



LITIGATING UNDER THE NEW JERSEY
ANTI-BULLYING BILL OF RIGHTS ACT:
A GUIDE FOR ADVOCATES

Primary Author: Matthew A. Stoloff, Esq.
Revised and Edited by Education Law Center

About Education Law Center

Founded in 1973, Education Law Center (ELC) is the nation's legal defense fund for public education rights. ELC is widely recognized for successfully advancing equal educational opportunity and justice in New Jersey and states across the country. ELC pursues advocacy work through litigation, public engagement, policy development, research, and communications.

ELC's legal and policy advocacy, which includes the landmark court rulings in the *Abbott v. Burke* litigation, has significantly advanced the provision of fair school funding, high quality preschool and school facilities improvements, especially for students from low-income families and students of color. ELC's mission is to ensure all students receive a high-quality public education effectively preparing them to participate as citizens in a democratic society and as valued contributors to a robust economy.

Acknowledgments

This publication was conceived and drafted by primary author, Matthew A. Stoloff, Esq. He graduated from Syracuse University College of Law in 2008 and has practiced law since 2009.

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Disclaimer

The information contained in this guide is for educational and informational purposes only. It does not constitute legal advice, nor is it intended to be a substitute for legal counsel. This manual contains general information related to New Jersey's anti-bullying law that may not reflect current or complete legal developments or practice. If you have questions about any legal matter specific to your case, or if you require legal advice, you should consult with a licensed attorney.

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Where to Find Resources

Cited throughout this guide are decisions by the New Jersey Commissioner of Education (Commissioner) and the New Jersey Office of Administrative Law (OAL). Many of those cases can be found, organized by date, at the following website:

<https://www.nj.gov/education/legal/commissioner/index.html>. New Jersey statutes and regulations can be found at the following website: <https://nj.gov/state/dos-statutes.shtml>.

The New Jersey Department of Education (DOE) provides links to helpful resources on its website at: <https://www.nj.gov/education/students/safety/behavior/hib/>. Updated information and guidance covering the 2022 amendments to New Jersey's Anti-Bullying Bill of Rights Act is found at <https://www.nj.gov/education/safety/sandp/hib/faq.shtml>. As of the date of this publication, an updated version of DOE's *Guidance for Parents on the Anti-Bullying Bill of Rights Act*, <https://nj.gov/education/safety/sandp/hib/docs/ParentGuide.pdf>, has not yet been released.

Preface

Garnering strong bipartisan support, the New Jersey Anti-Bullying Bill of Rights (ABR) was enacted by the New Jersey Legislature to promote a safe school environment for all students and to reduce the risk of suicides due to harassment, intimidation, and bullying.

There are arguments to be made, even by supporters of the ABR, that it can be improved upon. A task force was authorized by the New Jersey Legislature in 2019 to examine, evaluate, and make recommendations regarding implementation of the ABR, but work was delayed by the COVID-19 pandemic. The Anti-Bullying Task Force (ABTF) was finally convened in 2023 and issued a report dated December 28, 2023 -- just as this publication was being finalized -- making findings and recommendations to the Governor and Legislature. While the report has not been reviewed for inclusion in this publication, it is recommended reading for anyone interested in potential changes to the law and may be found at [New Jersey Anti-Bullying Task Force \(nj.gov\)](https://www.nj.gov/education/abtf/).

While parents may represent their children *pro se* (on their own) in the New Jersey OAL if they lack the financial resources to hire an attorney and are unable to obtain *pro bono* (free) assistance, it is an unfortunate fact that many of those who do so lose their case. It is hoped that this publication will provide some guidance to parents who proceed without the assistance of counsel.

This publication was also written for attorneys who need a reference guide in this growing area of law. Less experienced attorneys may appreciate the step-by-step detail this publication contains in preparing an ABR case before the OAL. More experienced attorneys may find the caselaw citations useful when a quick reference is needed. Ultimately, this publication was written to assist anyone involved in litigating ABR cases on behalf of students.

CHAPTER 1 - INTRODUCTION

1-1 Introduction to the ABR

The Anti-Bullying Bill of Rights Act, or ABR, was enacted by the New Jersey Legislature to promote a safe school environment for all students and to reduce the risk of suicides due to harassment, intimidation, and bullying (HIB). N.J.S.A. 18A:37-13 to -32.1; N.J.S.A. 18:37-37.1 to -37.5.

The original version of the ABR became law in September 2002 and has been amended several times since.¹ Significant amendments include:

1. Expanding the definition of HIB to include electronic communications;
2. Encompassing HIB incidents that occur off school grounds;
3. Mandating certain consequences for students found to have committed HIB;
4. Creating new uniform reporting forms for HIB incidents and creating the statewide position of School Climate State Coordinator; and
5. Imposing increased fines and providing potential civil liability for parents whose children have committed cyber-harassment.

1-2 The Definition of HIB

HIB has a broad definition, including any gesture, any written, verbal, physical act, or any electronic communication that occurs on or off school property, that is insulting or demeaning, causes physical or emotional harm, or creates a hostile educational environment. N.J.S.A. 18A:37-14. One important limit on the definition is that conduct is not classified as HIB unless it is reasonably perceived as being motivated by a “distinguishing characteristic.” “Distinguishing characteristics” include traits delineated in the ABR (such as race or gender) as well as other traits decided on a case-by-case basis.

See Section 2-1 below for the full definition of HIB, including the effects that must be shown as a result of this conduct.

1-3 The ABR Protects Only Students

By its own terms, the ABR protects only students, not staff in the schools. Thus, teachers or other school employees cannot file HIB complaints under the ABR against either students or fellow staff. However, both students and staff who effectively commit an HIB act against school staff may be subject to discipline on other grounds.

¹ Both the first amendment in January 2011 and the most recent, effective in 2022, were prompted by the suicides of students who had been the targets of HIB: Tyler Clementi, a Rutgers University student, and 12-year-old Mallory Grossman.

Note: Staff who commit HIB against students may be subject to discipline under the ABR. See Section 2-3(d) below.

1-4 The ABR Protects All Students Attending Public Schools

All students enrolled in New Jersey public schools, including preschool students, are protected by the ABR. Although the ABR does not require religious or parochial schools to adopt HIB policies, the law encourages these schools to adopt anti-bullying policies. See N.J.S.A. 18A:37-31; *Anti-Bullying Bill of Rights Act, Questions and Answers* (November 2015), <https://nj.gov/education/safety/sandp/hib/docs/AntiBullyingQA.pdf>.

1-5 The ABR Protects All Students Attending Charter Schools

Charter schools are public schools that operate under a charter granted by the New Jersey Commissioner of Education. N.J.S.A. 18A:36A-1 to -18; N.J.A.C. 6A:11-1.1 to -6.4. Charter schools are required to comply with the ABR and adopt HIB policies. N.J.A.C. 6A:16-1.2. Students who attend charter schools have the same rights under the ABR as those who attend traditional public schools.

1-6 Students Attending Private Schools

1-6(a) Approved Private Schools for Students with Disabilities

Some students with disabilities are placed by their public school districts in approved private schools pursuant to their rights under special education laws. Under N.J.A.C. 6A:16-7.8, approved private schools for students with disabilities must develop, adopt, and implement policies prohibiting HIB on school grounds and must adhere to other anti-bullying requirements mirroring those applicable to public schools. While school districts have both a district anti-bullying coordinator and an anti-bullying specialist in each school, N.J.S.A. 18A:37-20; N.J.A.C. 6A:16-7.7(f-g), each approved private school for students with disabilities is only required to have a school anti-bullying specialist. N.J.A.C. 6A:16-7.8(d).

1-6(b) Other Private Schools

While private schools are not generally required to comply with the ABR, courts recognize that private school students have due process rights. Private schools must follow a two-prong process: first, the private school “must adhere to its own established procedures for dismissal,” and second, “the school must follow a procedure that is fundamentally fair.” Hernandez v. Don Bosco Preparatory High, 322 N.J. Super. 1 (App. Div.), certif. denied, 162 N.J. 196 (1999). But, as the court in Hernandez v. Don Bosco noted, “[w]hether the procedure is fundamentally fair will depend on the circumstances.” Id. at 22.

A case applying the Hernandez decision provides insight into how this might apply in the context of HIB. B.S. and N.B. obo H.K. v. Noor-Ul-Iman Sch., 2016 WL 4145921 (N.J. Super. Ct. App.

Div. Aug. 5, 2016). There, staff at a private school accused a student of violating the school's HIB policy. During a two to three-hour interrogation, school staff called the student a "liar" and instructed him "to write a statement" regarding the allegations. However, the staff never identified the exact nature of the allegations. The student was expelled from school despite having never received a copy of the investigation report specifying the offending conduct. The Appellate Division held that the school's procedures were fundamentally unfair and reinstated the student's complaint against the school.

1-7 Private, School-Related Entities Are Usually Not Subject to the ABR, Though Their Members May Be

Students, teachers and school staff are subject to the ABR, but school clubs are not. While individual club members and volunteers may be held responsible for violating the ABR, clubs cannot themselves violate the statute. See Columbia High Sch. Baseball Boosters, Inc. v. Bd. of Educ. of the S. Orange-Maplewood Sch. Dist., EDU 4046-17 (Aug. 9, 2017), modified, Comm'r Decision No. 332-17 (Nov. 13, 2017) ("a booster club itself cannot be found to have violated the Act," but "individual booster club members are not exempt from the purview of the Act" and the BOE should have investigated whether individual club members violated ABR).

1-8 The ABR Guarantees an Appeals Process

When students believe that they have experienced HIB and disagree with the school administrator's finding that there was no HIB, they may appeal to have that determination reversed. Likewise, accused students have the right to appeal the HIB determination as well as any disciplinary action that has been imposed on them.

There are three opportunities to challenge an HIB finding (including a finding that no HIB occurred). The first is to request a hearing before the Board of Education (BOE or Board); the second is to appeal a Board's final decision to the Commissioner (including an initial decision by an Administrative Law Judge (ALJ) and review of that decision by the Commissioner); and the third is to appeal the Commissioner's decision to the Superior Court, Appellate Division. These processes are discussed separately in Chapters 3, 4, and 5.

See Chapter 6 for a discussion of other potential means of recourse for students who have experienced HIB.

CHAPTER 2 – HIB DEFINED, INVESTIGATION AND DISCIPLINE

When a school district staff member completes an HIB investigation and notifies the parent or guardian of the results of the investigation, the parent or guardian may wish to dispute the findings. In deciding how to respond, it is important for the parent or guardian to understand the definition of HIB, be familiar with the kind of statements and conduct that may constitute HIB, and be able to distinguish peer conflict from HIB conduct. This chapter discusses the essential elements of HIB, the reporting and investigation process, and various disciplinary and remedial measures employed by schools in response to HIB.

2-1 Full Definition of HIB Conduct

The statutory definition of HIB is set forth in N.J.S.A. 18A:37-14, which provides that:

“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, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

- a. 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;
- b. has the effect of insulting or demeaning any student or group of students; or
- c. 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.

HIB can take place in many forms, including verbal (teasing, making threats), physical (hitting, punching, spitting), psychological (spreading rumors, purposefully excluding people from

activities), and cyberbullying (using the internet, such as e-mail, messaging applications, or texting, to spread rumors, make threats, or attempt to socially isolate someone).

2-1(a) Three Elements Are Necessary to Prove HIB

A close examination of the definition of HIB suggests that there are three elements that must be met to prove HIB under the ABR. The first two essential elements are found in the main body of the definition: the conduct must: (1) be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic; and (2) substantially disrupt or interfere with the orderly operation of the school or the rights of other students. The third element, which focuses on the effect of the conduct, may be any one (or more) of the three criteria set forth in (a), (b), and (c) below the main body of the definition. See J.P. obo D.P. v. Bd. of Educ. of the Gloucester Cnty. Vocational-Tech. Sch. Dist., Comm’r Decision No. 97-20 (March 13, 2020), reversing EDU 15220-18 (Feb. 5, 2020) (“the term ‘or’ between subsections (b) and (c) also applies to subsection (a), such that a demonstration of any of these three criteria can support a finding of HIB”).

If, during the course of an HIB investigation or administrative law hearing, it cannot be established that all of the three elements exist, then there is no HIB as a matter of law. For example, if a student’s conduct does not substantially disrupt or interfere with the orderly operation of the school or the rights of the other students, then HIB has not been established as a matter of law. N.U. obo M.U. v. Bd. of Educ. of Town of Mansfield, Comm’r Decision No. 191-22 (Aug. 10, 2022); N.U. obo M.U. v. Mansfield Twp. Sch. Dist., 2022 WL 18024205 (D.N.J. Dec. 30, 2022). See Section 2-1(g) for a discussion of “substantial disruption.”

2-1(b) Verbal Statements Found to Constitute HIB

The following cases give examples of statements found to constitute HIB:

- HIB found, based on distinguishing characteristic of gender identity, where it was found that a 7-year-old female student questioned a student previously known as male about wearing female clothing and commented on toys that student liked. L.K. & T.K. obo A.K. v. Bd. of Educ. of Twp. of Mansfield, EDU 7067-16 (Jan. 22, 2019), rejected, Comm’r Decision No. 107-19 (April 22, 2019), aff’d in part and remanded, 2020 WL 6389939 (N.J. Super. Ct. App. Div. Nov. 2, 2020), certif. denied, 246 N.J. 323 (2021), Comm’r Decision No. 318-21 (on remand) (Dec. 9, 2021), aff’d, 2023 WL 6843542 (N.J. Super. Ct. App. Div. Oct. 17, 2023).
- HIB found, based on comments about how much the victim weighed and about his shoe size being so big. W.M. obo J.M. v. Bd. of Educ. of Twp. of Bedminster, Comm’r Decision No. 59-23 (March 7, 2023).

- HIB found when student called an African American student the “N” word. While the mother of the student who used the “N” word triggered the investigation (by complaining that the African American student had air-dropped a photo of her son to other students), her own son was found to have committed HIB. L.G. obo J.A. v. Bd. of Educ. of Borough of Metuchen, EDU 05388-19 (March 15, 2021), adopted, Comm’r Decision No. 97-21 (April 29, 2021).
- HIB found when students chanted “Kool-Aid” to an African American student. G.H. and E.H. obo K.H. v. Bd. of Educ. of Borough of Franklin Lakes, EDU 13204-13 (Feb. 24, 2014), adopted, Comm’r Decision No. 157-14 (April 10, 2014).
- HIB found under the characteristics of appearance and body type when one student called another student “a horse” and “fat ass.” R.G.B. obo E.B. v. Vill. of Ridgewood Bd. of Educ., EDU 14213-12 (April 1, 2013), adopted, Comm’r Decision No. 242-13 (June 24, 2013).
- HIB found, based on distinguishing characteristics of gender and sexual orientation, when student called another student anti-gay slurs and implied that he engaged in sexual aggression. G.A. obo K.A. v. Bd. of Educ. of Twp. of Mansfield, EDU 8816-12, adopted, Comm’r Decision No. 241-13 (June 24, 2013).
- HIB found, based on distinguishing characteristics of gender and sexual orientation, when student told another “he dances like a girl” and called him “gay.” J.M.C. obo A.C. v. Bd. of Educ. of Twp. of East Brunswick, EDU 4144-12 (Nov. 27, 2012), adopted, Comm’r Decision No. 10-13 (Jan. 9, 2013).

2-1(c) Behavior Found to Constitute HIB

The following cases give examples of other behaviors that constituted HIB:

- Offering a nut to a student with a known nut allergy and touching the victim’s water bottle and lunch bag with unwashed hands found to be HIB. J.M. obo B.M. v. Bd. of Educ. of Sch. Dist. of the Chathams, Comm’r Decision No. 201-23 (July 6, 2023).
- Verbal and physical sexual assault and harassment constitutes HIB. See T.R. and T.R. obo E.R. v. Bridgewater-Raritan Reg’l Bd. of Educ., EDU 10208-13 (Sept. 25, 2014), adopted, Comm’r Decision No. 450-14 (Nov. 10, 2014), amended decision, Comm’r Decision No. 144-15 (May 6, 2015) (holding that sexual harassment qualifies as HIB after male student attempted to sit on female student’s lap, asked her to engage in sexual activity, invited her to strip over the internet, and asked to see her breasts). The ALJ held, and the Commissioner agreed, that the male student’s conduct was motivated by a distinguishing characteristic (gender and sexual orientation) and not by a “unique and undefined personality trait” of the female student. See also B.M. obo C.M. v. Bergen Cnty. Vocational Schools Bd. of Educ., EDU 06600-20 (June 17, 2021), adopted, Comm’r Decision No. 157-

21 (Aug. 2, 2021)(upholding Board’s determination that grabbing of female student’s buttocks constituted HIB); J.C. and C.C. obo J.C. v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., EDU 12064-19 (May 20, 2020), adopted, Comm’r Decision No. 174-20 (Aug. 20, 2020)(student pulled down another student’s pants, then his own, while the other student was being held down; Board’s HIB determination upheld even though incident occurred in a private home).

- Defacing a portrait in a way that belittles someone’s religion constitutes HIB. See S.S. and W.S. obo J.S. v. Bd. of Educ. of Borough of Hasbrouck Heights, EDU 3683-04 (Sept. 6, 2005), adopted, Comm’r Decision No. 369-05 (Oct. 13, 2005) (upholding HIB finding and one-day suspension for adding yarmulke and curls to a portrait of another Jewish student).

