶ The ALJ found, and the Commissioner concurred, that the appropriate remedy would be to return the matter to the Board for its non-compliance with the procedures set forth in the Statute.
- ▶ The Commissioner noted that the ALJ's dicta relating to the substance of the matter, and whether the Board's determination was arbitrary, capricious or unreasonable, was improper. The Commissioner reasoned that due to the clear procedural violations in the matter, the HIB investigation was deemed incomplete at the local level.

Case Review:

R.N. v. BOE of the South Orange-Maplewood School Dist., Essex County, EDU 09346-16, Commissioner Decision No. 184-18 (June 22, 2018)

- ▶ Petitioner alleged retaliation against his son by a baseball coach for prior filing of an HIB complaint.
- ▶ The Board filed a motion to dismiss, contending that Petitioner did not have standing as his son reached the age of majority prior to the filing on the instant appeal.
- ▶ ALJ 1 found Petitioner had standing; ALJ 2 found that Petitioner did not have standing and failed to assert claims on his behalf and only sought relief for alleged violations of the Act against his adult son, thereby dismissing the matter without further reviewing the substantive claims.
- ▶ The Commissioner rejected ALJ 2's decision and remanded the matter for further proceedings, concluding that Petitioner had standing pursuant to N.J.S.A. 18A:37-16(a), which prohibits retaliation and reprisal.
- ▶ The Commissioner explained that Petitioner was within his rights to assert a claim; whether the allegations possess any merit is a separate issue, and same should have been considered at the OAL. The Commissioner further explained that the substantive issues in the underlying petition remain unresolved, and further exploration of the facts is required for proper adjudication of this matter.

Case Review:

W.D. and J.D. o/b/o G.D. v. BOE of the Twp. of Jefferson, Morris County, EDU 10587-17, Commissioner Decision No. 375-18 (Nov. 26, 2018), App. Div. (Sept. 29, 2020)

- ▶ Petitioner appealed the Board’s determination that use of a derogatory term against G.D. during an online chat was not HIB.
- ▶ The ALJ found that although the alleged HIB incident involved the reprehensible use of the “N-word” the facts show that the word was used during an online exchange among a group of fifth grade friends, in which all five girls were using extraordinarily offensive language toward one another. The girls excused the behavior as “pranking” on each other. Additionally, G.D. appeared to have suffered no detrimental effect from the incident, and confirmed that she viewed the incident in question as “mutual” pranking.
- ▶ The Commissioner concurred.
- ▶ The Appellate Division affirmed.

Case Review:

M.S. and N.S. o/b/o J.S. v. BOE of the Twp. of Hainesport, Burlington County, and J.M. and D.M. o/b/o J.M., EDU 08878-16, Commissioner Decision No. 155-19 (June 18, 2019)

- ▶ Petitioners appealed the Board's determination that the conduct was HIB, contending that the conduct at issue was a part of a longstanding and ongoing conflict between J.S. and J.M.
- ▶ The ALJ found that J.S. and J.M. have had conflicts with each other since first grade, and while ongoing, unresolved conflict between the two students does not necessarily fall within the statutory definition of HIB. A backdrop of such ongoing conflict does not insulate the conduct under review from being properly determined to be in violation of the Act.
- ▶ The ALJ found that J.S. calling J.M. weak and referring to J.M. as a weakling – and a subsequent physical confrontation – substantiated a finding of HIB, given that such conduct was reasonably perceived to be motivated by an actual or perceived characteristic, and caused J.M. embarrassment and emotional harm.
- ▶ The Commissioner concurred.

Case Review:

L.K. and T.K. o/b/o A.K. v. BOE of the Twp. of Mansfield, Burlington County, EDU 08878-16, Commissioner Decision No. 107-19 (Apr. 22, 2019)

- ▶ Petitioners sought a determination that the Board's finding of HIB was arbitrary, capricious, and unreasonable.
- ▶ The ALJ found that the conduct did not meet the statutory definition of HIB.
- ▶ The Commissioner rejected the ALJ's decision, finding that A.K.'s conduct was motivated by the victim's gender identity and expression, caused emotional harm to the victim, and substantially disrupted the educational environment. The Commissioner noted that although the Commissioner is mindful of A.K.'s young age at the time of the incidents, A.K. should have known that her persistent conduct was causing the victim emotional harm, as she was repeatedly counselled that her behavior was not appropriate and was advised to stop.

