

BOARD GOVERNANCE, THE ROLE OF A BOARD MEMBER AND HARASSMENT, INTIMIDATION AND BULLYING TRAINING

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Presented to the Montgomery Township Board of Education by
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Role of the Board

Role of the Board

- The Board's general powers and duties are defined in **Title 18A** of the New Jersey statutes.
- According to N.J.S.A. 18A:11-1, "General Mandatory Powers and Duties," the Board is required to, among other things:
 - **enforce the rules** of the New Jersey State Board of Education;
 - **make, amend, and repeal rules** for government and management of the schools and their employees; and
 - perform all acts and do all things, consistent with law and the rules of the State Board, necessary for **lawful and proper conduct, equipment and maintenance** of the District.

Role of the Board

- This requires the Board to do things like:
 - *Approve curriculum that meets the New Jersey Student Learning Standards;*
 - *Adopt a budget that provides for a thorough and efficient education;*
 - *Hire the necessary certified personnel to educate the District's students; and*
 - *Develop policies for the management of the school district.*
- None of these are actions that the Board takes alone—it acts based upon the recommendation of the Superintendent of Schools.

Role of the Board

- The Board is also required to hold hearings and make decisions on a number of issues:
 - *Harassment, intimidation, and bullying appeals (students);*
 - *Long-term suspension hearings (students);*
 - *Residency appeals (students);*
 - *Grievances under a collective negotiations agreement (personnel);*
 - *Terminations for cause (personnel);*
 - *Increment withholdings (personnel); and*
 - *Nonrenewals (personnel).*

Role of the Board

- The Board functions only when it is **in session**, and a “**quorum**” of the Board is required to convene a meeting and take action.
- Meetings must comply with the requirements of the Open Public Meetings Act.
- Committee meetings (less than a quorum).
- Emails and text messages.

The Board and the Administration

- The Board's direct responsibilities are to make policy, develop plans, and evaluate outcomes, not manage day-to-day operations.
 - *Members are responsible "not to administer the schools" but to "see that they are well run." N.J.S.A. 18A:12-24.1(d).*
 - *"No board member, by virtue of his/her office, shall exercise any administrative responsibility with respect to the schools or as an individual command the services of any school employee." Board Policy No. 0146.*
 - *Board members do not have "all access" to District schools and, in many respects, have no more authority than any other parent or community member.*
 - *Board Policy No. 0146 explains that Board members visiting a school must comply with district policy and procedures for school visitors like any other visitor.*

- The Board delegates certain responsibilities to administrative officials.
 - **Superintendent:** Administer the District, keep the Board informed of happenings, make operational recommendations.
 - **Business Administrator:** Oversee business and maintenance, prepare the budget, establish and maintain fiscal plans, serve as general accountant and official purchasing agent.

The Board and the Administration

- The Board–Administration relationship is intended to be cooperative, not adversarial.
 - *Members should share concerns with administration in advance of meetings—assures an effective public response.*
 - *Members should be mindful of which matters are appropriate for public discussion versus reserved for private consultation.*
- As required by the Code of Ethics for School Board Members and Board Policy No. 9120, a Board member confronted with a community complaint should withhold comment and instead refer the issue to the Superintendent; the Board may act only at public meeting and after failure of an administrative solution.

The Board and the Administration

- The Code of Ethics specifically requires Board members to support all District staff, including the administration: “I will support and protect school personnel in proper performance of their duties.”
- A violation of this command occurs when there is evidence that a Board member took deliberate action which resulted in undermining, opposing, compromising, or harming school personnel in the proper performance of their duties.
- This does not mean that a Board member cannot disagree with a recommendation made by the Superintendent, but it generally requires that Board members support the Superintendent.
- Criticizing the Superintendent, however, could lead to a violation of the Code of Ethics where it undermines or compromises the Superintendent's ability to do his or her job.

Division of Responsibility Between the Board and Superintendent

- *It is the primary duty of the Board to establish policies and the primary duty of the Superintendent to implement and administer those policies.*
- *The Superintendent is the primary professional advisor to the Board, and policies should not be adopted or revised without consulting the Superintendent.*
- *The Superintendent is responsible for the development, supervision, and operation of the school program and facilities and will be given latitude to implement and administer policies in accordance with the standards that the Board sets in policy.*

Role of the Board Member

Role of the Board Member

- The Board is a unit, not a collection of individuals.
 - *Members are expected to share opinions, but the Board elects a **single course of action** by majority vote.*
 - *In open meetings, to preserve decorum and ensure the Board expresses a single, consistent position, the **President alone speaks on the Board's behalf**, but may request another member's contribution.*

- Members' professional expertise and personal experience are instructive but **do not necessarily dictate Board action**.
 - *Example: Member with a finance background may have insights about District's financial affairs but should not insist on particular course of action or monopolize group discussion.*
 - *Example: Member may have opinions as the parent of a District student, but these opinions cannot compromise the member's duties to the Board and District as a whole.*

Role of the Board Member

- The powers of the Board and the authority of a Board member are not coextensive.
- As Board Policy No. 0146 explains: “No board member, by virtue of his/her office, shall exercise any administrative responsibility with respect to the schools or as an individual command the services of any school district employee.”
- Board members on their own have no supervisory authority.