2-1(d) Distinguishing Characteristics

The part of the HIB definition most commonly disputed in caselaw is whether a “distinguishing characteristic” motivated the conduct. The following have been found to qualify under the ABR as possible “distinguishing characteristics” (characteristics listed in the statute itself are not listed here):

- Characteristics such as meekness or weakness, height, intelligence, and sports proficiency may qualify as “distinguishing characteristics.” Joseph Ehrhard and Robert Ehrhard v. Hunterdon Central Reg’l Bd. of Educ., EDU 188-14 (Sept. 28, 2017), adopted, Comm’r Decision No. 366-17 (Dec. 21, 2017) (citing C.C. v. Bd. of Educ. of Jefferson, EDU 10872-14 (April 6, 2015), adopted, Comm’r Decision No. 153-15 (May 12, 2015)); M.S. and N.S. obo J.S. v. Bd. of Educ. of Twp. of Hainesport, EDU 8878-16 (March 28, 2019), adopted, Comm’r Decision No.155-19 (June 18, 2019)(upholding Board’s determination based on comment that victim was “a weakling” during struggle over Chromebook; background of longstanding conflict between students “does not insulate the conduct under review” from being determined a violation of the ABR).
- Vegetarianism can qualify as a “distinguishing characteristic.” G.C. obo C.C. v. Bd. of Educ. of Twp. of Montgomery, EDU 12103-15 (Jan. 22, 2016), adopted, Comm’r Decision No. 152-16 (April 22, 2016) (“vegetarians are idiots” and “he should eat meat because he’d be smarter and have bigger brains” held to be verbal acts motivated by a distinguishing characteristic).
- A student’s eating disorder, such as anorexia nervosa, may qualify as a “distinguishing characteristic.” S.C. obo K.C. v. Bd. of Educ. of Twp. of Montgomery, EDU 18290-15 (June 29, 2016), adopted, Comm’r Decision No. 301-16 (Aug. 11, 2016).
- Having head lice, if related to the alleged HIB conduct, can suffice as a “distinguishing characteristic.” W.C.L. and A.L. v. Bd. of Educ. of Tenafly, EDU 3223-12 (Nov. 26, 2012), adopted, Comm’r Decision No. 15-13 (Jan. 10, 2013).

A recent decision involving a claim of HIB against a coach explained that “status as a student alone is not a distinguishing characteristic” under the ABR. J.B. obo J.B. v. Bd. of Educ. of the Northern Valley Reg’l High Sch. Dist., EDU 04618-20 (March 8, 2021), adopted, Comm’r Decision No. 84-21 (April 13, 2021). Another recent decision explains that while bullying “may involve a real or perceived power imbalance” (see N.J.A.C. 6A:16-7.7(a)(2)(iii)), “the power imbalance inherent in the relationship between a teacher and a student cannot, by itself, be a distinguishing characteristic sufficient to prove an act of HIB.” Stephen Klapach v. Bd. of Educ. of Borough of Fort Lee, Comm’r Decision No. 79-21 (April 6, 2021). See also B.B. obo A.S. v. Bd. of Educ. of Borough of Paulsboro, Comm’r Decision No. 34-23 (Feb. 6, 2023) (no evidence of distinguishing characteristic in case alleging HIB by track coach).

2-1(e) Conflict is Distinguishable from HIB Conduct

Conflict between students does not necessarily rise to the level of HIB conduct. Verbal arguments and name calling are common when there is a peer conflict. However, peer conflict does not normally result in violent acts or continued taunting and repeated acts of unacceptable behavior over a period of time, and usually does not arise from a power imbalance or involve distinguishing characteristics. The following cases provide examples of circumstances in which HIB was not found:

- W.D. and J.D. obo G.D. v. Bd. of Educ. of Twp. of Jefferson, EDU 10587-17 (July 13, 2018), adopted, Comm’r Decision No. 375-18 (Nov. 26, 2018), aff’d, 2020 WL 5784414 (N.J. Sup. Ct. App. Div. Sept. 29, 2020) (use of the “N” word did not constitute HIB where it was part of a “pretend prank fight” in a chat room among fifth graders all using vulgar language; court declined to adopt a rule under which “the single use of a racial slur is a per se violation of the [ABR] Act”).
- C.S. obo J.S. v. Bd. of Educ. of Twp. of Lacey, EDU 03693-15 (Sept. 5, 2019), adopted, Comm’r Decision No. 270-19 (Oct. 16, 2019) (even assuming that victim had a distinguishing characteristic of sexual orientation or being a “weak and vulnerable female,” HIB finding must be reversed where there was no link between the accused student’s conduct and that characteristic; conduct appeared motivated by the “girls’ past personal relationship”).
- L.P. and H.P. obo L.P. v. Bd. of Educ. of West Morris Reg’l Sch. Dist., EDU 4462-16 (June 10, 2016), adopted, Comm’r Decision No. 277-16 (July 25, 2016) (“It is well established that conduct that is motivated by a personal dispute such as specific roles on a sports team, albeit potentially harmful, does not fall within the definition of bullying under the Act”).

- R.A. obo B.A. v. Bd. of Educ. of Twp. of Hamilton, EDU 10485-15 (May 12, 2016), adopted, Comm’r Decision No. 223-16 (June 22, 2016) (holding that personal conflict among students clearly existed, but that the lack of evidence of conduct being motivated by a distinguishing characteristic precluded it from falling under HIB).
- J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12 (Mar. 11, 2013), adopted, Comm’r Decision No. 152-13 (April 25, 2013) (single incident in which a student shoved a ball of paper down another student’s sweatshirt was conflict that did not rise to the level of HIB).
- L.B.T. obo K.T. v. Bd. of Educ. of Freehold Reg’l Sch. Dist., EDU 7894-12 (Jan. 24, 2013), adopted, Comm’r Decision No. 89-13 (Mar. 7, 2013) (dispute between two students regarding their respective roles on swim team was not HIB because there was no distinguishing characteristic).

2-1(f) Motivation and Intent of Actor

Recent decisions of the Commissioner focus on the literal language of the ABR in concluding that HIB may be found even if the person accused of HIB was not “actually motivated” by a distinguishing characteristic of the targeted student and did not actually intend to harm that student. In J.P. obo D.P. v. Bd. of Educ. of Gloucester Cnty. Vocational-Tech. Sch. Dist., cited above, a student who called a classmate “gay” claimed that he did so in a joking manner as part of a group of students who jokingly said, “dude your [sic] gay” to one another. The accused student testified that he did not believe that his classmate was gay as the target had a girlfriend at the time. The Board argued that the comment was made in an “open school setting,” where it could be heard by individuals who did not know anything about the targeted student’s sexual orientation. In reversing the ALJ’s decision and upholding the BOE’s decision that HIB had occurred, the Commissioner emphasized that the statute defines HIB as “an action ‘that is *reasonably perceived*’ as being motivated either by any actual or perceived characteristic....” As such, a finding of HIB “does not require an analysis of the actual motivation of the actor.” The Commissioner went on to state that “a board of education can find that an individual committed an act of HIB even if the individual did not intend to cause harm,” reasoning that only one of the three criteria listed as (a),(b) and (c) in the statute must be present to establish HIB and that “[n]one of these criteria require the actor to have actual knowledge of the effect that his actions will have, or to specifically intend to bring about that effect.” See also A.J. obo J.J. v. Bd. of Educ. of Town of Boonton, Comm’r Decision No. 145-20 (July 10, 2020), reversing EDU 10470-19 (April 9, 2020) (upholding Board’s finding of HIB where “N” word was overheard and accused student did not intend any harm; accused had explained that form of “N” word ending in “ah” was used among close friends as a term of familiarity or endearment); L.K. & T.K. obo A.K. v. Bd. of Educ. of Twp. of Mansfield, cited above (HIB found where 7-year-old female student questioned student previously known as male about dressing in female clothing and commented on toys that student liked; whether the accused student was actually aware of the concept of “gender identity” or was motivated by gender identity is irrelevant under ABR).

In Wehbeh v. Bd. of Educ. of Twp. of Verona, EDU 10981-18 (Dec. 24, 2019), rev'd and remanded, Comm'r Decision No. 51-20 (February 4, 2020), a teacher was accused of HIB when she advised a student with anxiety and panic disorders, who had a Section 504 plan, against enrolling in an AP chemistry course because of the difficulty the student was having in the honors chemistry course taught by the teacher. The student and her mother claimed that the teacher's remarks "touched upon [the student's] disability;" the teacher had no awareness of the potential negative impact of her remarks on the student. The Board found that the teacher had "unintentionally engaged in bullying behavior," and the ALJ reversed the Board, granting summary decision for the teacher on the ground that HIB cannot be "unintentionally" committed. Upon review, the Commissioner reversed and remanded the ALJ's decision, explaining that HIB could reasonably be found even if the teacher's comments were not motivated by the student's disability so long as "the student reasonably perceived the comments as being motivated by her disability." The Commissioner went on to explain that actual intent to harm the victim is not necessary to a finding of HIB: "HIB can occur when the victim reasonably perceives that the action was motivated by a desire to do harm." The Commissioner brushed aside language in Department of Education guidance documents referring to bullying as "intentional," noting that "guidance, while intended to be instructive for the public, does not replace the Commissioner's decisions as the definitive interpretation of the law."

While the Wehbeh decision focuses on the perception of the student with a disability in evaluating the motivation of a teacher accused of HIB, the court's decision in S.A. obo G.A. v. Bd. of Educ. of Twp. of Moorestown, 2019 WL 5152544 (N.J. Super. Ct. App. Div. Oct. 15, 2019), certif. denied, 241 N.J. 3 (2020), suggests that the conduct of a special education teacher toward one of their students should not be treated as motivated by the distinguishing characteristic of disability so long as the complained-of conduct is part of the teacher's obligation toward their students. S.A. involved a complaint by a special education student against an in-class support teacher who it was claimed "hovered over [the student's] desk, asked to see her test scores in front of other children, and called attention to her in ways that made [the student] feel embarrassed and uncomfortable." One incident involved the teacher pulling a paper out from under the student's arm when the student refused to let the teacher see it. The court, in upholding summary judgment for the Board, which had exonerated the teacher, found no evidence that the teacher was motivated by any distinguishing characteristic of the student. The teacher's actions were part of her "obligation as [the student's] special education teacher to oversee [the student's] work consistent with the parameters of her IEP." But see Tamaika DeFalco v. Bd. of Educ. of Twp. of Hamilton, EDU 2365-18 (June 25, 2019), adopted, Comm'r Decision No. 198-19 (July 26, 2019)(upholding Board decision that Spanish teacher committed act of HIB when, in front the class, she "directed [a classified student] to visit the child study team or guidance office if he was unable or unwilling to perform classwork;" teacher's action violated school district's policy against publicly "labeling" classified students). See also J.B. obo J.B. v. Bd. of Educ. of Northern Valley Reg'l High Sch. Dist., cited above (insufficient evidence that coach targeted student *because* of student's distinguishing characteristic of "academic commitment"; coach's "questionable treatment of the players was largely universal").

2-1(g) The Meaning of “Substantially Disrupts or Interferes with the Orderly Operation of the School or the Rights of Other Students”

Neither the ABR nor its legislative history provides insight into the phrase “substantially disrupts or interferes with the orderly operation of the school or the rights of other students.” There is caselaw, however, that addresses the meaning of that provision. This caselaw includes discussion of the tension between a school’s need to maintain order and the free speech rights of students.

In one case, T.R. and T.R. obo E.R. v. Bridgewater-Raritan Reg’l Bd. of Educ., cited above, a male student attempted to sit on a female student’s lap, asked her to engage in sexual activity, invited her to strip over the internet, and asked to see her breasts. In addressing the issue of whether the student’s conduct “substantially interfered with the orderly operation of the school,” the ALJ, quoting the Supreme Court’s First Amendment decision in Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986), stated that “P.H.’s words and actions towards E.R. substantially disrupted the orderly operation of the school because ‘the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.’” Additionally, P.H.’s words and actions interfered with E.R.’s rights “to be secure and to be let alone.” Compare W.D. and J.D. obo G.D. v. Bd. of Educ. of Twp. of Jefferson, cited above (parents of student who was called “N” word by text, off school grounds, as part of an “group chat” with classmates, failed to “demonstrate the incident substantially disrupted or interfered with the orderly operation of the school or the rights of [the student]” where there was no evidence that the student “suffered any significant impact beyond being rightfully upset following the incident and wanting to avoid resulting awkwardness at school the next day” or that the incident “interfered with [the student’s] ability to safely and effectively learn”).

Another case addresses the issue of substantial disruption in connection with a social media post made by a student outside of school (during a weekend). In this case, the student posted a screenshot of a friend with a cosmetic mud mask on her face with the caption “when he says he’s only into black girls.” The student’s post was found in violation of the school’s HIB policy, and the student was suspended for a day, removed from the Student Council, and denied other privileges. On appeal to the Commissioner of Education, the student’s parents argued that their daughter’s social media post “did not cause a substantial disruption sufficient to overcome her first amendment rights because it only offended students and the school simply had to monitor the cafeteria to make sure there were no physical altercations.” R.H. and M.H. obo A.H. v. Bd. of Educ. of Borough of Sayreville, Comm’r Decision No. 198-21 (Sept. 23, 2021), rev’d in part, 2023 WL 3431214 (D.N.J. May 12, 2023). The Commissioner upheld the Board’s HIB finding, distinguishing Mahanoy Area Sch. Dist. v. B.L. ex rel Levy, 141 S.Ct. 2038 (2021), a free speech case in which discussion of a student’s vulgar Snapchat post “took, at most, 5 to 10 minutes of an Algebra class ‘for just a couple of days’” and upset some members of the school cheerleading team, circumstances that did not amount to substantial disruption.

In a subsequent action in District court, the parents in R.H. and M.H. again asserted violation of their daughter’s First Amendment rights. The court denied the school district’s motion to dismiss

this First Amendment claim, reasoning that “increased supervision of students in the cafeteria” likely does not meet the standard of substantial disruption needed to justify the school’s action. Taking as true the parents’ claims that no altercations or cancellations of classes resulted from their daughter’s social media post, the District Court concluded that further fact finding was needed, stating “[S]hould discovery further elucidate disruption to school activity caused by A.H.’s post, such evidence may place A.H.’s speech outside the protections offered by the First Amendment.” R.H. and M.H. obo A.H. v. Bd. of Educ. of the Borough of Sayreville, 2023 WL 3431214 (D.N.J. May 12, 2023). See also N.U. obo M.U. v. Bd. of Educ. of Town of Mansfield, Comm’r Decision No. 191-22 (Aug. 10, 2022) (Board’s HIB finding was arbitrary and capricious as Board failed to consider whether the accused student’s conduct substantially disrupted or interfered with the rights of other students or the orderly operation of the school); and N.U. obo M.U. v. Mansfield Twp. Sch. Dist., 2022 WL 18024205 (D.N.J. Dec. 30, 2022) (denying school district’s motion for summary judgment on parent’s claims against school district under the First Amendment, Title VI of the Civil Rights Act, and the New Jersey Law Against Discrimination).

Additional cases addressing substantial disruption include D.D.K. obo D.K. v. Bd. of Educ. of Twp. of Readington, EDU 07682-15 (Oct. 6, 2016), modified, Comm’r Decision No. 397-16 (Nov. 11, 2016) (no HIB found because the HIB incidents did not substantially disrupt D.J.’s rights or interfere with the orderly operation of the school) and K.P. obo I.M. v. Bd. of Educ. of Twp. of Saddle Brook and Danielle Shanley, Superintendent, EDU 04624-19 (July 24, 2019), adopted, Comm’r Decision No. 232-19 (September 5, 2019), appeal dismissed, 2021 WL 922108 (N.J. Super. Ct. App. Div. March 11, 2021) (upholding Board’s determination not to conduct an HIB investigation where parent failed to allege or offer proof that comment that her daughter was “ugly and [a] bad dancer” was motivated by an actual or perceived distinguishing characteristic or substantially disrupted or interfered with the orderly operation of the school).

2-2 Overview of the HIB Reporting and Investigation Process and Related Issues

2-2(a) Duty to Report and Promptly Investigate

Staff who have witnessed an incident of HIB or received reliable information about such an incident must verbally report this to the school principal on the same day and follow up with a written report within two school days. N.J.S.A. 18A:37-15(b). DOE has issued a mandatory HIB Incident Form for staff (HIB 338 Form) that may be found at https://www.nj.gov/education/safety/sandp/hib/docs/HIB_Incident_Form_ForLEAs.pdf. DOE has issued a separate HIB 338 Form for families and caregivers, found at https://www.nj.gov/education/safety/sandp/hib/docs/HIB_Incident_Form_ForFamilies.pdf, but its use is not mandatory. If a parent reports an incident without completing an HIB 338 Form, the staff member who received the information should complete one and submit it to the principal. <https://www.nj.gov/education/safety/sandp/hib/faq.shtml>. See also D.M. obo K.B. v. Bd. of Educ. of Twp. of West Milford, EDU 4873-14, rejected, Comm’r Decision No. 468-14 (Nov. 24, 2014) (“nothing in the statute that states that a parent must submit a written form before an HIB investigation shall be initiated”).

School districts are required to have a procedure for anonymous reporting of HIB, including online reporting, but formal disciplinary action may not be undertaken solely on the basis of an anonymous report. N.J.S.A. 18A:37-15(b)(5). While families/caregivers may submit an HIB 338 Form anonymously, staff may not. <https://www.nj.gov/education/broadcasts/2023/july/19/ReleaseofHIB338Formsforthe2023-2024SchoolYear.pdf> (July 19, 2023).

Where an HIB complaint is received, the general rule is that the principal or principal's designee must initiate an investigation, to be conducted by a school anti-bullying specialist, "within one school day of the report of the incident." N.J.S.A. 18A:37-15(b)(6)(a). The principal must also inform the parents or guardians of all students involved in an alleged HIB incident. N.J.S.A. 18A:37-15(b)(5). Regarding parental notification, DOE's *Model Policy and Guidance for Prohibiting Harassment, Intimidation and Bullying on School Property, at School-Sponsored Functions and on School Buses* (August 2022)(hereinafter, "*Model Policy*,") found at <https://www.nj.gov/education/safety/sandp/hib/faq.shtml>, states: "a school district is not required to reveal personal information about the targeted student, such as a student's actual sexual orientation, gender identity or gender expression as part of the parental notice nor is a district required to reveal information about perceived distinguishing characteristics. To protect students, school district staff should only convey the facts regarding the alleged conduct (i.e. name calling) when communicating with parents...."

In a 2021 decision, the Commissioner of Education allowed the results of an HIB investigation to stand even though the school district was late in initiating its investigation, ordering the school district to institute corrective action to ensure that investigations are commenced in a timely fashion in the future. P.H. and K.G.H. obo L.H. v. Bd. of Educ. of the City of Northfield, Comm'r Decision No. 265-21 (October 21, 2021).

Note: While staff are obligated to report HIB immediately, neither the ABR nor its regulations specify a time limit for parental reports of HIB.