Case Review:

K.P. o/b/o L.M. v. BOE of the Twp. of Saddle Brook, Bergen County, EDU 04624-19, Commissioner Decision No. 235-19 (Sept. 5, 2019)

- ▶ Petitioners appealed the District’s decision not to conduct an HIB investigation.
- ▶ The ALJ found that the conduct did not meet the statutory definition of HIB. Specifically, Petitioner had failed to prove that the comment that I.M. was “ugly and a bad dancer” was motivated by any distinguishing characteristic, or that the alleged statement substantially disrupted or interfered with the orderly operation of school. The ALJ concluded that the Board did not fail to investigate this allegation of HIB.
- ▶ The Commissioner concurred and noted that the Board was not arbitrary, capricious or unreasonable in making a preliminary determination that the alleged conduct did not meet the criteria for HIB, pursuant to N.J.A.C. 6A:17-7.7(a)(2)(ix)(1), as its HIB policy set forth a process by which to make such a determination prior to launching a full HIB investigation (and the process was followed in this case).

Case Review:

H.C. o/b/o B.Y. v. BOE of the Boro. of Metuchen, Middlesex County EDU 05202-17, Commissioner Decision No. 183-18 (June 22, 2018)

- ▶ Petitioner alleged that the Board's finding of HIB was improper and further sought expungement of any reference to the alleged act of HIB from B.Y.'s school records alleging that the Board failed to comply with the procedural safeguards set forth in the Act.
- ▶ The ALJ found that the Board attorney conveyed the Board's decision to the Petitioner, but that this letter could not be considered a written decision in satisfaction of the procedural requirements of the Act. The ALJ deemed this to be a failure of the Board to issue a final decision and an "irreparable" procedural flaw.
- ▶ The Commissioner rejected the ALJ's decision and remanded the matter to the OAL for a hearing, in order to resolve the factual disputes, and to determine whether the Board was arbitrary, capricious or unreasonable in its finding of HIB.
- ▶ The Commissioner noted that the Board attorney's letter to the Petitioner explicitly set forth the Board's consideration of the matter and its decision to affirm the Superintendent's HIB determination. Thus, it does, in fact, constitute a written decision pursuant to N.J.S.A. 18A:37015(b)(6)(e).

Case Review:

J.L. o/b/o A.L. v. BOE of the Bridgewater-Raritan Reg'l School Dist., Somerset County, EDU 11604-15, Commissioner Decision No. 416-16 (Dec. 9, 2016)

- ▶ Petitioners alleged various procedural violations and sought reversal of the Board's finding of HIB and removal of any reference of the alleged incident from A.L.'s school records.
- ▶ The ALJ found that the Board failed to issue a written decision; failed to review the investigation report prior to affirming the HIB determination; failed to provide Petitioner information regarding the investigation; and incorrectly advised Petitioner that there was a ten-day limitation on requesting an "appeal" before the Board. Accordingly, the ALJ determined that the HIB decision be reversed and any reference to HIB be deleted from A.L.'s school records.
- ▶ The Commissioner concurred with the ALJ that there were some procedural errors but rejected the ALJ's determination.
- ▶ The Commissioner explained that the noncompliance with the procedure did not deprive the Petitioner or A.L. of their due process rights. The Commissioner further found that it was reasonable for the District to specify a timeframe within which to request a hearing, as the Board is statutorily required to affirm the HIB determination at the next Board meeting following reporting of same.
- ▶ The Commissioner found that neither the Board meeting minutes, nor the principal's letter, constituted a final written decision by the Board. The Commissioner explained that someone who is authorized to speak on behalf of the Board must notify the parents of the Board's decision.
- ▶ The Commissioner determined that the appropriate remedy would be to return this matter to the Board to provide Petitioner with an opportunity for a hearing and to issue a final decision.
- ▶ The Commissioner's decision was appealed to the Appellate Division and was affirmed in Oct 2018.