Role of the Board Member

- Board members have an obligation to preserve the confidentiality of information learned in their role as members of the Board.
- Board Policy No. 0146 explains that confidential information shall be used only for the purpose of helping the Board member discharge his or her official responsibilities.
- This expectation exists regardless of the impact the matter has on the Board member's own children or friends.
 - *Example: A member learns during closed session that the administration has suspended the District's seventh-grade math teacher pending the results of a psychiatric evaluation. This information **cannot be disclosed to anyone**, even if that member's child is a student in the teacher's class.*
 - *Example: The Board is deliberating over whether to reorganize its facilities such that all Pre K-4 students will attend school in one building and all 5-8 students will attend in another. A member **cannot disclose this information** even if he or she has a friend who is deciding whether to buy a house based on the makeup of the local schools.*

Limits on the Role of a Board Member: The Code of Ethics

Code of Ethics

- One of the main limits on the role of Board members is the Code of Ethics for School Board Members.
- Enacted in 2001 (N.J.S.A. 18A:12-24.1), it sets clear standards that all board of education members must follow.
- If there is a violation, any member of the public can file a complaint with the School Ethics Commission.
- The School Ethics Commission has the power to recommend that the Commissioner of Education reprimand, censure, suspend, or remove a board member who violated the Code.

Code of Ethics

- (a) I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.
- (b) I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.
- (c) I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.
- (d) I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.
- (e) I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Code of Ethics

- (f) I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.
- (g) I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.
- (h) I will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer.
- (i) I will support and protect school personnel in proper performance of their duties.
- (j) I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Code of Ethics: Limits on Board Members' Administrative Powers

- The limited role of a Board member is seen in a number of sections of the Code of Ethics for School Board Members:
 - *"I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them."* N.J.S.A. 18A:12-24.1(c).
 - *"I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run."* N.J.S.A. 18A:12-24.1(d).
 - *"I will support and protect school personnel in proper performance of their duties."* N.J.S.A. 18A:12-24.1(i).
 - *"I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution."* N.J.S.A. 18A:12-24.1(j).

Code of Ethics: Limits on Board Members' Administrative Powers

- What types of administrative action violates the Code of Ethics?
 - *Section (d): giving a direct order to school personnel or becoming directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district. N.J.A.C. 6A:28-6.4(a)(4).*
 - *Section (i): taking deliberate action which resulted in undermining, opposing, compromising, or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)(9).*
 - *Section (j): acting on or attempting to resolve a complaint or conducting an investigation or inquiry related to a complaint prior to referral to the Superintendent or outside of a public meeting prior to the failure of an administrative solution. N.J.A.C. 6A:28-6.4(a)(10).*

Code of Ethics in Practice

- The limits imposed by the Code of Ethics are clearly seen in the limited involvement Board members have in personnel decisions.
- The Board member's role in hiring is to vote to appoint the best qualified personnel available after consideration of the recommendation of the Superintendent.
- The Board cannot withhold its approval for the hiring of a candidate recommended by the Superintendent for arbitrary or capricious reasons.
- The Board should generally, as a best practice, limit its involvement in hiring to hiring the Superintendent of Schools and then only considering the Superintendent's recommendations for all other positions to avoid interference with the Superintendent's power to recommend candidates to the Board.

Code of Ethics in Practice

- Advisory Opinion A15-10

- *A board member requested an opinion regarding authority to conduct exit interviews of staff members to determine causes of staff turnover.*
- *The School Ethics Commission advised against board members engaging in exit interviews, explaining that it would violate sections (c) and (d) of the Code:*
 - Section (c): participation would be board action outside of policy making, planning, and appraisal duties.
 - Section (d): participation would be engaging in administrative functions left to school personnel.

Code of Ethics in Practice

■ Advisory Opinion A31-15

- *A board member requested an opinion regarding the appropriate level of involvement for board members in the interview process.*
- *The Commission explained that one or two board members may sit on an interview committee when established by the superintendent but must be strictly limited to functioning in an advisory role to the superintendent.*
- *The board members may not conduct the interview; they only offer observations and assessments while knowing that the final recommendation is the superintendent's decision.*
- *The board cannot usurp the superintendent's authority to recommend hires.*
- *The Commission noted its position that it does not support board members conducting interviews for positions below that of the superintendent of schools. It explained that "interviewing is generally an administrative function not within the authority of the Board or its members."*

Code of Ethics in Practice – Impermissible Personnel Actions

In re Polinik, SEC Dkt. No. C45-06 (2008)

■ Facts:

- *A board member, accompanied by another board member, went to the board office without prior notice to the administration to review the resumes of candidates for an open position.*
- *The superintendent and director of human resources were not there, but a secretary in the personnel office gave them some resumes to review.*
- *The board member asked where the remaining resumes were and, after being informed they were in a locked office, the board member found a custodian with a key.*
- *An assistant superintendent intervened before the board member entered the locked office, so the additional resumes were not reviewed.*

Code of Ethics in Practice – Impermissible Personnel Actions

In re Polinik, SEC Dkt. No. C45-06 (2008)

■ Decision:

- *Because the respondent entered the board office in her capacity as a board member, she had to limit her action to policy making, planning, and appraisal.*
- *The Commission held that she violated the Code of Ethics because she went beyond the mere appraisal of resumes, something she could do, by taking steps to locate and obtain the resumes that were not available.*
- *She, however, did not administer the schools.*
- *While she asked questions to the secretary and custodian, she did not instruct them regarding their job duties or usurp anyone's role.*

Code of Ethics in Practice – Impermissible Personnel Actions

Cheng v. Rodas, SEC Dkt. No. C58-14 (2015)

- The complaint alleged that a board president violated the Code by personally issuing a *Rice* notice to the business administrator without prior notification to the board or the recommendation of the superintendent.
- The *Rice* notice resulted in the business administrator's resignation.
- The Commission held this action violated N.J.S.A. 18A:12-24.1(e) because it was action beyond the scope of his authority that might have compromised the board because the *Rice* notice implied that he was acting on behalf of the board when no one authorized its issuance.
- A board president or the majority of the full board can only issue a *Rice* notice to the superintendent.

Code of Ethics in Practice – Impermissible Personnel Actions

Garrity v. Vander Woude, SEC Dkt. No. C50-12 (2016)

■ Facts:

- *Two board members alleged that the director of special services was “double-dipping” by working in another school district and conducted their own investigation which concluded that she engaged in criminal fraud.*
- *They brought their conclusion to the superintendent, demanded the superintendent issue a Rice notice, and aired the accusations two days later in closed session.*
- *The board authorized the board attorney to investigate, and he concluded she worked in both districts, there was no overlap in the work, and it had been disclosed.*
- *The board president and superintendent accused the two board members of violating the Code through their actions.*

Code of Ethics in Practice – Impermissible Personnel Actions

Garrity v. Vander Woude, SEC Dkt. No. C50-12 (2016)

■ Decision:

- *By conducting the “investigation” and making a determination of guilt, seeking a suspension, and demanding a Rice notice on their own, the Board members took action well beyond policy making, planning, and appraisal in violation of N.J.S.A. 18A:12-24.1(c).*
- *The demands they made to the superintendent violated N.J.S.A. 18A:12-24.1(d) because they improperly directed the superintendent to take action.*
- *The Board members should have presented what they knew to the superintendent and allowed the superintendent to investigate the matter instead of making demands and depriving the superintendent of the opportunity to reach an independent determination.*
- *Board members must submit all complaints to the superintendent and can only act on complaints at public meetings after failure of an administrative solution.*

Code of Ethics in Practice – Volunteering

- Volunteering in the schools also presents another tricky situation under the Code of Ethics.
- Advisory Opinion A32-14
 - *A board member requested an opinion regarding permission to volunteer for school theatrical productions by assisting with casting, rehearsals, and lighting.*
 - *The Commission explained that this would violate sections (c) and (d) of the Code of Ethics.*
 - *Explaining that this type of volunteering is inconsistent with board membership, the Commission explained that directly engaging in a school-sponsored function is outside of the limited scope of a board member's role.*
 - *The role would have required the board member to give direct orders to school personnel and students, engaging in responsibilities that were the exclusive domain of school personnel.*

Code of Ethics in Practice – Volunteering

- Advisory Opinion A10-15

- *A board member requested an opinion regarding whether volunteering as the leader of a school club which met on school grounds violated the Code.*
- *The Commission explained that this would violate sections (c) and (d) of the Code of Ethics.*
- *Being in a position of oversight and authority over students is beyond the scope of policy making, planning, and appraisal because the role required too much contact with students, parents and administrators.*
- *The role, with its constant presence in the school, blurred the line between the role of a board member and as a volunteer in the building by taking on day-to-day administration tasks.*

Creating Appearance of Board-Endorsed Candidates Called for Censure

- A board member wrote an Op-Ed endorsing four candidates for the upcoming board election and openly advocating for the complainant's non-election, using a disclaimer that stated, "The author is writing this endorsement on his own personal behalf. His opinions are his own." The board member also admitted that he did not seek approval from the board before writing the Op-Ed.
- The ALJ found that the board member's disclaimer was insufficient to convey that he was expressing his personal opinion, and that the statements were made outside the scope of his duties as a board member. The ALJ concluded that the Op-Ed had the potential to compromise the board in violation of N.J.S.A. 18A:12-24.1(e) and gave an unwarranted advantage to the candidates who the board member endorsed by virtue of the appearance that they were receiving a board endorsement in violation of N.J.S.A. 18A:12-24(b). The ALJ did not find a violation of N.J.S.A. 18A:12-24.1(f) (regarding independent judgment). The ALJ recommend the penalty of a reprimand.
- The SEC adopted the ALJ's findings of fact and legal conclusions, but recommended the penalty of a censure, due to the deliberate and purposeful nature of the conduct that could have led the public to believe he was speaking on behalf of the board.