2-2(b) Exception to Immediate Investigation Rule

In lieu of commencing an investigation within one school day of the report of an incident, regulations allow school districts to establish a process under which the principal, or the principal's designee, in consultation with the anti-bullying specialist, makes a "preliminary determination" of whether a reported incident (assuming all allegations are true) meets the definition of HIB or falls outside the scope of the ABR statute.

The 2022 amendment to the ABR requires the school principal to report to the superintendent all preliminary determinations that an incident falls outside the scope of HIB so that the superintendent may review each such determination and require an investigation if necessary. The superintendent must notify the principal in writing of any decision that an investigation is necessary. N.J.S.A. 18A:37-15(b)(5). The last page of the HIB 338 Form contains a box to be checked by the superintendent to indicate whether an investigation must be initiated.

2-2(c) Investigation Must Be Completed Within 10 School Days

The HIB investigation, which includes reviewing any pertinent documents and interviewing the alleged offender, alleged victims, and witnesses, must be completed as soon as possible, but not later than 10 school days from the date of the written report of the HIB incident or the written report from the superintendent to the principal (noted in Section 2-2(b) above) that an investigation is necessary. N.J.S.A. 18A:37-15(b)(6)(a).

2-2(d) Reporting to the Chief School Administrator and the BOE

Within 2 days of the completion of an HIB investigation, the results must be reported to the superintendent who then must report the results of the HIB investigation to the Board, “along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent,” no later than the date of the next BOE meeting. N.J.S.A. 18A:37-15(b)(6)(b–c). For charter schools, the results should be reported within the same time frames to the school lead person or administrative principal and then to its Board of Trustees.

2-2(e) Informing Parents and Guardians of the HIB Investigation

School administrators must provide parents or guardians of the students who are parties to the investigation with information about the investigation, including (1) the nature of the investigation, (2) whether HIB was determined, and (3) whether disciplinary action was taken. N.J.S.A. 18A:37-15(b)(6)(d). The information about the investigation must be shared with parents of offenders and victims within five school days of when the information is presented to the BOE. N.J.S.A. 18A:37-15(b)(6)(d).

2-2(f) Timeline for BOE Decision

The BOE must issue its written decision, affirming, rejecting, or modifying the superintendent’s decision, at the next BOE meeting following its receipt of the superintendent’s report. N.J.S.A. 18A:37-15(b)(6)(e). This may be the same Board meeting at which the Board initially receives investigation results. (As discussed in Section 3-1, a second Board decision may be issued subsequent to a hearing depending on timing issues).

2-2(g) Failure to Conduct HIB Investigation

Absent a preliminary determination (upheld by the superintendent) that a complaint could not constitute HIB (see Section 2-2(b)), failure to conduct an HIB investigation is a violation of the ABR. Administrators must conduct an HIB investigation when there is a report of possible HIB conduct. When there is a failure to conduct an HIB investigation, the petitioner may petition the Commissioner of Education to seek a declaratory judgment that the BOE failed to comply with the ABR and for an order directing the BOE to comply with the requirements of the ABR. See, e.g., D.M. obo K.B. v. Bd. of Educ. of Twp. of West Milford, cited above (Commissioner held that,

notwithstanding D.M.'s failure to oppose BOE's summary decision motion, all HIB conduct requires internal investigation by school anti-bullying specialist).

Sometimes the remedy for a failure to investigate is an expungement of records, while at other times the remedy will be a new hearing. Compare Edward Sadloch v. Bd. of Educ. of Twp. of Cedar Grove, EDU 619-14 (Mar. 26, 2015), adopted, Comm'r Decision No. 216-15 (June 23, 2015) (ordered any references to HIB expunged from four football coaches' files because of lack of investigation) with Stephen P. Gibble v. Bd. of Educ. of Hunterdon Central Reg'l Sch. Dist., EDU 2767-15 (April 12, 2016), modified, Comm'r Decision No. 254-16 (July 13, 2016) (ordering new hearing, instead of expunging records, due to procedural failures). See also J.L. obo A.L. v. Bd. of Educ. of Bridgewater-Raritan Reg'l Sch. Dist., EDU 11604-15 (October 24, 2016), rejected, Comm'r Decision No. 416-16 (Dec. 9, 2016), aff'd, 2018 WL 4997195 (N.J. Super. Ct. App. Div. Oct. 16, 2018), certif. denied, 237 N.J. 155 (2019) (rejecting ALJ's order expunging HIB from accused student's records and directing BOE to provide petitioner with "full and proper hearing"); J.B. obo M.B. v. Bd. of Educ. of the Borough of Haddonfield, EDU 11464-14 (April 20, 2018), modified, Comm'r Decision No. 170-18 (June 4, 2018) (directing Board to hold hearing and issue decision).

2-2(h) Failure to Notify Parents of Ongoing HIB Investigation

Some parents first become aware of an HIB incident when they receive an HIB finding from the principal, which may be mailed several days after the investigation has taken place. Although the ABR requires that parents be informed and are part of the investigation, N.J.S.A. 18A:37-15(b)(5), the ABR does not address the consequences when a parent is not informed about an ongoing HIB investigation.

2-2(i) False Accusations of HIB Conduct

False accusations of HIB conduct are actionable. The ABR requires that school districts adopt policies that contain consequences and remedial action for persons who falsely accuse another as a means of retaliation or as a means of harassment, intimidation or bullying. N.J.S.A. 18A:37-15(b)(9). In its [Model Policy](#), DOE directs school districts to include in its policies, at a minimum, the following specific consequences and remedial actions for those who falsely accuse another of HIB conduct:

- 1) Students: Consequences and appropriate remedial action for a student could range from positive behavioral interventions up to and including suspension or expulsion as permitted under N.J.S.A.18A:37-1, Discipline of Pupils, and as set forth in N.J.A.C. 6A:16-7.2, Short-term suspensions, N.J.A.C. 6A:16-7.3, Long-term Suspensions and N.J.A.C. 6A:16-7.4, Expulsions;
- 2) School Employees: Consequences and appropriate remedial action for a school employee or contracted service provider who has contact with students could entail discipline in accordance with district policies, procedures and agreements; and

3) Visitors or Volunteers: Consequences and appropriate remedial action for a visitor or volunteer could be determined by the school administrator after consideration of the nature, severity and circumstances of the act, including law enforcement reports or other legal actions, removal of building or grounds privileges, or prohibiting contact with students or the provision of student services.

2-2(j) Prohibition of Retaliation

The ABR prohibits “retaliation against any person who reports an act of harassment, intimidation or bullying.” N.J.S.A. 18A:37-15(b)(8). Board HIB policies must set forth consequences and appropriate remedial action for anyone who engages in retaliation or reprisal. Id. Crucially, the mere act of retaliating against someone for filing a report is itself a violation. In other words, the original report need not lead to a finding of HIB for retaliation to be found.

2-3 Disciplinary and Remedial Responses to HIB

2-3(a) Disciplinary Action Against HIB Offenders

The 2022 amendment of the ABR mandates that school district policies include specified consequences for students who have committed an act of HIB:

- For the first and second acts of HIB, the statute requires: (1) a copy of the results of the investigation be placed in the student’s record; and (2) the student may be subject to remedial actions, including the provision of counseling or behavioral intervention services, or discipline, or both, as determined by the principal in consultation with appropriate school staff.
- For the third or subsequent acts of HIB, the statute requires: (1) a copy of the results of the investigation be placed in the student’s record; and (2) the principal, in consultation with appropriate school staff, develop an individual student intervention plan to be approved by the superintendent or the superintendent’s designee, which may include remedial actions such as counseling or behavioral intervention services, or progressive discipline, or both, and may require the student, accompanied by a parent or guardian, to complete in satisfactory manner a class or training program to reduce HIB behavior. N.J.S.A. 18A:37-15(b)(4). (DOE’s [Model Policy](#) states at page 8 that an individual student intervention plan must be developed “when a student is found to be an offender in three HIB incidents and each subsequent incident occurring within one school year.” The phrase “within one school year” does not appear in the statute and may be inconsistent with statutory intent.)

Note: While an HIB 338 Form must be completed even if there is a preliminary determination that no HIB occurred, the Form “will only be added to a student record if the alleged incident is

founded, disciplinary action is imposed or is otherwise required to be contained in a student's record under State or Federal law." [Model Policy](#).

While the 2022 amendment to the ABR mandates certain consequences for HIB and repeated acts of HIB, individual school district policies may include a wide variety of additional disciplinary consequences. Appendix A of DOE's [Model Policy](#) lists the following examples of disciplinary consequences:

- Admonishment;
- Temporary removal from the classroom;
- Deprivation of privileges;
- Classroom or administrative detention;
- Referral to disciplinarian;
- In-school suspension during the school week or weekend;
- Out-of-school suspension (short-term or long-term);
- Reports to law enforcement or other legal action;
- Expulsion; and
- Bans from receiving certain services, participating in school-district sponsored programs or being in the school building or on school grounds.

School district HIB policies must be available on the district website and should be prominently posted on its home page. N.J.S.A. 18A:37-15.2; N.J.S.A. 18A:37-15(b)(11). The latest version of DOE's publication, [Guidance for Parents on the Anti-Bullying Bill of Rights Act](#), must also be posted on the homepage of each school district and of each school that has a website. N.J.S.A. 18A:37-15(b)(13).

New Jersey's *Uniform State Memorandum of Agreement between Education and Law Enforcement Officials* (2019 Revisions), <https://www.nj.gov/education/safety/sandp/schoolsafety/docs/moa/LawMOAJanuary2019.pdf> requires HIB incidents to be reported to law enforcement if the conduct falls within a mandatory reporting category. Mandatory reporting categories include bias-related acts, certain sexual offenses, and certain planned or threatened violence. See N.J.A.C. 6A:16-6.3.

2-3(b) Factors to Consider Before Imposing Disciplinary Action

N.J.A.C. 6A:16-7.7(a)(2)(vi) provides that school district policies must, at a minimum, provide consequences for HIB offenders which are "varied and graded according to the nature of the behavior; the nature of the student's disability, if any, and to the extent relevant; the developmental age of the student; and the student's history of problem behaviors and performance." The [Model Policy](#), in its Appendix A, lists the following factors for determining consequences:

- Age, disability (if and to the extent relevant), developmental and maturity levels of the parties involved and their relationship to the school district;
- Degrees of harm;

- Surrounding circumstances;
- Nature and severity of the behaviors;
- Incidences of past or continuing patterns of behavior;
- Relationships between the parties involved; and
- Context in which the alleged incidents occurred.

These factors are typically found in each district’s BOE policy.

2-3(c) Suspension and Expulsion

The ABR explicitly provides that students who engage in HIB may be suspended or expelled. N.J.S.A. 18A:37-2(k). However, long term suspension and expulsion should be reserved for students who have committed serious HIB conduct or have been subject to discipline in the past and can only be undertaken in accordance with the laws governing student discipline. See N.J.A.C. 6A:16-7.7(a)(2)(v)-(vi); L.K. & T.K. obo A.K. v. Bd. of Educ. of Twp. of Mansfield, cited above (stating in App. Div. decision of Nov. 2, 2020 that school district responses to HIB are “tailored to the circumstances and need not entail discipline rising to the level of a suspension. In any case where the seriousness of the HIB conduct warrants a long-term suspension,” the procedural protections for long-term suspension apply) (footnote omitted). For additional information on issues related to school discipline, including the special rules for students with disabilities, see ELC’s publications, *Student Discipline Rights and Procedures: A Guide for Advocates* (Second Edition 2012), https://edlawcenter.org/assets/files/pdfs/publications/StudentDisciplineRights_Guide_2_012.pdf, and *School Discipline in New Jersey: A toolkit for students, families and advocates* (2018), https://edlawcenter.org/assets/files/pdfs/publications/Student_discipline_manual.pdf.

2-3(d) Disciplinary Action Against School Staff

DOE has made it clear that teachers and other adults can be offenders under the HIB statute but are not protected by the statute as victims. Model Policy. See also Joseph Ehrhard and Robert Ehrhard v. Hunterdon Central Reg’l Bd. of Educ., cited above (discussing applicability of ABR to staff and teachers). School staff accused of HIB are entitled to the same due process rights as students so accused; neither students nor teachers have the right to cross-examine witnesses at BOE hearings. Tamaika DeFalco v. Bd. of Educ. of the Twp. of Hamilton, cited above (refusing to require procedures “more judicial in nature” than those included in the ABR for Board hearings and rejecting arguments for allowing cross examination when a teacher is the person accused of HIB); see also Ruth Young-Edri v. Bd. of Educ. of the City of Elizabeth, EDU 17812-18 (May 30, 2019), adopted, Comm’r Decision No. 174-19 (July 8, 2019) (noting in footnote that “[i]n other contexts, law and regulations make it clear when an adversarial hearing is required at the board level. See, e.g., N.J.A.C. 6A:16-7.3(a)(10), which specifies that the right to cross-examination is available in a board-level appeal of a long-term student disciplinary suspension”).

Like student offenders who are subject to a range of disciplinary action, school staff who engage in HIB conduct are also subject to a range of disciplinary action, including suspension without pay

and tenure removal for “unbecoming conduct.” See In the Matter of the Tenure Hearing of Steven E. Roth, Jr., Gloucester County Special Servs. Sch. Dist., EDU 15145-11S (May 11, 2012), modified, Comm’r Decision No. 263-12 (June 25, 2012), aff’d, 2013 WL 3284128 (N.J. Super. Ct. App. Div. July 1, 2013) (sustained use of demeaning language toward a special education student, in violation of Board’s HIB policy, resulting in termination of employment of tenured special education teacher). See additional discussion at Section 6-1(d).

2-3(e) Remedial Approaches to Reducing HIB in Schools

As noted in [Guidance for Parents on the Anti-Bullying Bill of Rights Act](#), “[t]he use of negative consequences should occur in conjunction with remediation and not be relied upon as the sole intervention approach.” The ABR provides a roadmap to school districts for reducing incidents of HIB. Under N.J.S.A. 18A:37-15(b)(6)(b), superintendents are empowered “to provide intervention services, establish training programs to reduce harassment, intimidation or bullying and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action.”

N.J.S.A. 18A:37-15(b)(7) requires that the range of ways in which schools respond to incidents of HIB “shall include an appropriate combination of services that are available within the district such as counseling, support services, intervention services, and other programs, as defined by the commissioner.” In the event that necessary programs to address HIB are not available within the district, the ABR states that the district may apply to DOE’s Bullying Prevention Fund for a grant to support out-of-district programs and services. N.J.S.A. 18A:37-15(b)(7). To seek such a grant, the school district must first have explored bullying prevention programs and approaches that are available at no cost. N.J.S.A. 18A:37-17. While the Bullying Prevention Fund, established by N.J.S.A. 18A:37-28, has not been regularly funded by DOE, there may be cases where it is appropriate for a school district to apply for a grant.

Under N.J.S.A. 18A:37-17, schools and school districts must “annually establish, implement, document, and assess bullying prevention programs or approaches, and other initiatives” and these “shall be designed to create school-wide conditions to prevent and address” HIB. Appendix A of DOE’s [Model Policy](#) provides examples of individual, classroom, school, and/or district-wide remedial responses to HIB including:

- Personal remedial measures for students who bully (such as restitution and restoration, closely monitored behavioral management plans, or student treatment or therapy)
- Environmental remedial measures (such as the adoption of research-based systemic bullying prevention programs, professional development plans for involved staff, disciplinary action for school staff contributing to problem, schedule modifications, adjustments in hallway traffic, or targeted use of monitors).

The [Model Policy](#) also points out that mediation should NOT be used to address HIB, stating that “while well-intentioned, **mediation is an inappropriate strategy**, because it is designed to help

resolve conflict; however, HIB is not a conflict, and it may be a form of abuse. As a result, the use of mediation to address HIB only serves to further victimize the target of the HIB, rather than provide relief from HIB for the victim.” (Bold in original text.)

2-4 Complaints to the Executive County Superintendent for Violations by School Districts

The Executive County Superintendent of Schools, as a local branch of the DOE, is responsible for ensuring that districts within its county abide by the mandates of the ABR. As such, the Executive County Superintendent may investigate complaints that a school district within its county has violated the ABR, and may order corrective action, where such complaints have “not been adequately addressed on the local level.” N.J.S.A. 18A:37-25.

Complaints to the Executive County Superintendent can be appropriate in cases involving the district’s failure to provide a specific HIB report that the parent or student can appeal. Some other examples of noncompliance suitable for a complaint to the Executive County Superintendent include a district’s failure to have its anti-bullying policy available online, as required by N.J.S.A. 18A:37-15(b)(11) and N.J.S.A. 18A:37-15.2; failure to initiate investigations even though a credible allegation has been provided to the school administration; or failure to abide by the timeframes established for completing investigations under N.J.S.A. 18A:37-15(b)(6)(a) or for holding hearings and providing information to parents under N.J.S.A. 18A:37-15(b)(6)(d). These examples are not exclusive as the ABR permits complaints to the Executive County Superintendent in any instance where an HIB complaint has been inadequately addressed by a school district. N.J.S.A. 18A:37-25.

2-5 The Role of the School Climate State Coordinator

The position of a School Climate State Coordinator was established within DOE “to serve as a resource to parents, students, and educators” by the ABR amendments of 2022. N.J.S.A. 18A:37-37.1. The duties and responsibilities of the State Coordinator are spelled out by statute to include: identifying and disseminating research and resources to promote best practices with regard to student social-emotional learning and a positive, supportive school climate; providing information on the ABR and its regulations; reviewing and reporting HIB data and “any patterns of harassment, intimidation, or bullying in public schools”; working collaboratively with law enforcement, DOE, and other specified state agencies to develop a training program on the impact of HIB; and providing an annual report to the Commissioner, State Board of Education, and Legislature summarizing the State Coordinator’s activities and making “any specific recommendations concerning school climate best practices and procedures.” Id.

DOE is required to post contact information for the School Climate State Coordinator in a prominent location on the homepage of its website. N.J.S.A. 18A:37-37.3. At the time of publication, there is a post on the bottom of DOE’s homepage listing **School Climate State Coordinator Contact Information:** HIB@doe.nj.gov.

CHAPTER 3 – BOARD OF EDUCATION HEARINGS AND DECISIONS

BOE hearings are designed to be an informal process. This Chapter discusses the process and the obligations of all parties involved at the BOE hearing stage of an HIB dispute. Because many aspects of BOE hearings under the ABR are not explicitly addressed by the statute or its regulations, there are variations among school districts and unanswered questions that arise in practice.