Case Review:

E.W. and D.W. o/b/o A.W. v. BOE of the Bridgewater-Raritan Reg'l School Dist., Somerset County, EDU 9963-14, Commissioner Decision No. 320-17 (Oct. 23, 2017)

- ▶ Petitioners challenged the determination of the Board A.W. engaged in HIB based upon an incident involving another student, both seventh graders, wherein A.W. allegedly made comments relating to the other student's religion.
- ▶ The Board determined that that the statement made by A.W. could have been perceived to be disparaging of J.S.'s religion, and thus, met the definition of HIB. The Board issued a one-day suspension and ordered A.W. complete an HIB writing project.
- ▶ Petitioner's contested the designation of the incident as an HIB violation, and instead contended that the incident was a conduct violation.
- ▶ The ALJ found that, while there could be diverging opinions as to the final determination, there were no material facts at issue and held that A.W.'s statement could have reasonably been perceived to have been motivated by J.S.'s religion.
- ▶ The Commissioner adopted the ALJ's decision with clarification regarding the threshold requirements for a finding of HIB.

Case Review:

C.K. and M.K. o/b/o M.K. v. BOE of the Township of Voorhees, Camden County, EDU 20510-10, Commissioner Decision No. 81-17 (March 23, 2017)

- ▶ Petitioners appealed the determination of the Board that their child, M.K., was not the victim of HIB. Specifically, it was alleged that I.L., a special education student, reached under a partition separating two bathroom stalls in the girls' restroom, grabbed M.K.'s leg, and said "high five".
- ▶ The ALJ concurred with the Board and determined that I.L. – a special needs student – had a habit of indiscriminately seeking out high fives from classmates. Thus, there was no evidence to suggest that I.L. knew who M.K. was when she committed the alleged act, or that her actions were motivated by a perceived characteristic.
- ▶ The ALJ further found that while the Board did not fail to timely investigate or report the incident between I.L. and M.K., or fail to timely provide petitioners with information about the investigation, the Board did fail to hold a hearing within ten days of Petitioners' June 26, 2015 request for same.
- ▶ However, no further action was required to remedy the procedural error, as the Camden County Office of Education conducted a complaint investigation and issued a report in August 2016 directing the Board to take corrective action in regard to its handling of HIB complaints.
- ▶ The Commissioner concurred.

Case Review:

Columbia High School Baseball Boosters, Inc. v. BOE of the South Orange-Maplewood School District, Essex County, EDU 4046-17, Commissioner Decision No. 332-17 (Nov. 13, 2017)

- ▶ Petitioner challenged the Board's determination that the Booster Club committed an act of HIB when it disinvited one of the baseball team members to the end of year banquet.
- ▶ The ALJ found that the Act and its accompanying statutes and regulations do not apply to the Booster Club because its members are not staff, school employees, students or school volunteers.
- ▶ The Commissioner determined that the Booster Club itself cannot violate the Act; however, Booster Club members themselves are not exempt from the purview of the Act - there must be a determination on a case-by-case basis as to whether the member falls into one of the categories of individuals that have certain responsibilities under the Act.
- ▶ The Commissioner further found that, at this juncture, a hearing at the OAL concerning the conduct of the individual Booster Club members would be beyond the scope of the HIB investigation that was conducted and decided at the Board level.

Case Review:

N.U. on behalf of minor child, M.U., EDU 16045-18, Commissioner Decision No. 106-20 (Apr. 24, 2020)

- ▶ Petitioner challenged the Board's determination that M.U. committed an act of HIB in when he told a fellow sixth grader who had just gotten a haircut that he looked like Donald Trump.
- ▶ The ALJ found the Board actions were not arbitrary, capricious or unreasonable and that the 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. The ALJ ordered the petition be dismissed.
- ▶ The Commissioner remand the matter to OAL finding that the current record was insufficient to determine whether the Board acted arbitrary, capricious or unreasonable manner.
- ▶ The Commissioner stated an action of HIB requires three elements and the record only addressed the first element.

Case Review:

J.P. on behalf of minor child, D.P., EDU 15220-18, Commissioner Decision No. 97-20 (Mar. 13, 2020)

- ▶ Petitioner challenged the Board’s determination that D.P. committed an act of HIB when he called a fellow student “gay”.
- ▶ The ALJ reversed the Board’s determination because the Board failed to consider D.P.’s explanation of the circumstances surrounding the comment and the fact that D.P.’s comments “were not motivated by any actual or perceived characteristic, such as sexual orientation...” of the targeted student.
- ▶ The Commissioner reversed the ALJ’s decision determining that D.P.’s subjective lack of ill intent is not sufficient to overcome the record evidence that established that commenting on or misstating another student’s sexual orientation could reasonably be perceived as being motivated by that characteristic; D.P.’s comments substantially disrupted A.G.’s education; and such comments were reasonably considered to be insulting or demeaning