Failing to Disclaim Personal Statements Violated Code of Ethics

- A board member signed his name on a political flyer that included his picture and name followed by the words, "Board of Education." The flyer stated that the persons on the flyer support South Asian persons and culture, and that the complainant, as the leader of "a radical group," was challenging the controlling political party and trying to "take over our township government."
- The SEC found that the board member violated the following Code of Ethics provisions:
 - *N.J.S.A. 18A:12-24.1(e) by taking action beyond the scope of his duties as a board member and such action having the potential to compromise the board, and by failing to include the appropriate disclaimer;*
 - *N.J.S.A. 18A:12-24.(f) by surrendering "his independent judgment to a partisan political group by collaborating with other individuals to support candidates in the Democratic party;" and*
 - *N.J.S.A. 18A:12-24.1(g) by failing to verify the accuracy of the information set forth on the flyer.*
- The SEC recommended a penalty of censure for the board member's multiple violations.

Voting on MOAs After Term Finalized Did Not Violate Code of Ethics

- The respondent board member was also employed by the Borough Zoning Department and had a child employed as a teacher in the district. The district also employed the Mayor's brother as a Building & Grounds Supervisor and a Borough Councilman's brother as an Account Clerk. According to the complainant, the Mayor and Councilman "represent and vote on all actions taken by the Borough, including all decisions on employment, salaries, benefits, and promotions."
- The complaint alleged that the board member voted in the affirmative on MOAs that pertained to the Mayor's brother and Borough Councilman's brother (**which were not teacher contracts**), and did not recuse herself from voting on new contracts for school staff members that would be direct supervisors of the Mayor's brother and Borough Councilman's brother. The board had allegedly completed a conflict of interest review and advised the board member that she did not have any conflicts pertaining to her Borough employment in terms of negotiations or personnel issues.
- The SEC dismissed the complaint, finding no violation of N.J.S.A. 18A:12-24(b) (unwarranted advantages) or (c) (financial interest of family member). The SEC found that the board member was not *involved* in the negotiations of any of the MOAs (*that* would have been a conflict), voted to approve the MOAs only *after* all terms and conditions were finalized, and the votes were not directly related to her employer or a relative.

No Violation for Prohibiting Board Member from Participating in Meeting via Phone

- The board held several in-person meetings to discuss the superintendent's evaluations, which the complainant failed to attend. The complainant then sought to participate in the final meeting to finalize the superintendent's annual summary report via phone. By a majority vote, the board excluded the complainant's participation via phone out of concern for confidentiality, as there was no guarantee of the complainant's location. The SEC dismissed the complaint in its entirety because the complainant failed to provide sufficient evidence that the board members violated various standards of ethical conduct set forth in N.J.S.A. 18A:12-24.1.
 - a. *No evidence that the board violated any specific law, rule, or regulation.*
 - b. *No evidence that the decision on the manner and method of participation negatively impacted the educational welfare of students.*
 - c. *The manner in which a meeting should be conducted falls within the confines of "policy making, planning, and appraisal".*
 - e. *The manner in which a meeting should be conducted is a governance issue within the board's authority.*
 - g. *No evidence that board provided inaccurate information to complainant regarding voting to exclude his participation.*

Free Speech and the School Ethics Act (N.J.S.A. 18A:12-21 et seq.)

Free Speech and the School Ethics Act

- The School Ethics Commission has explained that “[B]oard members do not surrender the rights that they have as citizens such as freedom of speech when they become members of a school board. However, in exercising those rights, board members must comply with the School Ethics Act.”
- This balance must be kept in mind whenever a board member expresses his/her opinion publicly; whether through a letter to the editor of the local newspaper, a social media post, an email, or any other public statement or comment.
- There are two provisions of the Code that often come into play when reviewing board member speech: Subsection (e) and subsection (g). Subsection (e) requires board members to recognize that authority rests with the board, and avoid making any personal promises or taking any private action that could compromise the board. Subsection (g) requires board members to maintain the confidentiality of information that would needlessly injure individuals or the schools if disclosed. When board members elect to disclose non-confidential information, Subsection (g) places on them an affirmative obligation to ensure the information is accurate.
- **This means that even if information is accurate and, technically speaking, not confidential, it should not be included in a public statement, such as a letter to the editor or a social media post, if it has the potential to compromise the board.**