3-1 Deadline to Request a BOE Hearing

The ABR, in conjunction with the 2018 regulations, provides the following timelines related to HIB findings and BOE hearings:

- 1) the results of any HIB investigation, “along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent,” must be reported to the BOE by no later than the date of the BOE meeting “next following the completion of the investigation” (N.J.S.A. 18A:37-15(c));
- 2) the BOE must issue its written decision, affirming, rejecting, or modifying the superintendent’s decision, “at the next board of education meeting following its receipt of the report” (N.J.S.A. 18A:37-15(e)); this may be the same BOE meeting noted in (1) above;
- 3) all parents or guardians whose children are parties to an HIB investigation must receive written information about the investigation within five school days after the results are reported to the BOE (N.J.S.A. 18A:37-15(d));
- 4) a request for a hearing before the BOE must be filed by a parent or guardian no later than 60 calendar days after the written information is received (N.J.A.C. 6A:16-7.7(a)(2)(xi)(1)); and
- 5) the BOE must hold a hearing within 10 business days of the receipt of a request from a parent or guardian (N.J.A.C. 6A:16-7.7(a)(2)(xi)(2)).

As indicated in (4) above, parents and guardians have a time limit of 60 calendar days to request a hearing before the BOE in ABR matters. N.J.A.C. 6A:16-7.7(a)(2)(xi)(1). Because this time limit is triggered by the receipt of written information by a student’s parents or guardians about the HIB investigation, it likely does not apply in cases where school officials have failed to provide such information to the parents or guardians.

The 60-day time limit to request a BOE hearing creates the possibility that the BOE will have already voted on a superintendent's decision before a hearing request is made. (See Section 2-2(f)). As long as the hearing request is made within 60 days of the receipt of written information, the BOE is obligated to hold a hearing and issue a second decision that supersedes its first. See, e.g., L.K. & T.K. obo A.K. v. Bd. of Educ. of Twp. of Mansfield, cited above (BOE hearing held after initial BOE vote). (If the Board fails to provide written information to the parents about the investigation, then the 60-day deadline should not apply.) While there is no stated deadline in the statute or regulations for a BOE to issue a second decision, the rules suggest that such a decision would be required no later than the BOE meeting following the hearing.

3-2 Requirements for Requesting a BOE Hearing

N.J.A.C. 6A:16-7.7(a)(2)(xi)(1) states that a request for a BOE hearing "shall be filed with the district board of education secretary" no later than 60 calendar days after the parent or guardian receives the required written information about the HIB investigation. Unless a school district or charter school has established its own procedures, there are no additional formal requirements for requesting a BOE hearing. Of course, the request should refer to the specific HIB determination to be appealed. To have proof that a request for a BOE hearing was made and received, it is recommended that parents submit the request via email and certified mail, return receipt requested. A hearing is required to be held "within 10 business days of receipt of the request." N.J.A.C. 6A:16-7.7(a)(2)(xi)(2).

3-3 Requesting HIB Reports

If a parent has not received a copy of the HIB report that the school district relied on to support its HIB determination, the parent should submit a written request for a copy of the report in advance of the BOE hearing.

Under the ABR, parents are entitled to receive:

...information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board.

N.J.S.A. 18A:37-15(b)(6)(d).

The nature and extent of the "information" that must be provided to a parent in advance of a board hearing is not entirely clear under current caselaw. In practice, a redacted copy of the HIB report will typically be provided to parents in advance of the BOE appeal. However, some Board attorneys have taken the position that parents are not entitled to a copy of the HIB report unless the parents have requested a hearing before the BOE. Other Board attorneys go further and have

asserted that parents have a right to receive information about the investigation, but this does not include a copy of the HIB report.

Two cases in which the Commissioner ruled that the school district failed to comply with the ABR's requirement to disclose information provide some guidance about the access to information needed to satisfy this statutory obligation. These cases, cited above, are Ruth Young-Edri v. Bd. of Educ. of the City of Elizabeth and J.L. obo A.L. v. Bd. of Educ. of Bridgewater-Raritan Reg'l Sch. Dist. In Ruth Young-Edri, the Commissioner concurred with the ALJ ("for reasons thoroughly stated in the Initial Decision") that the BOE had failed to comply with "the due process protections" of the ABR, including N.J.S.A. 18A:37-15(b)(6)(d), and upheld the ALJ's order that the BOE hold another hearing, prior to which:

Young-Edri be supplied with the investigatory file to include witness statements and the report of the anti-bullying specialist; and ... she be permitted to present witnesses and documentary evidence to the Board at a hearing.

Ruth Young-Edri, cited above (quoting from ALJ decision).

Instructive to the ALJ in Ruth Young-Edri regarding the scope of information to be shared in HIB cases was the unpublished 2018 decision of the Appellate Division affirming the Commissioner's decision in J.L. As described by the ALJ:

The matter was remanded to the local board, which was directed to provide the parents with the full record of the HIB allegations, "including the underlying investigative report, [and] any additional written reports or summaries." Ibid. Only with this completeness of information, the court determined, would the hearing contemplated by law afford the family its rightful measure of due process, and satisfy the requirements of N.J.S.A. 18A:37-15(b)(6).

Ruth Young-Edri, cited above (quoting from ALJ decision).

In a subsequent case, Melanie Sohl v. Bd. of Educ. of the Town of Boonton, EDU 05070-20 (Feb. 24, 2021), rejected, Comm'r Dec. No. 106-21 (May 18, 2021), the Commissioner found that two letters received by a teacher charged with HIB (from the principal and superintendent) prior to the Board hearing, which notified the teacher of the comment she was alleged to have made, recounted that she had admitted to making the comment, informed the teacher that the district found evidence of HIB, and described the discipline being imposed, were sufficient to satisfy the requirements of N.J.S.A. 18A:37-15(b)(6)(d). The Commissioner rejected the ALJ's decision that would have granted the teacher a new Board hearing and the right to review "the investigatory file, including all witness statements, the ABC report, and all other documentary evidence" prior to such hearing. In distinguishing the earlier decisions in Ruth Young-Edri and J.L., the Commissioner described Ruth Young-Edri as a case in which a letter of reprimand "informed [a teacher] that she was a perpetrator in an HIB case, but did not recount any of the factual basis for that determination," and J.L. as a case in which "the accused child's parents were not informed about the HIB investigation until after the Board voted." The most determinative factor in Melanie Sohl, however, may have been the teacher's admission of the statement that was

alleged to constitute HIB. In the context of this admission, further disclosure of information would not have changed the outcome of the HIB determination.

In G.C. obo B.C. v. Bd. of Educ. of the Twp. of Lacey, EDU 10910-20 (August 10, 2022), adopted, Comm’r Decision No. 234-22 (Sept. 19, 2022), an ALJ ruled in favor of a school district which had rejected the request of the mother of a student accused of HIB for further discovery in advance of her child’s Board hearing. However, the record in that case makes clear that, prior to the hearing, the Board provided the accused student’s parents with the HIB report, an email from the alleged victim’s mother to the principal, and written statements of the accused student and a friend who witnessed the incident. This level of disclosure, which included the HIB report, was therefore found to satisfy the statutory duty to provide information about the investigation.

In a 2023 case, B.B. obo A.S. v. Bd. of Educ. of the Borough of Paulsboro, cited above, the Commissioner upheld a Board’s decision that HIB had not occurred even where the school district failed to provide the alleged victim’s mother with information about the investigation within five school days and failed to offer her the opportunity for a Board hearing. The Commissioner found that the “petitioner was afforded a full evidentiary hearing in the OAL” and refused to remand the case for a Board hearing where there was no evidence that the alleged conduct was motivated by a “distinguishing characteristic” as required by the ABR. As in the Melanie Sohl case, the Commissioner gave less weight to procedural violations committed by a BOE where the outcome of the HIB determination was clear.

TIP: If parents were denied access to a copy of the HIB report, they may wish to include a count in their petition to the Commissioner of Education that they were denied access to the HIB report when they filed their appeal to the BOE. Additionally, parents have the option of filing a motion to compel the production of the HIB report during the administrative law proceedings.

3-4 Persons Present at BOE Hearing

The hearing before the BOE is designed to be confidential and informal. Depending on the school district and whether the BOE has a meeting within 10 days of the request for an appeal, parents may face either a full BOE in executive session (i.e., without the public present) or an HIB Committee consisting of several BOE members. The anti-bullying specialist who conducted the HIB investigation, the principal, and possibly the district superintendent, may be present at the hearing. Parents will have the opportunity to explain why they think the HIB finding is incorrect and/or why the disciplinary action imposed was improper. N.J.S.A. 18A:37-15(b)(6)(d).

Note: While the ABR “likely” permits utilization of an HIB Committee to review information and report to the Board, a full Board vote is required to render a decision. J.L. obo A.L. v. Bd. of Educ. of the Bridgewater-Raritan Reg’l Sch. Dist., cited above.

3-5 Time Limitations of the BOE Hearing

There are generally no time limitations on the length of the hearing, and the length will vary depending on the complexity of the HIB case and the extent to which the BOE is willing to

undertake fact-finding. In practice, some BOEs have conducted hearings in under 30 minutes and even in as little as 10 minutes.

3-6 Informal Nature of BOE Hearing

Because BOE hearings are designed to be informal, parents have several options available to them. A good approach is to prepare a written statement in advance of the hearing and read that statement out loud in front of the BOE or HIB Committee. The statement should clearly explain why the BOE's determination was incorrect.

Prior to a hearing, parents are advised to request relevant information not already in their possession from the school district. The parent of a student accused of HIB might consider requesting copies of any allegations or complaints made against the child. Parents of both the accused student and the student alleging to be the target of HIB should request copies of any investigation reports (or other relevant documents) not already provided by the district, statements obtained from witnesses, recordings made during the investigation, and notes of interviews. If the district does not provide these materials in response to an informal request, parents may pursue a more formal request for student records or a request under the Open Public Records Act. Parents should attempt to speak with the anti-bullying specialist to fill in any gaps or ask questions about the scope of the investigation, who was interviewed, what was learned, and how the conclusion was reached.

At the hearing, parents may offer additional evidence that was not considered by either the anti-bullying specialist or the BOE when it made its initial HIB determination. Such evidence may include emails, social media posts, photographs, audio/video recordings, or statements from witnesses. Because the proceeding does not take place in a court of law, the New Jersey Rules of Evidence do not apply. Parents can ask the BOE's permission to question the anti-bullying specialist at the hearing, but, under current caselaw, there is no right to cross-examination at an HIB hearing before a BOE.

In L.K. & T.K. obo A.K. v. Bd. of Educ. of Twp. of Mansfield, cited above, the parents of a 7-year-old child found by the BOE to have engaged in HIB argued that they were denied due process during their appeal to the BOE. Their argument was that a finding of HIB is comparable in impact to a long-term suspension, with respect to which students are "provided pre-hearing notice of the specific testimony and charges against the student and are afforded the right to confront and cross-examine the witnesses against them at a school board hearing." The Superior Court, Appellate Division (in its decision dated Nov. 2, 2020) refused the parents' request to, as the court viewed it, "engraft those additional procedural rights onto the process for adjudicating HIB allegations," noting that the parents had the opportunity to cross-examine the BOE's witnesses at the "plenary hearing before the ALJ" that was part of their administrative appeal. The court also noted that in cases where students face potential long-term suspension as a consequence of HIB, the due process protections applicable to long-term suspension apply.

TIP: Parents should object to school district staff having contact with BOE members about the case outside of their presence.

3-7 Bringing the Child to the BOE Hearing

Parents may bring their child to the BOE hearing and allow the child to make a statement or answer questions the BOE members may have. There are many factors that parents should consider before deciding whether to bring the child, and the decision should be made carefully and, if possible, with the advice of an attorney. These factors include:

1. What is the nature of the HIB allegation and the issue on appeal?
2. What is the child's age and maturity level?
3. Is the child comfortable speaking in front of adults and strangers?
4. Can the child answer questions truthfully, or is the child easily persuaded to say "yes" or "no" even though it is not true?
5. Does the child have any difficulties communicating in English?
6. Is the child traumatized, and will bringing the child cause further emotional harm?
7. If the child is the alleged perpetrator, is the child facing related juvenile charges in which testimony before the BOE could be used against the child?
8. Will the child appear remorseful if accused of bullying?

3-8 Remedies to Seek at BOE Hearing

Parents who request a hearing before the BOE should be clear about what remedy they seek. The remedy sought will depend on who is appealing the HIB determination. If parents are appealing a determination that no HIB occurred, the remedy that they seek is a reversal of that determination and the imposition of consequences and/or remedial action. If parents are appealing the determination that HIB occurred, the relief they seek may be one or more of the following: (1) a reversal of the determination that the student engaged in HIB conduct; (2) a reduction in disciplinary action; or (3) removal of the HIB violation from the student's file ("expungement"). In some instances, parents may agree with the determination that HIB occurred but disagree with the manner in which school administrators addressed the conduct and request a different form of redress.

In exceptional circumstances, it may be possible to receive tuition reimbursement for a student who has been bullied to the point of having to transfer to another school. However, to obtain this reimbursement, a bullied student must prove "that the alleged bullying took place, that timely notice of the harassing conduct was provided to the district, that under all of the circumstances the Board failed to take actions reasonably calculated to remediate and end the conduct, that petitioner exhausted all available administrative remedies with the district and had no alternative but to remove the student from the school environment, and that [the parent] did in fact remove the student and educate him elsewhere at a specific cost to [the parent]." J.K. obo P.B. v. Bd. of Educ. of Twp. of Springfield, EDU 09972-09 (Oct. 13, 2011), rev'd, Comm'r Decision No. 47-12 (Feb. 9, 2012). As a practical matter, this type of relief is more likely to be granted in

an appeal before the Commissioner than in a hearing before the BOE, and even then, it is considered an exceptional remedy. See Section 6-4.

3-9 Contents of BOE Decision

Generally, the BOE decision will be a short (often one page) document that affirms, rejects, or modifies the HIB investigation's finding and/or the disciplinary action imposed on the student. The decision will generally advise the parent of the right to appeal to the Commissioner of Education. On rare occasions, a BOE decision will be detailed and span several pages. This may occur when there are multiple offenders and/or when the BOE is aware that the parents have retained an attorney. In some cases, the Board's attorney will send a letter setting forth the Board's decision. An attorney letter constitutes a written decision pursuant to N.J.S.A. 18A:37-15(b)(6)(e). Board minutes, however, "do not constitute a *written decision* by the Board." H.C. obo B.Y. v. Bd. of Educ. of Borough of Metuchen, EDU 5202-17 (May 8, 2018), rev'd, Comm'r Dec. No. 183-18 (June 22, 2018) (italics in original).

CHAPTER 4 - APPEALING TO THE COMMISSIONER OF EDUCATION

Appeals from a decision of the BOE must be made to the Commissioner of Education, who has primary jurisdiction over controversies arising under the ABR. D.B. by C.B. v. Jersey City Bd. of Educ., 2018 WL 6424126 (N.J. Super. Ct. App. Div. Dec. 7, 2018). There are several steps that must be taken before the Commissioner can decide on the appeal taken from the BOE's decision. In general, when the Commissioner receives the petition, the Commissioner will transmit the petition to the OAL, where an ALJ will be assigned to hear the case and issue a recommendation. See generally N.J.A.C. 1:1–3.2. The ALJ's recommendation is then filed with the Commissioner for consideration. The Commissioner must either adopt, reject, or modify the ALJ's recommendation. N.J.S.A. 52:14B-10(c). To aid the Commissioner's decision, a party disagreeing with the ALJ's findings of fact, conclusions of law, or disposition of the case may file "exceptions" to the ALJ's decision, and the other party may file a reply.

4-1 Filing the Appeal

4-1(a) Board of Education Decision is Required Before Appealing to Commissioner

All appeals to the Commissioner under New Jersey's school laws, including the ABR, are to be made from "a final order, ruling or other action by the district board of education." N.J.A.C. 6A:3-1.3(i). The ABR establishes a right to appeal to the Commissioner, but only from the BOE's decision, which must be in writing. N.J.S.A. 18A:37-15(e). "Without a decision from the Board, the matter is not yet ripe for a decision by the Commissioner." J.B. obo M.B. v. Bd. of Educ. of Borough of Haddonfield, cited above. See also C.J., obo minor children v. Bd. of Educ. of Twp. of Willingboro, EDU 8020-16 (Feb. 14, 2017), adopted, Comm'r Decision No. 94-17 (Mar. 30, 2017) (emergent relief petition seeking out-of-district placement on the grounds that children were "mistreated and abused" denied where parent failed to follow the procedural requirements for bringing HIB claims; parent may report future incidents to the BOE and request an ABR investigation).

As explained in Section 3-1 above, because of the timing rules contained in the statute and regulations, a BOE may vote on an HIB matter and issue a decision prior to a hearing request being made. So long as the BOE has issued a written decision, this decision may be appealed to the Commissioner: parents need not request a Board hearing to pursue such an appeal. R.C. and B.C. obo A.C. v. Bd. of Educ. of Twp. of Galloway, Comm'r Decision No. 132-22 (June 23, 2022) ("the Commissioner notes that a party challenging a board of education's HIB decision is not required to request and participate in a hearing before the board of education prior to filing a petition of appeal with the Commissioner. N.J.S.A. 18A:37-15(6)(d) provides that a parent *may* request a hearing, but nothing in the Anti-Bullying Bill of Rights Act requires a board hearing"); M.M. obo minor child v. Bd. of Educ. of the Twp. of Lafayette, Comm'r Decision No. 253-20 (Nov.

5, 2020), n. 8 (“A parent who does not request a hearing is still permitted to appeal a board’s decision to the Commissioner – provided that a decision has been made. Here, the obstacle to the Commissioner’s jurisdiction is not the lack of a hearing, but the lack of a decision by the Board”).²

Given the Commissioner’s deference to Board decisions (see Section 4-3(d)), it is advisable to request a hearing if the Board has issued an initial decision that is unfavorable.