Letters to the Editor

Advisory Opinions A02-06 and A03-07

- In these companion advisory opinions, the Commission considered a board member's right to send a letter to the editor of a local newspaper expressing her opinions on topics of public interest (specifically, the school budget).
- The Commission concluded that such letters are generally permissible, provided the statements therein are consistent with the Code. Therefore, the Commission analyzed how best to reconcile a citizen's basic free speech rights with a board member's responsibility to comply with the Code.
- Ultimately, the Commission concluded that such letters would comply with the Code as long as the board member: (1) provides accurate information that is not confidential; (2) does not take private action that would compromise the board; and (3) does not "hold her or himself out as a board member."
- **To avoid holding oneself out as a board member, the board member must: (a) identify himself as a board member in the letter; (b) indicate that he is writing the letter in his role as a private citizen; and (c) state that the letter is neither authorized by nor written on behalf of the board.**

Letters to the Editor (continued)

- To date, the Commission has not issued any advisory opinions regarding social media postings, or a board member's right to comment on topics of public interest via social media.
- It is, however, recommended that board members follow the Commission's letter-to-editor guidance when choosing to express opinions regarding topics of public interest on social media, particularly in publicly accessible forums.
- When considering whether to incorporate into a social media posting the letter-to-editor guidelines, board members are encouraged to use their best judgment based upon the social media platform used and the topic being discussed.
- For example, board members should always issue a qualifying statement when posting about topics relevant to their school district, regardless of the social media platform used. Even if a comment is posted to a private Facebook page accessible only to certain individuals, there is nothing to prevent one of those individuals from sharing the post with others. With respect to matters of public significance, such as politics or religion, board members are encouraged to issue a qualifying statement when posting in public forums.

Bey v. Brown, Camden Bd. of Educ., C25-11 (December 20, 2011)

FACTS

In Bey, the board president filed a complaint after respondent, a fellow board member, posted certain statements on Facebook and in a local newspaper.

FACEBOOK #1 (Count 1)

- *“The school board President doesn't let students speak; the board votes for programs that are not effective; six months is not long enough to write a plan. PARENTS AND STUDENTS – BE SCARED.”*

FACEBOOK #2 (Count 2)

- *“Now if we could only do something about our local terrorists that destroy dreams and burn futures.” (Under this statement was a link to the Camden City Public Schools' website and a picture of the superintendent).*

NEWSPAPER (Count 3)

- *“There is no improvement in high school graduation in many years, nor are there any initiatives to address that issue...What happened in Newark is exactly what needs to happen in Camden...The difference between some of the school board members and school administrators and me is that they believe that poor, minority students can't do any better than this.”*

Bey, (continued)

HOLDING

Notably, the board president only alleged violations of Subsection (g) (requirement to post accurate information) and Subsection (i) (support and protect school personal), and did not allege a violation of Subsection (e) (private action which may compromise the board). Therefore, the Commission did not examine whether the statements had the ability to compromise the board.

The Commission dismissed Count 1 (first Facebook post) and Count 3 (newspaper article) because there was no factual evidence that the board member posted inaccurate or confidential information - his statements were his own opinions. It is unknown whether the Commission would have found a violation of Subsection (e).

The Commission found there was a violation of Subsection (i) with regard to Count 2. “Comparing the superintendent to a terrorist, on a social media outlet which allowed for access by many people, was an intentionally confrontational act. In this connection, the Commission acknowledges...that members of the community assume that board members have insight that others do not have. Thus, when a sitting board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen.”

Social Media Guidelines for Board Members

Guidelines for Board Members' Social Media

When using social networks, Board members are advised to:

- Not post anything that would violate any of the District's policies for Board members;
- Uphold the District's value of respect for any individual(s) and avoid making defamatory statements about the Board of Education, the school district, employees, students, or their families;
- Not disclose any confidential information about the school district or confidential information obtained as a result of being a Board member, about any individual(s) or organization, including students and/or their families;
- Not use or refer to their Board of Education title or position when soliciting for a business organization that he or she or any immediate family member has an interest in, as well as posting or referencing any confidential information regarding the Board of Education or the school district obtained through their Board membership, unless authorized by law;

Guidelines for Board Members' Social Media (continued)

- Refrain from having communications through social networks with other Board members regarding any Board of Education business to avoid any potential violation of the New Jersey Open Public Meetings Act;
- Not respond to any postings regarding Board of Education or school district business or respond to any question or inquiry posted to the Board member or posted on any social network regarding Board of Education or school district business and shall refer any such questions or inquiries to the Superintendent of Schools to address, as appropriate; or
- Not post any information on social network determined by the New Jersey School Ethics Commission to be a violation of the New Jersey Ethics Act.

Harassment, Intimidation, and Bullying

Definition of HIB

- “Harassment, intimidation, or bullying” is defined as 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 by either 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;*
 - *Takes place on school property, at any school function, or off school grounds;*
 - *Substantially disrupts or interferes with the orderly operation of the school or the rights of other students; and that*
 - A reasonable person should know, under the circumstances, that the act(s) 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/her person or damage to his/her property; or
 - Has the effect of insulting or demeaning any student or group of students; or
 - Creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Board Involvement with HIB – Reporting Potential HIB

- All Board members (as well as all employees, volunteers, and contracted service providers who have contact with students) must verbally report any alleged violations of the Board's HIB Policy to the Principal or the Principal's designee on the same day when the individual witnessed or received reliable information regarding the incident of alleged HIB.
- Within two school days of the verbal report, the individual who made the report must submit a report in writing to the Principal.
- A Board member or school employee who promptly reports an incident of HIB to the appropriate school official designated in the HIB Policy, or to any school administrator or safe schools resource officer, and who makes the report in compliance with the procedures in the HIB Policy, receives immunity from any lawsuit which seeks damages for a failure to remedy the report incident of HIB.

Board Involvement with HIB – Results of the HIB Investigation

- If the Principal or designee determines that the reported incident, assuming the facts reported are true, is a report within the scope of the definition of HIB, an investigation will be initiated.
- The Board does not become involved again until the conclusion of the investigation.
- The Superintendent must report the results of each HIB investigation to the Board no later than the date of the next regularly scheduled Board meeting following the completion of the investigation.
- The Superintendent's report must include information on any consequences imposed under the Code of Student Conduct, any services provided, training established, or other action taken or recommended by the Superintendent.

Board Involvement with HIB – Board Hearing

- After the Superintendent reports the results of the investigation to the Board, information about the investigation must be provided to the involved offenders and targets/victims within five school days including:
 - *The nature of the investigation;*
 - *Whether the District found evidence of HIB; and*
 - *Whether consequences were imposed or services provided to address the incident of HIB.*
- Providing this information triggers the ability of the offender or the target/victim to request a hearing before the Board.
- A hearing before the Board can also be requested when the Principal or designee makes a preliminary determination that a complaint is not within the scope of the HIB Policy.

Board Involvement with HIB – Board Hearing

- The request for a hearing must be filed with the Board Secretary within sixty calendar days after the written information regarding the information is provided.
- The Board must hold the hearing within ten business days of receipt of the request for a hearing.
- The hearing occurs in executive session to protect the confidentiality of the students involved.
- At the hearing, the Board may hear testimony and consider information provided by the anti-bullying specialist and others, as appropriate, regarding the incident, the findings from the investigation of the incident, recommendations for consequences or services, and any programs instituted to reduce such incidents, prior to rendering a determination.
- For a hearing of a decision following an investigation, the Board must choose to affirm, modify, or reverse the Superintendent's decision.

Board Involvement with HIB - Decision

- At the next regularly scheduled Board meeting following the Board's receipt of the Superintendent's report on the results of the investigation or following a hearing, the Board must issue a written decision to affirm, reject, or modify the Superintendent's decision.
- The Board's decision can be appealed to the Commissioner of Education.

Board Involvement with HIB – Policy Review

- The District must annually conduct a reevaluation, reassessment, and review of its HIB Policy, making any necessary revisions and additions.
- In doing so, the Board must include input from the anti-bullying specialists.
- If the Board adopts revisions to the HIB Policy, it must transmit a copy of the revised HIB Policy to the Executive County Superintendent within thirty days.
- A link to the HIB Policy must also appear prominently on the home page of the District's website as well as each school's website and be distributed annually to all staff, students, and parents.
- The Board must also annually examine the training needs of school employees and volunteers who have significant contact with students for the effective implementation of the HIB policies, procedures, programs and initiatives.

Recent Hib Cases

Conduct Away From School Grounds and First Amendment

- A rising sophomore did not make the varsity cheerleading team or her preferred position on the softball team, and was frustrated that certain freshmen made varsity. While at a local convenience store, she posted two photos on Snapchat:
 - *One was an image of her and her friend flipping the bird with the caption, "F_school f_softball f_cheer f_everything."*
 - *The second was just text that said, "Love how me and [another student] get told we need a year of jv before we make varsity but that[t] doesn't matter to anyone else?"*
- Several cheerleaders and students saw the Snapchat posts, took screenshots, and shared them. The coaches decided that the use of profanity in connection with an extracurricular activity violated team and school rules, and suspended her from the cheerleading squad for the upcoming year.