4-1(b) Deadline to Appeal to the Commissioner

Parents have 90 days from the date of the BOE’s written decision to appeal to the Commissioner. N.J.S.A. 18A:37-15(b)(6)(e); N.J.A.C. 6A:3-1.3(i). If a hearing before the Board occurs, the 90-day period begins with the date the Board issues its decision based on the hearing. This 90-day timeline is strictly enforced and will not be relaxed absent a substantial constitutional issue or matter of significant public interest. See, e.g., H.D. and D.D. obo L.D. v. Bd. of Educ. of Borough of Woodcliff Lake, EDU 06602-20 (Sept. 17, 2020), adopted, Comm’r Decision No. 252-20 (November 2, 2020) (refusing to relax 90-day deadline where petitioners argued that COVID-19 pandemic caused them delay in sending Board decision to their attorney); E.G.M. obo J.M. v. Bd. of Educ. of the Twp. of Mahwah, cited above (petition time-barred where petitioner failed to correct deficiencies in her original submission to Commissioner within 90 days, which ran from date Board notified petitioner of its decision after hearing). See also Valerie Kenny v. Bd. of Educ. of Borough of Moonachie, EDU 09284-17 (Aug. 17, 2017), adopted, Comm’r Decision No. 286-17 (Sept. 27, 2017) (90-day timeline to file appeal to Commissioner was not tolled when teacher-petitioner chose to challenge BOE’s HIB determination through collective bargaining agreement’s grievance process); compare J.B. obo M.B. v. Bd. of Educ. of Borough of Haddonfield, cited above (where Board failed to issue a written decision, “there was no Board decision from which to run the time for appeal”).

TIP: Mark your calendar to avoid missing deadlines. The 60-calendar day deadline to request a Board hearing begins after receiving written information about the HIB investigation. The 90-day deadline to appeal an adverse BOE decision to the Commissioner runs from the date of the BOE’s written decision.

4-1(c) Contents of Petition to Commissioner

The format of a typical petition is described and illustrated in N.J.A.C. 6A:3-1.4(a), and the Department of Education has provided a [Pro Se Petition of Appeal template](#) on its website. More detail about the components of the petition is provided in the following sections.

² Litigation in M.M. v. Lafayette then continued without altering the Commissioner’s ruling on this point. See M.M. obo minor child v. Bd. of Educ. of Twp. of Lafayette and Jennifer Cenatiempo, Former Superintendent, EDU 00546-22 (July 5, 2023), adopted, Comm’r Decision No. 248-23 (Aug. 21, 2023) (upholding dismissal with prejudice due to parent’s unwillingness to appear at in-person hearing following denial of her request for a virtual hearing).

4-1(c)(i) Case Caption

The case caption identifies the petitioner(s) and the respondent. If you are the parent or guardian who is filing the appeal, then you will be the petitioner(s). The respondent would then be the local BOE.

In education matters, or any matter involving minors, initials are used instead of the full names of the students and their parents. Typically, the first two initials identify the student's parents or guardians. This is followed by the acronym "obo" - meaning "on behalf of" - the student. Again, the student's name is only referenced in initials. For example, Amanda Zuckerman and Bob Zuckerman on behalf of Casey Zuckerman would be captioned A.Z. and B.Z. obo C.Z. The caption should clearly identify the name of the local BOE as the respondent. It is good practice to look at the school district's website and use the precise name that the local Board uses to identify itself.

4-1(c)(ii) Statement of Facts

The petition should be drafted in much the same manner as a complaint that would be filed in the New Jersey Superior Court. Ideally, a statement of facts (also referred to as allegations because they have not yet been proven) should be set forth in numbered paragraphs. At a minimum, this section of the petition should contain the following:

1. The names of the parties involved in the action;
2. The student's age and grade;
3. A clear description of the alleged HIB conduct, including where and when it occurred;
4. An indication as to whether anyone else was involved in the incident (if appropriate);
5. A statement of the Board's HIB determination and when it made that determination;
6. The date on which the parents (petitioners) requested a hearing before the BOE (if applicable); and
7. The date on which the BOE issued its written decision.

4-1(c)(iii) Causes of Action

Following the statement of facts, the next section of the petition should cite the specific school laws under which the controversy has arisen and describe how the petitioners' rights were violated. Each violation arising under the ABR should be considered a separate cause of action, and therefore listed separately. For instance, an allegation that the student's conduct did not meet the definition of HIB would be considered a separate violation, or cause of action, from the BOE's failure to advise the parents of their right to appeal to the BOE within 60 days.

4-1(c)(iv) Relief Sought

The relief available to parents under the ABR from the Commissioner is comparable to the relief that can be sought from the BOE, discussed in Section 3-8. Parents of a student who has been determined to have engaged in HIB conduct may seek an order directing the BOE to remove

(“expunge”) the HIB records from the student’s educational file or to modify the consequences. Depending on the circumstances of the case, parents who allege that their child was the victim of HIB may seek an order that includes one or more of the following: directing the BOE to conduct a more thorough investigation as to whether HIB occurred; directing the BOE to provide teachers and staff with additional HIB training; directing the BOE to place either their child or the aggressor at another school for safety reasons; directing the BOE to impose other consequences or remedial action; or simply reversing the determination that no HIB occurred.

The ABR does not include a provision authorizing attorneys’ fees and costs to the prevailing party. However, if there are additional claims under laws that authorize attorneys’ fees, such as the Individuals with Disabilities in Education Act, Section 504 of the Rehabilitation Act of 1973, or the New Jersey Law Against Discrimination, the petitioner must seek fees in the appropriate forum. In any event, it should be noted that the Commissioner is not authorized to award attorneys’ fees and costs. J.A. v. Bd. of Educ. for Dist. of S. Orange and Maplewood, 318 N.J. Super. 512, 526 (App. Div. 1998) (citing Balsley by Balsley v. North Hunterdon Reg’l Sch. Dist. Bd. of Educ., 117 N.J. 434, 442-443 (1990)).

4-1(c)(v) Verification

The petitioners must provide a signed and notarized “verification,” either at the end of the petition or in a separate document accompanying the petition. This is a short and plain statement that the allegations are “true to the best of my knowledge and belief.” N.J.A.C. 6A:3-1.4(a). If a pro se petition is filed without proper verification, the Commissioner will not process the petition, but will instead advise the petitioner to correct the deficiency within a limited timeframe. N.J.A.C. 6A:3-1.4(b). Once the deficiency has been corrected, the Commissioner will proceed to process the petition.

TIP: Parents may be able to get their verifications notarized at a credit union or bank free of charge. Some accountants are also notaries, and most shipping offices such as FedEx provide notary services. In the alternative, parents can provide the required verification by using the certification language set forth in the New Jersey Rules of Court: “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.” R. 1:4-4(b). When this certification language is used, notarization is not required.

4-1(c)(vi) Certification of Service

The final document that must be included with the petition is the “Certification of Service” - sometimes referred to as “Proof of Service” - which contains a statement that the petition, verification, and any supporting documentation were filed with the Commissioner and served upon the respondent. This document must be dated and signed by the person who caused the documents to be served. The certification language included in the Tip above should be included above the signature of the person signing the proof of service.

4-1(d) Filing the Petition with the Commissioner and Serving it on the Respondent

Filing occurs when the petition, verification, and certification of service are received by the Commissioner “in care of” the Director of the Office of Controversies and Disputes. There is no fee to file a petition with the Commissioner. The address is:

Commissioner of Education
c/o Director of the Office of Controversies and Disputes
New Jersey State Department of Education
P.O. Box 500
Trenton, NJ 08625

Petitions of appeal may be filed electronically with the Commissioner by emailing the petition to ControversiesDisputesFilings@doe.nj.gov. N.J.A.C. 6A:3-1.2 (definition of “filing”). The website of the Office of Controversies and Disputes states that electronic filing is “strongly encouraged” until further notice and that if documents are filed electronically, a hard copy need not be mailed. <https://www.nj.gov/education/cd/>.

Additionally, a copy of the petition, verification, and certification of service must be served on the respondent BOE. Proof of service means “proof of delivery by mail or in person....” N.J.A.C. 6A:3-1.2. It is good practice to serve the documents via certified mail, return receipt requested, on either the school district superintendent or the Board secretary and to provide a courtesy copy to the school district’s counsel, if known.

4-2 BOE’s Response to Petition

4-2(a) Timeline to File Answer or Motion to Dismiss

Once the petition has been served, the BOE (known as the “respondent”) may either file an answer to the petition or move to dismiss the petition in place of an answer. N.J.A.C. 6A:3-1.5(g). In either event, the BOE has 20 days from the date of receipt of the petition to file its response. N.J.A.C. 6A:3-1.5(a). If the BOE fails to file a response within 20 days, the Commissioner will issue a notice informing the BOE that “unless an answer is filed within 10 days of the receipt of said notice, each count in the petition shall be deemed admitted and the Commissioner may decide the matter on a summary basis.” N.J.A.C. 6A:3-1.5(e). However, the Commissioner may, at its discretion, offer the BOE a second opportunity to respond to the petition beyond the first 10-day extension.

4-2(b) General Denials Are Not Permitted

If the BOE chooses to file an answer, it must admit or deny each and every allegation set forth in the petition. The BOE is not permitted to issue general denials. N.J.A.C. 6A:3-1.5(b).

4-2(c) Motion to Dismiss the Petition Due to Failure to Timely Appeal

A motion to dismiss may be filed in lieu of an answer to assert that the petition was filed late (i.e., beyond the 90-day deadline). See, e.g., M.P. obo K.K. v. Bd. of Educ. of Morris Hills Reg'l Sch. Dist., EDU 2805-14 (June 13, 2014), adopted, Comm'r Decision No. 310-14 (July 29, 2014).

TIP: To avoid a motion to dismiss based on failure to timely appeal within 90 days, it is important to meet the 90 day timeline. If the petition is filed on the 90th calendar day, parents should be prepared to provide proof that service of the petition was in fact made on the 90th day. If the 90th day happens to fall on a weekend or a holiday, and service of the petition was made on the next business day following the weekend or holiday, then parents can argue timeliness by analogizing to the New Jersey court rule that extends a deadline that falls on a Saturday, Sunday, or legal holiday “until the end of the next day which is neither a Saturday, Sunday, nor legal holiday.” N.J. Ct. R. 1:3-1.

4-2(d) Motion to Dismiss the Petition Due to Mootness

The BOE may file a motion to dismiss the petition on the grounds that the issues raised are moot. The Commissioner has held, however, that the fact that a student has graduated or no longer attends a particular school where the HIB incident allegedly occurred does not necessarily mean that the issue is moot. See, e.g., B.E. obo F.E. v. Bd. of Educ. of the Twp. of Piscataway, EDU 11838-18 (Dec. 20, 2018), rev'd and remanded, Comm'r Decision No. 2-19 (Jan. 4, 2019); T.R. and T.R. obo E.R. v. Bridgewater-Raritan Reg'l Bd. of Educ., cited above. See also D.M. obo K.B. v. Bd. of Educ. of Twp. of West Milford, cited above (“The Commissioner is also not persuaded by the District’s argument that it was not required to initiate an HIB investigation because the petitioner withdrew K.B. from the District. Any allegation of HIB committed against one of its students must be investigated by the school district, regardless of whether the student is disenrolled after the allegation is reported”); M.D.G. ex rel. C.J. v. Bd. of Educ. of Atlantic City, EDU 6450-04 (April 27, 2005), adopted, Comm'r Decision No. 191-05 (May 26, 2005) (student’s withdrawal from school did not excuse the BOE from investigating the alleged bullying incident); R.S. obo G.M. v. State Operated Sch. Dist. of the City of Paterson, EDU 14769-15 (Dec. 2, 2016), reversed and remanded, Comm'r Decision No. 17-17 (Jan. 13, 2017)(“[w]hether petitioner’s daughter has graduated from the District is not relevant to the issue of whether the alleged conduct constituted HIB,” citing J.M. obo T.M. v. Bd. of Educ. of Town of Tinton Falls, Comm'r Decision No. 39-14 (Jan. 23, 2014)).

4-3 Transmission to the Office of Administrative Law and Initial Considerations

4-3(a) Commissioner Transmits Petition and Responsive Papers

After the petition and responsive papers have been filed, the Commissioner will transmit the papers to the OAL for a contested hearing. There are three OAL locations in New Jersey:

Trenton (Mercerville) Office
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville (Hamilton Twp.), New Jersey 08619

Newark Office
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Atlantic City Office
Office of Administrative Law
1601 Atlantic Avenue, Suite 601
Atlantic City, New Jersey 08401

The Commissioner will transmit the papers to the appropriate OAL office.

4-3(b) Office of Administrative Law

The OAL is not a court; it is a state agency whose regulatory authority includes some adjudicative functions. In re Tenure Hearing of Tyler, 236 N.J. Super. 478, 486-487 (App. Div. 1989). However, to the extent possible, litigants should proceed in a manner as if the OAL were a court. “Although an administrative agency, such as the OAL, is not a ‘court’ in the true or literal sense of the term, many principles and rules that govern judicial proceedings and determinations can be applied to an agency’s quasi-judicial or adjudicative functions. Judicial rules of procedure and practice are transferable to administrative agencies when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications.” In re Tenure of Onorevole, 103 N.J. 548, 554–55 (1986) (citing Hackensack v. Winner, 82 N.J. 1, 28-29 (1980)).

The Rules governing proceedings at the OAL can be found in Title 1 of the New Jersey Administrative Code, which may be accessed at <https://www.state.nj.us/oal/rules/accessp/>.

4-3(c) Prehearing Conference and Order

Once an ALJ has been assigned to the case, the ALJ may reach out to the parties to schedule a pre-hearing conference, likely to be conducted by telephone. N.J.A.C. 1:1-9.1(d); N.J.A.C. 1:1-13.1(d).

After the parties agree to a mutually convenient day and time, a written notice will be sent to the parties confirming the day and time of the pre-hearing conference, stating that discovery should already have been commenced, and listing the matters to be covered in the conference and addressed in the ALJ’s Prehearing Order. Those matters (listed in N.J.A.C. 1:1-13.2) include, as appropriate:

1. The issue or issues to be resolved, including any special education problems.
2. The parties, their status, and their attorneys or other representatives, including the name of the particular attorney who will try the case.
3. Any special notice requirements.
4. The date, time, and place for the hearing. Parties should be prepared to discuss one or more alternate hearing dates.
5. Stipulations as to facts and issues.
6. Settlement efforts.
7. Any amendments to the pleadings contemplated or granted.
8. Discovery matters remaining to be completed, the date when discovery shall be completed, and the type of discovery to be used.
9. The order of proofs.
10. A list of exhibits marked for identification.
11. A list of exhibits marked in evidence by consent.
12. Estimated number of fact and expert witnesses.
13. Any motions contemplated, pending and granted.
14. Discovery matters and deadlines.
15. Other special matters.

Additionally, the parties should be prepared to discuss how long the hearing may be expected to last. The parties should have their calendars readily available. Typically, the ALJ will propose a hearing date several months into the future. Alternative hearing dates may be proposed in the event of inclement weather.

After the prehearing conference, the ALJ must, within 10 days, issue a Prehearing Order that sets forth the hearing dates and addresses the issues considered at the prehearing conference. If the Prehearing Order contains an inadvertent error, the parties should immediately notify the ALJ and request a corrected Prehearing Order.

4-3(d) The Standard of Review on Appeal to the Commissioner

Parties appealing to the Commissioner face a significant challenge given that BOE determinations are granted the presumption of correctness and may be overturned only if arbitrary, capricious, or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). “Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances.” Worthington v. Fauver, 88 N.J. 183, 204 (1982) (quoting Bayshore Sewerage Co. v. Dept. Environ. Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973)). See also G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Borough of Franklin Lakes, cited above (to prevail, petitioner “must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it”); M.S. and N.S. obo J.S. v. Bd. of Educ. of Twp. of Hainesport, cited above (upholding Board decision that HIB occurred even against background of longstanding conflict between the students; emphasizing that “overturning a board of education’s finding of HIB presents a high hurdle”); A.J. obo J.J. v. Bd. of Educ. of Town of Boonton, cited above (where there was evidence that student did not say the “N” word, “at best

this evidence balances the evidence that he did make the statement”; ALJ therefore erred in overturning Board’s HIB determination); J.M obo B.M v. Bd. of Educ. of Sch. Dist. of the Chathams, cited above (“ALJ inappropriately substituted his own judgment for that of the Board”).

A Board’s determination may be treated as arbitrary, capricious and unreasonable if it is found to be contrary to the intention of the governing statute. See J.A.H. v. Twp. of Pittsgrove Bd. of Educ., cited above (overturning Board’s determination that student who shoved a crumpled piece of paper down another student’s sweatshirt committed HIB where there was an ongoing conflict between the students).

4-3(e) Emergent Relief

Emergency, or “emergent,” relief consists of a party asking for immediate action and temporary relief on a specific issue that is time sensitive. Emergent relief is available to petitioners only when irreparable harm will result if a decision is not made on an expedited basis. N.J.A.C. 1:1-12.6(a). An application for emergent relief is appropriate in situations where the student may miss an important opportunity, such as a graduation ceremony. Applications for emergent relief are governed by N.J.A.C. 6A:3-1.6.

4-3(e)(i) Process of Seeking Emergent Relief

If relief is sought on an emergency basis, the petitioner must file a motion accompanied by a memorandum of law that sets forth the standard for emergent relief as explained in Crowe v. De Gioia, 90 N.J. 126 (1982). N.J.A.C. 6A:3-1.6(b). In essence, the petitioner must demonstrate the following:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner’s claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm if relief is not granted than the respondent will suffer if the requested relief is granted.

4-3(e)(ii) Requesting Emergent Relief When a Petition Is Pending

Even if a petition to appeal from the BOE’s decision has already been transmitted to the OAL, a party who seeks emergent relief must file the request for emergent relief directly to the Commissioner, who then either decides the issue or forwards the motion to the OAL. N.J.A.C. 1:1-12.6(b–c). Where an ALJ issues a decision on an emergent relief application, the ALJ’s recommendation is forwarded to the Commissioner who then makes a final determination regarding the request for emergent relief.

4-4 Discovery

“Discovery” is the process through which the parties exchange documents and information relevant to the case. Discovery can be a valuable tool in HIB litigation, particularly for parents who may not have a copy of the HIB report or other evidence such as a video recording of the alleged HIB incident. Alternatively, if the HIB report contains only basic information, discovery will provide parents with additional information in order to prepare for any defense raised by the BOE.