Conduct Away From School Grounds and First Amendment

- The district court found that the photos did not cause a substantial disruption in school (the discussion took a few minutes of an Algebra class for a few days, some members of the cheerleading team were upset, and while there was an expressed concern for team morale, there was no serious decline). Therefore, in accordance with *Tinker v. Des Moines*, the punishment violated the First Amendment.
- The Third Circuit affirmed, but seemingly held that the board's ability to discipline students for speech that causes a substantial disruption (the *Tinker* standard) **did not apply to off-campus speech...**

Conduct Away From School Grounds and First Amendment

- The United States Supreme Court declined to establish a bright-line rule for what constitutes protected off-campus speech, but set forth three features distinguishing a school district's efforts to regulate off-campus speech.
 1. *In relation to off-campus speech, a school will rarely stand in loco parentis, so such speech is generally not subject to regulation.*
 2. *Since off-campus speech includes all speech uttered by a student, 24/7, courts must be skeptical of efforts to regulate it.*
 3. *Public schools, as "nurseries of democracy," have an interest in protecting a student's unpopular expression, especially when that speech takes place off-campus. ("I disapprove of what you say, but I will defend your right to say it.")*
- Here, the speech did not have any features that would place it outside the First Amendment's ordinary protection (i.e., it was not fighting words, it was not obscene, it did not identify the school or target anyone specific in the school community, and it was sent privately to Snapchat friends).
- Further, the district's interests in punishing the speech were diminished by the fact that the speech was made outside of school on the student's own time, the parents had not delegated control to the district over the student's behavior outside of school and the school made no efforts to prevent vulgar language outside of school, and there was no substantial disruption within the school.

Conduct Away From School Grounds and HIB

- On February 11, 2017, A.H., who was thirteen years old at the time, posted a picture on Snapchat of a friend with a mud mask on her face with the caption, “When he says he’s only into black girls.” After several students complained to the school, a HIB investigation was conducted, and the board determined that A.H. had committed an act of HIB. A one-day suspension was imposed, and A.H. was removed from the student council.
- Thereafter, A.H.’s parents filed an HIB complaint claiming that A.H. was being called a racist after an incident in her multicultural class in which she glanced up after students were asked to put their heads down and raise them if they had witnessed racism in their home. She also alleged that she was teased in math class when she was asked if she “liked chocolate”—a reference to whether she dated black boys. The board found that these incidents did not constitute HIB.
- Following a hearing, the ALJ found that even though the post occurred outside of school, it constituted HIB because it caused a substantial disruption at school. The ALJ also affirmed the board’s finding that A.H. was not a victim of HIB in the second complaint.
- The Commissioner agreed with the ALJ...

R.H. and M.H. o/b/o A.H. v. Board of Educ. of Borough of Sayreville,
OAL Dkt. Nos. EDU 09435-17 and EDU 14833-17, Initial Decision (June 24, 2021), adopted, Comm’r (Sept. 23, 2021)

Conduct Away From School Grounds and HIB

- Regarding the social media post...
 - *The social media post depicting a white person in “black face” was reasonably perceived to be motivated by the distinguishing characteristic of race.*
 - *The post caused a substantial disruption to the orderly operation of school. The principal testified that three students reported to the principal that they were very upset and wanted action to be taken immediately and planned to confront A.H. The post was spread throughout the school, there were murmurings in the hallways, and teachers heard students talking about the matter. She changed her schedule that day, and for weeks after, to monitor the eighth grade lunch to prevent fights from erupting in the cafeteria. Multiple students approached her in the cafeteria with concerns about racism in school and wanting to know what was going to happen to the offender.*
 - *A reasonable person would know that the post would cause emotional harm and insult or demean black students because it is inherently racial in nature.*
 - *Although the post occurred outside of school hours, it was viewed by many students and caused a disturbance at the school.*

Conduct Away From School Grounds and HIB

- The Commissioner was not persuaded by the parents' argument as to why *Mahanoy* should have prevented the board from regulating A.H.'s speech.
 1. *The post caused a substantial disruption in school. Unlike in Mahanoy where the post resulted in a short discussion in Algebra class, the post at issue here resulted in students becoming very upset, creating the potential for altercations, such that the principal had to monitor lunch for weeks to ensure student safety.*
 2. *Additionally, while the parents argued that the post had no nexus to the school, the post was made on a platform that enabled many students to see the picture, thus bringing it into the school, where a substantial disruption occurred.*
 3. *Further, as to the parents' argument that the board was not standing in loco parentis, the Commissioner found that the board was not attempting to do so; rather, staff was seeking to maintain order in the school following a social media post that caused a substantial interference with the school's regular operations.*
 4. *Finally, the speech at issue here is distinct from the type of speech cited in Mahanoy (which was protected speech expressing disagreement or criticism). Here, the speech was a racist photograph and remark which a reasonable person would perceive as offensive to black people, and was therefore within the school's authority to regulate.*

R.H. and M.H. o/b/o A.H. v. Board of Educ. of Borough of Sayreville,

OAL Dkt. Nos. EDU 09435-17 and EDU 14833-17, Initial Decision (June 24, 2021), adopted, Comm'r (Sept. 23, 2021)

HIB Appeal Rights

- Parents appealed a board level decision that their seven-year-old daughter committed an act of HIB against a transgender student after she repeatedly asked the student inappropriate questions concerning her gender expression as a female, despite having been told by school staff and the parents not to question her, as it was hurting her.
- Not only did the parents challenge the determination, but the **HIB appeal process...**

HIB Appeal Rights

- The parents argued that the impacts of a HIB finding are comparable to those of a long-term suspension, and therefore, students charged with HIB should be afforded similar procedural rights as those facing a long-term suspension (i.e., pre-hearing notice of testimony and charges, right to confront and cross-examine witnesses).
- The Court disagreed, holding that in enacting the ABBRA, the Legislature could have mirrored the procedures required for adjudicating long-term suspensions, but did not. The Court also found the parents' argument that the impact of a HIB finding on a future college application was "far more deleterious than a suspension" to be too speculative to raise constitutional concern.
- This case confirms that HIB hearings at the board level are not "adversarial."