Note: Federal and state rules aimed at safeguarding student privacy come into play when a discovery request includes information about a student or students other than the requestor’s own child. A useful discussion of these rules is contained in Fitzke-Grey v. Bd. of Educ. of the West Essex Reg’l Sch. Dist., Comm’r Decision No. 22-23 (Jan. 23, 2023), in which a music teacher found by the Board to have committed HIB sought to obtain the entire HIB investigatory file as well as a copy of the student’s Section 504 plan, which he had been accused of violating. Finding that due process considerations weighed in favor of granting the teacher access to the records so that he could review them for his defense, the Commissioner ruled in favor of the teacher but placed various restrictions on the records release aimed at protecting the privacy of the student involved in the incident as well as student witnesses.

4-4(a) Discovery Is Limited

The Uniform Administrative Procedure Rules governing the OAL provide parties with limited discovery, including written interrogatories, requests for production of documents, and requests for admissions. N.J.A.C. 1:1-10.2(a). Depositions, which are oral testimony taken under oath, are available only on motion for good cause. N.J.A.C. 1:1-10.2(c). Unless otherwise indicated in a scheduling order or case management order, all discovery must be completed “no later than 10 days before the first scheduled evidentiary hearing.” N.J.A.C. 1:1-10.4(e).

4-4(b) Special Education and Discovery

Occasionally, but not always, there may be special education and ABR cases that need to be litigated simultaneously. If so, parents should be aware that discovery in special education matters is extremely limited compared to HIB or general education matters. N.J.A.C. 1:6A-10.1(d) - which governs discovery in special education cases heard in the OAL - provides that “[d]iscovery shall, to the greatest extent possible, consist of the informal exchange of questions and answers and other information. Discovery may not include requests for formal interrogatories, formal admissions or depositions.” Accordingly, if related HIB and special education cases are being litigated at OAL, interrogatories and requests for admissions should be limited to the HIB claims to avoid discovery disputes. Note that while the special education and ABR cases may be consolidated for one hearing, the ALJ will issue two separate decisions.

4-4(c) Discovery Requests

Under N.J.A.C. 1:1-10.4(c), a party who has received a notice requesting discovery must, within 15 days of receipt of the notice, “provide the requested information, material or access or offer a schedule for reasonable compliance with the notice.” In the case of a Request For Admissions, each matter shall be deemed admitted “unless within the 15 days the receiving party answers, admits or denies the request or objects to it pursuant to N.J.A.C. 1:1–10.4(d).”

N.J.A.C. 1:1-10.4(d) provides that a party wishing to object to any discovery request or to compel discovery must place a telephone conference to the ALJ and to all other parties no later than 10 days from receipt of the discovery request or the response to a discovery request. Failure to do so may cause the ALJ to deny any objections to the discovery request or decline to compel discovery.

Any party who needs an extension of a discovery deadline should contact the ALJ before the deadline expires. Typically, an extension request will need to be faxed or emailed to the ALJ.

4-4(d) Failure to Produce Discovery

An ALJ has the authority to impose monetary sanctions on attorneys who refuse to produce discovery or cooperate with a discovery order, though sanctions must be compensatory and not punitive. In re Timofai Sanitation Co. Inc., 252 N.J. Super. 495, 509 (App. Div. 1991). See also N.J.A.C. 1:1-14.14 (providing list of sanction powers granted to ALJ); In re Uniform Admin. Procedure Rules, 90 N.J. 85, 106 (1982) (the power of sanctions is “essential to the proper conduct of administrative hearings”).

The OAL does not appear to have the authority to impose contempt on parties. See Wright v. Plaza Ford, 164 N.J. Super. 203, 218 (App Div. 1978) (“we perceive no great need to invest nonjudicial officers with the power to adjudicate and punish criminal contempts”). However, OAL orders are enforceable in the Superior Court of New Jersey under a court rule entitled “Summary Proceedings to Enforce Agency Orders.” N.J. Ct. R. 4:67-6.

4-5 Motion Practice

Parties may file a “motion” to get a ruling on legal issues from the ALJ prior to a hearing. A motion is a written application to the OAL requesting certain relief. In HIB matters, typical motions include (1) motion to dismiss; (2) motion for summary decision; and (3) motion for partial summary decision. Motions to dismiss and for summary decision are filed when a party believes that no hearing to take oral testimony is required at all, and a decision can instead be made based on the motion papers that have been filed. It should be noted that the legal standard in a motion to dismiss is different from that of summary decision. A motion for partial summary decision seeks a ruling on some part of the case but would not decide the case as a whole.

4-5(a) Filing Motion Papers

An original copy of all motion papers should be filed with the OAL, addressed to the ALJ who has been assigned to hear the case. To ensure that the motion papers have been received by the ALJ, choose a method of service that offers delivery confirmation. Unlike actions in the New Jersey Superior Court, there is no fee to file motions or other papers with the OAL. A copy of all motion papers should also be served simultaneously on the respondent's attorney.

4-5(b) Motion for Summary Decision

A party may move for summary decision or partial summary decision at any time after a case is transferred to the OAL as a contested case, so long as the motion is made at least 30 days prior to the scheduled hearing. N.J.A.C. 1:1-12.5(a). Summary decision or partial summary decision is appropriate where there is "no genuine issue of material fact" in dispute. N.J.A.C. 1:1-12.5(b). This means that the claim does not rely on any facts that are disputed between the parties; instead, the moving party claims that even if you accept all disputed facts alleged by the opposing party as true, the moving party would still win the case because it is controlled by a purely legal question. The standard of review for summary decision substantially mirrors the language of the summary judgment standard used in state courts, set forth in New Jersey Court Rule 4:46-2(c). S.G. obo R.G. v. Fair Lawn Bd. of Educ., EDU 7469-99 (Aug. 8, 2000), aff'd, Comm'r Decision No. 320-00 (Sept. 25, 2000).

When faced with a motion for summary decision, the essential question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). See also J.S. v. East Orange Bd. of Educ., EDS-00917-13 (June 5, 2013) (quoting Nat'l Transfer, Inc. v. New Jersey Dep't of Env'tl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002), for proposition that OAL must analyze motion for summary decision in accordance with Supreme Court decision in Brill).

Thus, on a motion for summary decision, the ALJ must examine the pleadings, papers, as well as any affidavits filed with the motion, to determine whether an evidentiary proceeding is at all necessary and, if not, then grant summary decision or partial summary decision as a matter of law. If, based on the facts presented, only one conclusion can be reached, there will be no need for an evidentiary hearing. See Brill, cited above, at 541 ("To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose'").

If the non-moving party opposes summary decision, that party must show that there is a genuine issue of material fact in dispute requiring a hearing. If the non-moving party's evidence is "merely colorable, or is not significantly probative, summary [decision] should not be denied." Glennon v. New Jersey State Bd. of Examiners, EDU 07419-07 (Aug. 4, 2009), adopted, Comm'r Decision No. 306-09 (Sept. 18, 2009).

4-5(c) Timelines for Motions for Summary Decision

Motions for summary decision are governed by N.J.A.C. 1:1-12.5. If there is no scheduling order designating days upon which a motion for summary decision must be filed, such motions must be filed no later than 30 days prior to the first scheduled hearing date. N.J.A.C. 1:1-12.5(a). The original motion papers are sent directly to the ALJ, with a copy served on respondent's counsel. If the opposing party fails to respond within 20 days of service of the motion, summary decision, if appropriate, shall be entered. N.J.A.C. 1:1-12.5(b). However, if the opposing party chooses to respond within 20 days of service of the motion, the moving party then has 10 days to file a reply. N.J.A.C. 1:1-12.5(b).

4-5(d) Components in a Motion for Summary Decision and Response

Although N.J.A.C. 1:1-12.5(b) contains sparse information about what should be contained in a motion for summary decision, it is good practice to draft all the papers that one would typically file in support of a motion for summary judgment in the New Jersey Superior Court. This includes: (1) notice of motion; (2) memorandum of law; (3) statement of undisputed material facts; (4) certification and exhibits that support the statement of undisputed material facts; and (5) certification of service. A memorandum of law (or legal brief) in support of a motion for summary decision should include, at a minimum, an introduction or preliminary statement, the legal standard, summary of facts, legal arguments, and the conclusion.

To prevail in opposition to a motion for summary decision, the opposing party must "by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b).

4-5(e) Petitioner's Failure to Oppose Motion for Summary Decision

A parent-petitioner's failure to file opposition papers to a BOE's motion for summary decision does not necessarily mean that the BOE is a prevailing party as a matter of law. See K.T. obo K.H. and T.D. v. Bd. of Educ. of Twp. of Deerfield, EDU 489-13 (June 19, 2013), rev'd, Comm'r Decision No. 278-13 (July 30, 2013) ("Given that the motion was unopposed, the ALJ was entitled to presume the absence of material *factual* dispute. It does not, however, follow that respondent is entitled to a decision in its favor *as a matter of law*") (italics in original).

4-5(f) ALJ's Decision is Due Within 45 Days

Once all motion papers have been filed within the timeframe established in the ALJ's scheduling order or pursuant to N.J.A.C. 1:1-12.5(b), the ALJ is required to decide such motions "within 45 days from the due date of the last permitted responsive filing." N.J.A.C. 1:1-12.5(c). "All motions in writing shall be decided on the papers unless oral argument is directed by the judge." N.J.A.C. 1:1-12.2(d). If the ALJ directs oral argument on a motion, it will generally be heard via telephone conference. N.J.A.C. 1:1-12.3.

4-5(g) ALJ May “Reserve” Decision and Proceed with the Hearing

Although the ALJ’s decision is due “within 45 days from the due date of the last permitted responsive filing,” N.J.A.C. 1:1-12.5(c), the ALJ may “reserve” decision on a motion and order the parties to proceed with the hearing. Similarly, where a party moves to dismiss the petition, the ALJ may reserve decision and order the parties to proceed with the hearing. State Operated Sch. Dist. of the City of Newark v. Jakubiak, EDU 3961-97 (Dec. 22, 1998), adopted, Comm’r Decision No. 33-99 (Feb. 11, 1999). Given the explicit regulatory timeframe for summary decision motions, it is unclear what authorizes an ALJ to reserve decision on a motion for summary decision until after a hearing has been conducted. However, one case suggests that an ALJ is empowered to reserve a decision on a motion for summary decision pursuant to N.J.A.C. 1:1-1.3(a). Christopher Delli Santi v. Fire Dep’t, City of Newark, 1992 WL 398303, CSV 1309-91 (Oct. 14, 1992).

TIP: If an ALJ fails to rule on a summary decision motion within the 45 day timeline or a party wishes to challenge the ALJ’s authority to “reserve” decision, a party may wish to file a writ of mandamus in the New Jersey Superior Court for an order directing the ALJ to issue a decision pursuant to N.J.A.C. 1:1-12.5(c).

4-5(h) Joint Stipulation of Facts and Issues in Dispute

The ALJ’s Pre-Hearing Order may require the parties to submit a joint stipulation of undisputed facts and a statement of issues in dispute to the ALJ on a certain date prior to the scheduled hearing.

4-5(h)(i) Joint Stipulation of Facts

A joint stipulation of facts is a document that is jointly prepared by both parties and contains numbered paragraphs that set forth facts that both parties agree on. In this document, parties will often stipulate to basic background facts, including the student’s name, grade level, and the name of the school the student attends. Each stipulation of fact should be addressed separately in numbered paragraphs. The starting point to drafting a joint stipulation of facts is to examine the allegations in the petitioners’ petition and the respondent’s answer. Each admission in the respondent’s answer to the petition should be incorporated into the joint stipulation of facts. Parties who have a good working relationship will often agree to additional facts outside of the pleadings, such as facts revealed from discovery. It may be helpful to annex documents to the stipulation of facts, and both parties should, ideally, agree to pre-mark these documents as joint exhibits in advance of the hearing.

4-5(h)(ii) Issues in Dispute

Though it may appear redundant at face value, some ALJs may request that the petitioners submit a list of issues in dispute both to prevent confusion and to help the ALJ and the respondent understand what issues will be addressed at the hearing. It is important to remember that ALJs

may not be aware of any discovery that has been exchanged between the parties. Between the filing of the petition and the completion of discovery, the petitioners may learn that one or more issues are moot or no longer worth pursuing for one reason or another. Thus, the petitioners' submission of all issues in dispute streamlines the hearing process and clarifies what issues are at stake. The issues in dispute should be presented in a separate document from the joint stipulation of facts.

4-6 The Administrative Hearing

4-6(a) The OAL Hearing

The hearing is similar to a bench trial, which is a trial decided by a judge without a jury. The parties will have an opportunity to make opening statements before calling witnesses to offer testimony on direct examination. Witnesses will also be subject to cross-examination. The ALJ may also ask witnesses questions and ask them to clarify facts. After the record closes, the parties may offer legal summations ("closing arguments") or submit written summations by the date established by the ALJ.

4-6(b) Settlement

It is not uncommon for parties to settle cases on the morning of the first day of the hearing, or even on the second day of the hearing. A settlement may be placed on the record orally but should also be set forth in writing by way of a joint stipulation signed by all parties. N.J.A.C. 1:1-19.1(a). Subsequently, the ALJ will issue an initial decision incorporating the full terms of the settlement and recommending its approval. The ALJ will then send the initial decision to the Commissioner for review and approval. It should be noted that settlement of HIB litigation is not binding until the Commissioner has approved the proposed terms of the settlement agreement. Once the Commissioner has approved the settlement and adopts the initial decision as the final decision, the petition is dismissed subject to the parties' compliance with the terms of the settlement.

4-6(c) Student Confidentiality

HIB matters almost always involve minor students. In such instances, hearings are closed to the public. N.J.A.C. 1:1-14.1. Although hearings are recorded either by a stenographic reporter or audio device, the names of all minors are redacted from the record. (There is no requirement to move to seal a record involving a minor.)

4-6(d) Conduct of Hearings

Although the OAL is not a court (see Section 4-3(b)), hearings are conducted in much the same way as a bench trial in the New Jersey Superior Court. The conduct of hearings is set forth in N.J.A.C. 1:1-14.7, which provides, among other things, that:

1. The ALJ commences the hearing by stating the case title and the docket number, asking the representatives or parties present to state their names for the record and briefly describing the matter in dispute;
2. The party with the burden of proof may make an opening statement, followed by all other parties in an order determined by the judge;
3. After opening statements, the party with the burden of proof shall begin the presentation of evidence unless the judge has determined otherwise. The other parties may present their evidence in an order determined by the judge;
4. Cross-examination of witnesses shall be conducted in a manner determined by the judge to expedite the hearing while ensuring a fair hearing; and
5. When all parties and witnesses have been heard, opportunity shall be offered to present final oral arguments, in an order determined by the judge.

4-6(e) Burden of Proof

In ABR matters, the petitioner generally has the burden of proof. See, e.g., C.P. obo L.P. v. Bd. of Educ. of Twp. of Warren, EDU 13907-16 (Jan. 16, 2018), adopted, Comm’r Decision No. 56-18 (Feb. 16, 2018). Ordinarily, unless the ALJ’s Pre-Hearing Order requires otherwise, the party who has the burden of proof will begin the presentation of evidence. N.J.A.C. 1:1-14.7(c).

4-6(f) Exhibits

Ensuring that documents are properly introduced into the record is critical. The Scheduling Order or Pre-Hearing Order may contain the ALJ’s individual rules. For instance, some ALJs may require that each party provide a copy of all pre-marked documents to the ALJ and opposing counsel at least several days before the hearing. In the absence of such rules, all documents should be pre-marked at least several days prior to the hearing, and at least four copies of each pre-marked document should be ready for distribution at the hearing. One copy will be for your use; one copy for the ALJ; one copy for opposing counsel; and one copy to show to a witness, if necessary.

4-6(f)(i) Pre-marking Exhibits

Whenever possible, the parties should agree to joint exhibits, which are each pre-marked “J” followed by a number. Joint exhibits help streamline the hearing and reduce paper costs. Where the parties do not agree on identifying a particular document as a joint exhibit, it should be pre-marked with the letter “P” (for petitioner) or “R” (for respondent), followed by a number.

4-6(f)(ii) Organizing Exhibits in Advance of the Hearing

It is useful to create a table of contents that will help you and the ALJ quickly locate the exhibits for use at the hearing. A simple table of contents may look like this:

Exhibit	Description
J-1	School district’s HIB investigation report (11-1-2023)

J-2	Letter from Board of Education to Petitioners (11-14-2023)
J-3	Letter from Petitioners requesting appeal to Board of Education (11-15-2023)
P-1	Email correspondence between A.B. and Y.Z. (10-20-2023)
P-2	Email correspondence between A.B. and Y.Z. (10-24-2023)
P-3	Facebook page on Y.Z.'s account (screen capture 10-29-2023)

4-6(f)(iii) Introducing Exhibits into Evidence

To save time, the ALJ may ask at the start of the hearing if the parties wish to introduce all joint exhibits into evidence. Generally, there should not be any objections to this since both the petitioners and respondent will be relying on those joint exhibits. For other exhibits, it is reasonable to avoid introducing those documents into evidence until they are needed. If, for example, a witness, A.B., indicates that she sent an email, a party may then introduce a copy of the email and move to admit the email into evidence.

4-6(g) Oral Testimony

In many cases, the heart of the petitioners’ case at the administrative hearing will be the child’s testimony. For the school district, it might be the testimony of the school anti-bullying specialist who conducted the investigation or the district anti-bullying coordinator. In some cases, it may be necessary to hear from an expert witness, such as a psychologist, psychiatrist or social worker. The OAL rules governing the treatment of testifying witnesses are found at N.J.A.C. 1:1-15.8 (general requirements) and -15.9 (expert and opinion testimony).

4-6(g)(i) Examination and Cross-Examination of Minors

In any matter involving a minor in the OAL, attorneys and ALJs should be mindful that the minor may be under stress or feel humiliated by sitting in a hearing room and answering questions about their experiences. ALJs who have substantial experience with overseeing hearings will be able to offer suggestions about how examination and cross-examination of children should proceed. Factors to be considered include the child’s age and maturity level, the existence and nature of any disability, the nature of the alleged HIB conduct, and any recommendations by psychologists or psychiatrists. ALJs may suggest allowing the child to accompany the ALJ into chambers and having the parties examine and cross-examine the child telephonically from the hearing room. This method may be less embarrassing and intimidating for the child, while allowing the ALJ to observe the child’s movements and facial expressions. In hearings involving students of high school age, parents may be asked by the student to leave the hearing room. If a child testifying in the hearing room is met with aggressive or hostile cross-examination, it is appropriate to make an objection.

4-6(g)(ii) Subpoenaing Witnesses

When a witness does not agree to testify voluntarily, a party may issue a subpoena. N.J.A.C. 1:1-11.1(a) states that “[s]ubpoenas may be issued by the Clerk, any judge, or by pro se parties,

attorneys-at-law or non-lawyer representatives, in the name of the Clerk....” The subpoena must be served in person or by certified mail return receipt requested. N.J.A.C. 1:1-11.2(a). Only a judge may issue a subpoena for certain parties, including the Governor, an agency head, an Assistant Commissioner, a Deputy Commissioner, or a Division Director; such a subpoena depends on a showing by the requesting party that the individual in question “has firsthand knowledge of, or direct involvement in, the events giving rise to the contested case, or that the testimony is essential to prevent injustice.” N.J.A.C. 1:1-11.1(a).

Witnesses who are subpoenaed are entitled to payment by the requesting party at a rate of at \$2.00 per day of attendance if the witness is a resident of the county in which the hearing is held, with “an additional allowance of \$2.00 for every 30 miles of travel in going to the place of hearing from his or her residence and in returning if the witness is not a resident of the county in which the hearing is held.” N.J.A.C. 1:1-11.2(b).

4-6(g)(iii) Motion to Quash Subpoena

A subpoenaed party who does not wish to comply with the subpoena must seek to quash the subpoena by way of motion. N.J.A.C. 1:1-11.3. After the subpoenaed party files a motion to quash the subpoena, the ALJ will issue an order either quashing the subpoena or upholding it. The ALJ’s decision quashing or upholding the subpoena may be appealed by a party, or by the person subpoenaed, to the Commissioner, and then to the Appellate Division of the Superior Court.

Should the subpoenaed party fail to respond to the subpoena, the ALJ will ordinarily agree to adjourn the hearing to provide the requesting party the opportunity to bring an action in the Superior Court for an order directing the subpoenaed party to comply with the subpoena. N.J.A.C. 1:1-11.5; see also In re Tenure Hearing of Brigitte Geiger and In re Tenure Hearing of Sharon Jones, 2015 WL 7261458 at *7 (N.J. Super. Ct. App. Div. Nov. 18, 2015) (party proceeding with hearing without seeking enforcement order may forfeit right to have subpoena enforced or to have evidentiary inferences drawn in their favor; ALJ does not abuse their discretion in refusing to draw an adverse inference when a party does not seek an enforcement order to comply with the subpoena).

4-6(g)(iv) Telephonic Testimony

It may be possible to obtain consent from the ALJ to allow a witness to testify by telephone or video conference call. N.J.A.C. 1:1-15.8(e). Notice should be given in advance. Factors the ALJ weighs include the significance of the witness’s testimony, where the witness is located, and whether the opposing party consents to telephonic or video testimony. If the ALJ grants the request, the examination will be conducted as if the witness were present in the room.

4-6(g)(v) Sequestering Witnesses

Sequestration of witnesses means excluding certain witnesses from the hearing room until they are ready to testify. Some parties ask to sequester witnesses to prevent them from becoming influenced by facts or opinions they hear from other witnesses who are testifying. Sequestration of witnesses is not addressed in the Uniform Administrative Procedure Rules, though ALJs are given discretion to “take such . . . actions as are necessary for the proper, expeditious and fair conduct of the hearing.” N.J.A.C. 1:1-14.6(p). In practice, ALJs have ordinarily permitted sequestration of witnesses at a party’s oral request. Such requests can be made as an oral motion before or immediately after the hearing opens.

4-6(h) Evidentiary Rules

Except for provisions governing privileges or where “statutes or other rules governing particular administrative proceedings affirmatively require [their] application,” the New Jersey Rules of Evidence do not apply to administrative agency proceedings, including proceedings that are transmitted by the Commissioner to the OAL. *See, e.g., DeBartolomeis v. Bd. of Review*, 341 N.J. Super. 80, 83-84 (App. Div. 2001)(quoting Biunno, *Current N.J. Rules of Evidence*, comment 3 on N.J.R.E. 101(a) at 14 (2001)). The evidence rules that apply at OAL can be found at N.J.A.C. 1:1-15.1 - 15.12.

4-6(i) Hearsay

Hearsay is an out-of-court statement offered to prove the truth of whatever the statement asserts. For example, if a witness testified that “Sally said that the rock hit her in the knee” in order to prove that the rock hit Sally in the knee, that would constitute hearsay. Hearsay is admissible in administrative proceedings at the OAL and “shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.” N.J.A.C. 1:1-15.5(a). However, ultimate findings of fact cannot be based solely on hearsay evidence. N.J.A.C. 1:1-15.5(b). This is referred to as the “residuum rule,” which was set forth by the New Jersey Supreme Court:

It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

Weston v. State, 60 N.J. 36 (1972). For an analysis of the hearsay rule in ABR proceedings, see R.G.B. v. Vill. of Ridgewood Bd. of Educ., cited above. See also J.K. obo P.B. v. Bd. of Educ. of Twp. of Springfield, EDU 09972-09 (Oct. 13, 2011), rev'd, Comm'r Decision No. 47-12 (Feb. 9, 2012) (in case where student did not testify, the testimonies of parents who were not first-hand witnesses were insufficient to prove HIB).

4-6(j) Sanctions and Contempt

The OAL does not have the authority to impose contempt on the parties. However, ALJs do have the authority to impose sanctions. See In re Certain Sections of the Unif. Admin. Procedure Rules, 90 N.J. 85 (1982). Unprofessional behavior should be avoided at all times. Counsel and their clients should conduct themselves respectfully and tactfully.

4-6(k) Closing Summations or Final Written Submissions

After all exhibits have been entered into evidence and witnesses have testified, the parties will have an opportunity to offer closing summations. This is an opportunity for each party to summarize the evidence that has been presented in the light most favorable to that party. Instead of closing summations, a party may request permission to file final written submissions. In cases without an extensive record, ALJs may deny written submissions in favor of closing summations. Alternatively, some ALJs prefer written submissions.

4-6(l) Deadline for ALJ to Issue the Initial Decision

Following a plenary hearing, the ALJ has 45 days to issue the initial decision. N.J.A.C. 1:1-18.1(e). In practice, a decision may not be issued for several months, if not longer.

4-7 Matters Subsequent to ALJ's Initial Decision

4-7(a) Transmittal of ALJ's Initial Decision to the Commissioner

As explained earlier, the ALJ's decision is merely a recommendation, and it is the Commissioner's decision that carries the force of law. N.J.A.C. 1:1-14.9(b). After the ALJ issues an initial decision, a copy of the decision and the record is sent to the Commissioner, who then has 45 days to review the matter and either adopt, modify, or reject the ALJ's initial decision. Before issuing a final decision, however, the Commissioner will review "exceptions" filed by the parties and, if necessary, review the hearing transcript.

4-7(b) Filing Exceptions

"Exceptions" are written objections, which provide the losing party with an opportunity to explain why the ALJ's decision or recommendation was incorrect. See generally N.J.S.A. 52:14B-10(c). Because it is the Commissioner's decision that carries the force of law, submitting written exceptions is crucial, particularly if a party expects to appeal to the Appellate Division, because

“[o]n appeal from an agency determination, we review the final decision of the agency head, not the ALJ’s initial decision.” In re Dennis, 385 N.J. Super. 369, 375 (App. Div. 2005). However, even in the absence of written exceptions, the Commissioner may still reject the ALJ’s decision. See, e.g., R.S. obo G.M. v. State Operated Sch. Dist. of City of Paterson, cited above.

A party who wishes to file exceptions must do so within 13 days of the date that the ALJ’s initial decision was mailed to the parties. N.J.A.C. 1:1-18.4(a). Exceptions should be mailed or emailed to the Commissioner and a copy must be served on all other parties.

N.J.A.C. 1:1-18.4(b) requires that the contents of the exceptions include the following: (1) findings of fact, conclusions of law or dispositions to which exception is taken; (2) specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge; and (3) supporting reasons. Exceptions to factual findings must describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law must set forth the authorities relied upon. Replies to exceptions, which “may include submissions in support of the initial decision,” may be filed and served on all parties within 5 days from receipt of exceptions. N.J.A.C. 1:1-18.4(d).

4-7(c) Hearing Transcripts

There is no statute or regulation requiring that a transcript of the hearing be filed with written exceptions. In practice, however, this is recommended. If the Commissioner opts to reject or modify the initial decision, the Commissioner will often, but is not always required to, review the hearing transcript. See B.C. v. Bd. of Educ., Cumberland Reg’l Sch. Dist. and NJSIAA, 220 N.J. Super. 214 (App. Div. 1987). However, if the Commissioner receives exceptions “challenging material and genuine factual findings by the ALJ,” then the Commissioner’s acceptance of those findings is “subject to a duty of review” of the transcript, with the party raising such exceptions bearing the burden of providing “relevant parts of the record” for the agency’s review. In re Morrison, 216 N.J. Super. 143, 158-59 (App. Div. 1987).

Hearings at OAL are typically audio recorded. A party may request a transcript from the OAL clerk. N.J.A.C. 1:1-14.11(a). Because the case will likely have involved a minor, only parties may request a transcript of the record. N.J.A.C. 1:1-14.11(g)(3).

4-7(d) Commissioner’s Decision

If the Commissioner agrees with the ALJ’s initial decision, the Commissioner’s decision will typically consist of a one- or two-page document stating that the ALJ’s initial decision is adopted. However, if the Commissioner rejects or modifies the initial decision, the Commissioner must explain why. In this regard, the Administrative Procedure Act states at N.J.S.A. 52:14B-10(c):

In reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. The agency head may not reject

or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

The Administrative Procedure Act and its implementing regulations further provide that if the Commissioner fails to issue a final decision within 45 days, the initial decision by the ALJ becomes final. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.6(e).

CHAPTER 5 - APPEALING TO THE APPELLATE DIVISION

A comprehensive, detailed discussion about how to appeal to the New Jersey Superior Court, Appellate Division, is a book in itself. Below is a brief overview of the process. For an in-depth and step-by-step analysis, *see* Jeffrey S. Mandel, *New Jersey Appellate Practice*, <https://www.gannlaw.com/onlineStore/Main/AppellatePractice.cfm> (also available at some libraries).

5-1 Appealing to the Appellate Division

The appeal to the Appellate Division provides either party with an opportunity to challenge the Commissioner's final decision in a judicial court. There is no trial or hearing at this stage. All legal arguments are based upon the "record below," which generally consists of all papers filed by the parties, the ALJ's initial decision, the transcript of the hearing, exhibits introduced into the record, and the Commissioner's final decision. N.J. Ct. R. 2:5-4.

5-2 The Scope of Review is Limited

The scope of appellate review is limited to a review of the administrative record and the law applied to that record. Generally, reviewing courts will uphold the Commissioner's decision unless it "was arbitrary, capricious, or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies expressed or implicit in the [enabling legislation]." Aqua Beach Condo. Ass'n v. Dep't of Civil Serv., 186 N.J. 5, 16 (2006) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). *See generally* In re Adoption of Amendments, 435 N.J. Super. 571, 583-84 (App. Div. 2014). *See also* In re Virtua-West Jersey Hosp., 194 N.J. 413, 422 (2008) (courts should not disturb agency findings unless: (1) agency did not follow the law; (2) decision was arbitrary, capricious, or unreasonable; or (3) decision was not supported by substantial evidence).

However, the standard of review of agency adjudication "requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings..." Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973). Additionally, a reviewing court need not defer to an agency head's findings of fact where the agency head rejects an ALJ's credibility-based findings of fact. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988).

5-3 Appeal Based on Commissioner's Violation of Administrative Procedure Act

As noted in Section 4-7(d), the Administrative Procedure Act requires the Commissioner of Education to explain any reversal or modification of an ALJ's initial decision and to make new or modified findings of fact, supported by adequate evidence, when rejecting or modifying any findings of fact by an ALJ. The Commissioner's failure to abide by these rules provides grounds for appeal. *See* L.K. & T.K. obo A.K. v. Bd. of Educ. of Twp. of Mansfield, cited above (remand

ordered where decision of Commissioner failed to “explain why the Commissioner rejected the ALJ’s assessment of the credibility of the evidence presented by the Board, as required by the Administrative Procedure Act”).

5-4 Initiating the Appeal to the Appellate Division

The party seeking to appeal must file a Notice of Appeal with the Appellate Division. N.J. Ct. R. 2:5-1(d). The deadline for filing is 45 days from the date of service of the Commissioner’s decision. N.J. Ct. R. 2:4-1(b). However, an extension of up to 30 days may be requested. N.J. Ct. R. 2:4-4(a).

A Case Information Statement is required under N.J. Ct. R. 2:5-1; a copy of the final decision of the Commissioner being appealed from must be annexed to the Case Information Statement. N.J. Ct. R. 2:5-1(h). A \$250 filing fee is also required for all parties who are not excused from the fee on the basis of indigency. A copy of the Notice of Appeal must be served on all parties, the ALJ, and the Commissioner.

5-5 Record on Appeal

New Jersey Court Rule 2:5-4(a) provides that “all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies” are part of the record on appeal. This includes a transcript of the OAL hearing, which must be obtained from the OAL Clerk. N.J.A.C. 1:1-14.11(a).

5-6 Mediation

When the clerk receives the Notice of Appeal, the Appellate Division may order the parties to participate in mediation to resolve their dispute. If mediation is not ordered, or if mediation is unsuccessful, a scheduling order will be issued. The scheduling order sets forth the deadlines by which the parties must file their briefs.

5-7 Briefs

The heart of an appellate case is the brief. In addition to setting forth the legal arguments why the decision below should be overturned, it is essential that the brief meets the Appellate Division’s filing requirements. The New Jersey Courts website includes a helpful checklist to ensure that the brief complies with the Appellate Division’s requirements, as well as sample formal and letter briefs which may be helpful to those inexperienced in writing briefs:

<https://www.njcourts.gov/self-help/appeals/guide>;

https://www.njcourts.gov/sites/default/files/forms/10836_cklist_brief.pdf;

https://www.njcourts.gov/sites/default/files/forms/11898_create_brief_sample_letter.pdf;

https://www.njcourts.gov/sites/default/files/forms/11898_create_brief_sample_formal.pdf.

5-8 Oral Argument

Either party may request oral argument within 14 days after service of the other party's brief by filing a separate document specifically making that request. N.J. Ct. R. 2:11-1(b)(2). If neither party requests oral argument, then, unless argument is ordered by the court, the appeal will be decided based on the briefs.

CHAPTER 6 - SPECIAL ISSUES

6-1 Pursuing Additional Causes of Action

The ABR states that its provisions “shall not be interpreted to prevent a victim from seeking redress under any other available law either civil or criminal.” N.J.S.A. 18A:37-18. In some cases, parents may have additional causes of action and wish to seek other relief, such as monetary relief, not available under the ABR. This publication is not intended to fully address the many considerations involved in bringing multiple claims, such as when and how such claims may be pursued, and any effect that litigating an HIB case before the Commissioner might have on a parent’s ability to bring other claims. The information provided below is not a substitute for seeking the advice of an attorney with appropriate expertise to consider potential additional claims given the specific facts of the case.

The circumstances surrounding a bullying dispute may give rise to claims such as certain discrimination and tort claims (discussed in Sections 6-1(b) and (c) below), that fall outside the school laws and therefore outside the jurisdiction of the Commissioner. N.J.S.A. 18A:6-9; see J.G. obo K.C. v. Hackettstown Public Sch. Dist., 2018 WL 3756952 (D.N.J. Aug. 8, 2018). While various judicial doctrines, including New Jersey’s “entire controversy” doctrine and traditional legal doctrines of res judicata and collateral estoppel, function to prevent duplicative or piecemeal litigation of matters arising out of the same set of facts, these doctrines should not prevent parents from bringing additional claims (during a pending HIB appeal or after a decision by the Commissioner), when the Commissioner lacks the power to decide those other claims.³ Hecht v. East Brunswick Bd. of Educ., 2019 WL 293234 (D.N.J. Jan. 23, 2019) (parent’s challenge before Commissioner of disciplinary action imposed on her daughter did not bar other claims later brought in District Court under 42 U.S.C. §1983; Commissioner lacks jurisdiction over Section 1983 claims and was limited to considering reasonableness of suspension); Morris v. City of Trenton, 2014 WL 4798871 (D.N.J. Sept. 26, 2014) (subsequent litigation not barred where “[p]laintiff could not have effectively pursued all of his affirmative claims in a single litigation”); Galbraith v. Lenape Reg’l High Sch. Dist., 964 F. Supp. 889 (D.N.J. 1997) (holding teacher’s failure to join Title VII, NJLAD, and breach of contract claims in her tenure action before Commissioner

³ While the Commissioner of Education has jurisdiction to hear claims falling under N.J.S.A. 18A:36-20, barring discrimination in public schools based on “race, color, creed, sex or national origin,” the existence of such jurisdiction does not prevent a party from subsequently seeking additional relief (not available in a case before the Commissioner) in another forum. Balsley by Balsley v. N. Hunterdon Reg’l Sch. Dist. Bd. of Educ., cited above (in case involving participation by female on football team, counsel fees under New Jersey Law Against Discrimination should be determined by Division on Civil Rights subsequent to Commissioner’s order allowing for participation); see also Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887 (D.N.J. 2003) n. 6 (disability discrimination claims are not within the Commissioner’s jurisdiction; distinguishing Balsley).

did not preclude teacher from later raising those claims before a court; noting applicability of entire controversy doctrine requires “equally competent jurisdictions”).

One issue to consider, however, is the preclusive effect that a factual finding or determination by the Commissioner in an ABR case may have in a subsequent action involving other claims arising from the same circumstances. N.U. obo M.U. v. Mansfield Twp. Sch. Dist., 2022 WL 18024205 (D.N.J. Dec. 30, 2022) (Commissioner’s determination in HIB appeal that school district failed to show student’s conduct “substantially disrupted education environment” would be sufficient to have preclusive effect against district in subsequent action brought by parent alleging violation of student’s First Amendment rights). Additional considerations arise where an ABR determination is appealed to the Appellate Division of the Superior Court, in which case practitioners may need to decide whether to join other claims. See Maisonet v. NJ Dep’t of Human Services, 140 NJ 214 (1995). Finally, issues may arise when an ABR case pending before the Commissioner is settled by the parties. Parents and their attorneys are cautioned that the broad waivers of any possible related claims often sought by school board attorneys as a term of settlement may not be acceptable if the parent wants to pursue claims that could not be raised before the Commissioner in another forum.

Examples of additional causes of action are discussed in the following sections.

6-1(a) Individuals with Disabilities Education Act (IDEA)

The IDEA is a federal law that was enacted to protect the rights of students with disabilities and to ensure that students with disabilities are afforded a free and appropriate public education. 20 U.S.C. §1412(a)(1); 34 C.F.R. §300.17. See also N.J.A.C. 6A:14-1.2(b)(1). Under IDEA, students with disabilities are entitled to special education services, related services (such as speech, physical, and occupational therapies), and accommodations and/or modifications in order to progress in school and prepare for “further education, employment, and independent living.” 34 C.F.R. §300.1(a). School districts are required to develop an Individualized Education Program (IEP) tailored to meet the unique needs of the student, working with parents as members of the “IEP team.” 20 U.S.C. § 1414(d); N.J.A.C. 6A:14-3.7; N.J.A.C. 6A:14-1.3 (definition of “IEP team”). The IEP is memorialized in a written document the required components of which are described at N.J.A.C. 6A:14-3.7(e) – (f).

There is a two-year statute of limitations for matters brought under the IDEA (dating from the time that a parent knew or should have known of the alleged action forming the basis of the complaint). If, in addition to HIB issues, parents have a dispute with the school district regarding special education matters, they may file a separate petition (known as a “due process petition”) with the New Jersey Department of Education, Office of Special Education (OSE). Unlike ABR decisions by an ALJ, which must be reviewed by the Commissioner of Education, decisions of an ALJ in special education matters are final and may be appealed directly to the New Jersey Superior Court or the U.S. District Court for the District of New Jersey.

When filing a special education due process petition with OSE at the same time that an ABR claim is pending, a cover letter should plainly state that a separate petition arising under the Anti-

Bullying Bill of Rights has been simultaneously filed with the New Jersey Commissioner of Education. The cover letter can also request that the OAL consolidate the ABR and IDEA matters in a single proceeding. Even if the hearing is consolidated, the ALJ will ultimately issue two separate decisions: an initial decision on the ABR claims and a final decision on the IDEA claims.

Note: The bullying of a student with a disability can itself give rise to an IDEA claim, since “severe and prolonged harassment by other students” has been ruled to deny a free appropriate public education under the IDEA. Shore Reg’l High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004). For more information on special education issues, see Education Law Center’s publication, *The Right to Special Education in New Jersey: A Guide for Advocates*, available in [English](#) and [Spanish](#) at <https://edlawcenter.org/publications/>.

6-1(b) New Jersey Law Against Discrimination (NJLAD)

The NJLAD is a state law designed to eradicate “the cancer of discrimination.” Fuchilla v. Layman, 109 N.J. 319, 334 (1988) (quoting Jackson v. Concord Co., 54 N.J. 113, 124 (1969)); N.J.S.A. 10:5-1 - 49. Among other protections, the law bans discrimination on the basis of certain enumerated characteristics in “places of public accommodation.” N.J.S.A. 10:5-12(f)(1). Places of public accommodation must grant equal “accommodations, advantages, facilities or privileges” to all persons. N.J.S.A. 10:1-2. The term “places of public accommodation” includes schools, N.J.S.A. 10:1-5, and a cause of action for discriminatory harassment under the NJLAD exists where a student alleges “discriminatory conduct that would not have occurred ‘but for’ the student’s protected characteristic, that a reasonable student of the same age, maturity level, and protected characteristic would consider sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment, and that the school district failed to reasonably address such conduct.” L.W. ex rel. L.G. v. Toms River Reg’l Schools Bd. of Educ., 189 N.J. 381, 402-403 (2007);⁴ C.S. v. Bridgewater-Raritan Reg’l Sch. Dist. Bd. of Educ., 2023 WL 1807750 (N.J. Super. Ct. App. Div. Feb. 8, 2023), certif. denied, 254 N.J. 66 (2023)(no basis for liability under NJLAD where school district took “prompt remedial actions” to address conduct at issue); Williams v. Lenape Bd. of Educ., 2020 WL 2111221 (D.N.J. May 4, 2020)(claims related to participation on school football team survived motions for summary judgment; “there is no reason the NJLAD should not apply to discrimination in extracurricular participation”); Dickerson v. Walkkill Valley Reg’l High School Bd. of Educ., 2020 WL 2847757 (D.N.J. June 1, 2020) (school principal/superintendent may be held individually liable under NJLAD under deliberate indifference standard where he witnessed racially motivated harassment at basketball game and did nothing to stop it; neither N.J.S.A. 18A:37-16(c) nor (d) provide basis for immunity from liability); C.W. v. Manasquan Bd. of Educ., 2023 WL 2264464 (D.N.J. Feb. 28, 2023)(court denied

⁴ The L.W. case ultimately resulted in an award of \$50,000 in damages and \$28,175 in attorney’s fees to the student and an additional \$10,000 penalty against the school district. See L.W., et al. v. Toms River Reg’l Schools Bd. of Educ., CRT 04253-07 (Sept. 19, 2012), adopted, DCR No. PQ07IE-02596 (Feb. 25, 2013).

school district's motion to dismiss claim of hostile educational environment based on allegations of "harassment and bullying [student] endured in connection with his diagnosed mental disabilities and perceived sexual orientation"). A school district's failure to reasonably address bias-based harassment against a student violates the NJLAD where such inaction "has the effect of denying to that student any of a school's 'accommodations, advantages, facilities or privileges'," L.W. ex rel. L.G. v. Toms River Reg'l Schools Bd. of Educ., 189 N.J. at 402 (cited above); see also Know the Law: Public Accommodation Discrimination, <https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/public-accommodation-discrimination/>.

The NJLAD contains a list of protected characteristics that is exhaustive and exclusive,⁵ unlike the ABR, which extends protection to students with "other distinguishing characteristics" not specifically listed in the statute. (See Section 2-1(d)). Complaints arising under the NJLAD can be filed with the Division on Civil Rights within 180 days, N.J.S.A. 10:5-13, or with the New Jersey Superior Court within two years. Roa v. Roa, 200 N.J. 555, 564 (2010). The ABR specifically provides that "a parent, student, guardian or organization may file a complaint with the Division on Civil Rights within 180 days of the occurrence of any incident of [HIB] based on membership in a protected group as enumerated in the [NJLAD]." N.J.S.A. 18A:37-15(b)(6)(f).

ABR claims can be raised at the same time as the filing of NJLAD claims with the Division on Civil Rights,⁶ as long as the ABR claims are filed with the Commissioner within the 90-day deadline discussed in Section 4-1(b). A cover letter should accompany the petition raising ABR claims and the complaint raising NJLAD claims indicating that separate actions have been filed and, if appropriate, a request should be made that the OAL consolidate the matters. If the Division on Civil Rights is not ready to proceed with the NJLAD case before the ABR statute of limitations expires, the ABR petition should note that the petitioner intends to preserve claims under the NJLAD.

As in the case of ABR decisions made by an ALJ - which are subject to review by the Commissioner of Education - decisions made by an ALJ under the NJLAD are recommendations subject to a final decision by the Director of the New Jersey Division on Civil Rights. It should be noted that the Division on Civil Rights does not have the authority to order a school district to comply with the

⁵ NJLAD delineates the following characteristics: "race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality." N.J.S.A. 10:5-12(f).

⁶ The concurrent jurisdiction of the Commissioner to decide certain discrimination claims is beyond the scope of this publication. See Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514 (1977); Balsley by Balsley v. North Hunterdon Reg'l Sch. Dist. Bd. of Educ., cited above; Hennessey v. Winslow Twp., 183 N.J. 593, 602 (2005) (acknowledging "thorny questions" when considering preclusion in connection with concurrent jurisdiction of administrative agencies).

ABR; this authority is vested in the Commissioner of Education. See N.J.S.A. 18A:6-9; D.B. by C.B. v. Jersey City Bd. of Educ., cited above.

Note: Instead of filing NJLAD claims with the Division on Civil Rights, the student’s claims can be filed directly in the Superior Court of New Jersey within two years of the alleged discrimination. Information on differences between filing with the Division and filing in Superior Court can be located on the [Division’s website](#).

6-1(c) Personal Injury and Tort Claims

The ABR “does not create or alter any tort liability,” N.J.S.A. 18A:37-18, nor does it “create an independent cause of action.” E.S. v. Elizabeth Bd. of Educ., 2020 WL 7640537 (D.N.J. Dec. 23, 2020). See also C.S. v. Bridgewater-Raritan Reg’l Sch. Dist. Bd. of Educ., cited above; R.A. v. West Essex Reg’l Sch. Dist. Bd. of Educ., 2021 WL 3854203 (N.J. Super. Ct. App. Div. Aug. 30, 2021).

Tort claims have, however, been filed in state court to recover monetary damages in some cases in which a school district’s negligence in addressing bullying resulted in significant personal injury.⁷ A detailed discussion of bringing a tort claim against a school district is beyond the scope of this publication.

That said, New Jersey courts recognize that school districts have a duty to supervise the children in their care and to take reasonable precautions for their safety and well-being. Frugis v. Bracigliano, 177 N.J. 250 (2003); L.E. v. Plainfield Pub. Sch. Dist., 456 N.J. Super. 336, 194 A.3d 105 (App. Div. 2018), certif. denied, 236 N.J. 627 (2019). Prior to bringing a tort action against a school district, a parent must file a Notice of Tort Claims within 90 days of their student’s injury pursuant to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12- 3, except in the case of certain sexual offenses described at N.J.S.A. 59:8-3(b). See N.J.S.A. 59:8-8 (90-day rule); R.A. v. West Essex Reg’l Sch. Dist. Bd. of Educ., cited above. However, a minor student retains the right to file when they turn 18, as long as they meet the timelines from that date. N.J.S.A. 59:8-8.

6-1(d) Conduct Unbecoming

A teacher who harasses, intimidates or bullies students risks disciplinary consequences for “unbecoming conduct” – also known as “conduct unbecoming a teacher.” N.J.S.A. 18A:6-10; N.J.A.C. 6A:9B-4.4. Where the conduct is egregious, the result may be termination of employment, even if the teacher has tenure. See In the Matter of the Tenure Hearing of Steven E. Roth, Jr., Gloucester County Special Servs. Sch. Dist., cited above (sustained use of demeaning language toward a special education student, in violation of Board’s HIB policy, resulting in

⁷ It is important to note that damages for pain and suffering are not available through a tort action against a public entity or public employee, except “in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$3,600.00.” N.J.S.A. 59:9-2(d).

termination of employment). A teacher convicted of criminal harassment may forfeit employment and be permanently disqualified from holding public office in New Jersey. State v. Perez, 2015 WL 4133506 (N.J. Super. Ct. App. Div. July 10, 2015) (repeated racist remarks and religious slurs by teacher).

The disciplinary and punitive consequences for unbecoming conduct by a teacher exist separate and apart from the ABR and its procedures. See In re Roth, cited above (harassment, intimidation or bullying of student by teacher is misconduct sufficient to warrant serious punishment irrespective of applicability of ABR; see also In re Tenure Hearing of Demetrio Surace, EDU 4400-12 (Sept. 16, 2013), adopted, Comm’r Decision No. 387-13 (Nov. 1, 2013); In re Tenure Hearing of Jennifer O’Brien, EDU 5600-11 (Oct. 28, 2011), adopted, Comm’r Decision No. 544-11 (Dec. 12, 2011), aff’d, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013) (inappropriate social media posts by teacher); In re Tenure Hearing of Brigitte Geiger and In re Tenure Hearing of Sharon Jones, Comm’r Decision No. 205-16A (June 6, 2016) (on remand from Appellate Division, cited above in Section 4-6.7(c)) (teachers whose racial slurs were overheard by students in an adjacent room were disciplined by forfeiture of 120 days of salary, suspension for six months without pay, and withholding of salary increments for two years).

When a charge of misconduct against a board employee is presented to a board of education, the board must determine whether there is “probable cause to credit the evidence in support of the charge” and, if so, whether the charge “is sufficient to warrant a dismissal or reduction of salary.” N.J.S.A. 18A:6-11. If both criteria are met, then the board must forward the charge to the Commissioner for a hearing. Id. Although parents cannot initiate a charge against a board employee before the Commissioner, it appears that parents can present such a charge for consideration by the board of education by filing it in writing with the secretary of the board, along with “a written statement of evidence under oath to support such charge.” Id.

6-2 HIB as a Criminal Offense/Consequences to Parents

DOE’s [Model Policy](#) states that “[s]chool district officials should be aware that certain HIB acts may also rise to the level of a criminal offense if they constitute bias intimidation, hazing, and cyber-harassment or if they violate another provision of the Code of Criminal Justice, such as those addressing assault, harassment, threats, robbery, and sexual offenses.”

While a discussion of the overlap of HIB with various criminal offenses is beyond the scope of this publication, it should be noted that the 2022 legislation amending the ABR increased the potential consequences to parents whose child has been found to have committed cyber-harassment. Under New Jersey’s criminal code, a person commits the crime of cyber-harassment if, “while making one or more communications in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person: (1) threatens to inflict injury or physical harm to any person or the property of any person; (2) knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person

or place a reasonable person in fear of physical or emotional harm to his person; or (3) threatens to commit any crime against the person or the person's property.” N.J.S.A. 2C:33-4.1(a).

Cyber-harassment is generally a fourth-degree crime. N.J.S.A. 2C:33-4.1(b). If a minor under the age of 16 is found to have committed cyber-harassment, the court may order the child, accompanied by a parent, to complete in a satisfactory manner a class or training program to reduce the tendency toward cyber-harassment and/or a class or training program to bring awareness to its dangers. N.J.S.A. 2C:33-4.1(c). The 2022 legislation amending the ABR increased the fines for parents who fail to comply with such orders; parents may now be fined up to \$100 for a first offense and up to \$500 for subsequent offenses. N.J.S.A. 2C:33-4.1(d). Additionally, under the 2022 legislation, parents demonstrating “willful or wanton disregard in the exercise of the supervision and control of the conduct of a minor” who has been found to have committed cyber-harassment (or criminal harassment) may face civil liability for its consequences. N.J.S.A. 2C:33-4.1(f); N.J.S.A. 2A:53A-17.1.

6-3 Attorneys’ Fees and Damages

As noted in Section 4-1(c)(iv), the ABR does not contain a fee-shifting provision, and the Commissioner is not permitted to award attorneys’ fees in education cases. Balsley by Balsley v. North Hunterdon Reg’l Sch. Dist. Bd. of Educ., cited above. The Commissioner also does not have the authority to award monetary damages. J.A. v. Bd. of Educ. for Dist. of S. Orange and Maplewood, cited above; see also C.V. obo T.W. v. Bd. of Educ. of the City of Plainfield, EDU 5442-06 (Aug. 15, 2006), adopted, Comm’r Decision No. 316-06 (Sept. 12, 2006), aff’d, SB No. 37-06 (April 4, 2007). However, damages may be available under other statutes, such as the NJLAD or federal antidiscrimination laws,⁸ and attorneys’ fees and costs may be available to the prevailing party under statutes including the IDEA, Title IX, the Americans with Disabilities Act, or the NJLAD, through a subsequent court action.

6-4 HIB Target Is Fearful of Attending School

When the target of HIB is fearful of attending school, separation of the target from the perpetrator may be sought as a remedy. In general, remedial measures should be designed to alter the behavior of harassers, not the person harassed. L.W. v. Toms River Reg’l Schools Bd. of Educ., 381 N.J. Super. 465, 495 (App. Div. 2005), aff’d as modified, 189 N.J. 381 (2007). In some cases, a school district may agree to transfer the offender to a different class. In other cases, particularly where there are multiple offenders, the school district may agree to place the victim at another school within or out of the district. As an exceptional remedy, the Commissioner of Education may approve the reimbursement to a parent of their child’s tuition at an out-of-district

⁸ For example, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. (prohibiting discrimination on the basis of sex in educational institutions and programs receiving federal funding) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq. (prohibiting discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance).

school, until a plan for the student's safe return to her district school has been developed and implemented. M.P. v. Bd. of Educ. of Delran, 1985 S.L.D. 1834. In J.K. obo P.B. v. Bd. of Educ. of Twp. of Springfield, EDU 09972-09 (Oct. 13, 2011), reversed, Comm'r Decision No. 47-12 (Feb. 9, 2012), the Commissioner, while reversing an ALJ's recommendation for tuition reimbursement under the circumstances of the case, set forth a standard for such relief. The Commissioner's opinion states that tuition reimbursement cannot occur unless a parent can demonstrate the following: 1) the alleged bullying actually took place; 2) timely notice of the conduct was provided to the district; 3) the district failed to take actions reasonably calculated to remediate the situation and end the conduct; 4) the parent exhausted all available administrative remedies; and 5) there was no remaining alternative but to remove the student from the unsafe environment and educate them elsewhere.

When the impact of HIB on a student is severe, it may be appropriate to request counseling or therapy, and, if the child is a child with a disability, accommodations, supports, or services under the student's 504 Plan or IEP. With appropriate medical documentation, temporary home instruction may be an option for some students until a better solution is established. See N.J.A.C. 6A:16-10.1.

6-5 Disability Accommodations at Administrative Law Hearings

Parents and/or their counsel who file HIB appeals and have a hearing impairment or other disability should contact DOE or the OAL immediately to request accommodations. If, for example, a party who is hearing impaired would be prevented from fully participating in a telephone conference, they may request an in-person conference. See N.J.A.C. 1:1-14.3(d) (noting that a hearing-impaired party is entitled to an interpreter or other accommodation).