Teacher-Student Interactions

- The parent reported to the district that her son, J.B., a senior, was “bullied, ostracized and singled out” by his soccer coach, Mr. Truppi, in various ways, including:
 - *On several occasions, J.B. told Mr. Truppi that he had college-related meetings and would miss practice. Mr. Truppi mocked J.B. and told him school should not be a priority, athletics should come first;*
 - *Mr. Truppi would falsely blame J.B. for being the last to join the team huddle when he was not, for showing up late to practice when he did not, and for being disrespectful when he was only asking questions;*
 - *During a drill, J.B. ran onto the field at the wrong time. Mr. Truppi looked at J.B. in anger and walked off the field. J.B. texted Mr. Truppi an apology, and Mr. Truppi responded, “Let’s talk tomorrow at 3:15. Bring your uniform.” J.B. believed that he was going to be kicked off the team (but he was not);*
 - *J.B. texted Mr. Truppi that he had to miss practice due to a religious holiday and school closure. Mr. Truppi texted the entire team and said, “Any freshman players who want to practice with varsity today, we would be happy to have you.” Mr. Truppi allegedly told players on multiple occasions that he would replace them with freshmen. J.B. was only permitted to play in the next day’s game for 30 seconds, unlike in other games.*
 - *J.B. quit the soccer team in the last month of the season.*

Teacher-Student Interactions

- The ABS found that the allegations did not meet the definition of HIB.
 - *Based on witness interviews, there seemed to be a consensus that Mr. Truppi was “passionate” about “motivating his players to reach full potential as individuals and a team.” However, at times he was “overly emotional, focusing ‘more on the negatives than positives which can, at times, undermine the trust and confidence the players have in [him] as well as the team environment and culture.”*
 - *Despite there being evidence of a substantial disruption due to Mr. Truppi’s conduct, there was no evidence that the conduct was motivated by a “**distinguishing characteristic.**”*
- The Board affirmed that decision, and the parent appealed, arguing that Mr. Truppi’s conduct was based on J.B. (1) being “**intellectual**” and “**committed to academics**” and (2) being a **student**, creating a power imbalance.

Teacher-Student Interactions

- The ALJ found there was insufficient evidence to conclude that Mr. Truppi targeted J.B. based on his being “intellectual” and “committed to academics.” Mr. Truppi’s conduct, albeit questionable, appeared to be universal to students.
- The ALJ also found that **J.B.’s status as a student is not a distinguishing characteristic**. The power imbalance that exists by virtue of the position of an adult teacher or coach and a minor child, without more, is insufficient to substantiate a HIB finding.
- For those reasons, the ALJ upheld the board’s decision, and the Commissioner affirmed.

Anti-Bullying Bill of Rights Act Amendments

The following amendments become effective on July 9, 2022.

1. The first two amendments apply to preliminary determinations by the principal, which are authorized by Board Policy 5512. The superintendent may **disagree** with the preliminary determination that the reported incident does not meet the HIB threshold and require the principal to conduct an investigation. The superintendent must notify the principal of this determination **in writing**.
2. The superintendent must give an **annual report** to the Board that includes the number of times a principal made a preliminary determination that the incident did not meet the HIB threshold.

Anti-Bullying Bill of Rights Act Amendments

3. The superintendent and principal must consult **law enforcement**, as appropriate, pursuant to the Uniform State Memorandum of Agreement, if the student's behavior may constitute a possible violation of the New Jersey Code of Criminal Justice.
4. Consequences for first and second offenses may be remedial action including counseling or behavior intervention services, or discipline, or both. For third and subsequent offenses, the principal must develop an **individual intervention plan**, which must be approved by the superintendent, that may include remedial action, progressive discipline, or both, and may require the student, accompanied by the parent/guardian, to complete a class or training program to reduce instances of HIB. On all occasions, **a copy of the results** of the investigation must be placed in the student's record.

Anti-Bullying Bill of Rights Act Amendments

5. Districts must provide a means for parents/guardians to confidentially report acts of HIB using an **online form** that will be developed by the DOE.
6. Written reports to the principal must be on a **form** that will be developed by the DOE. The form must be completed even if a preliminary determination is made that the report does not meet the HIB threshold, and **kept on file**, but not in any student record, unless the incident results in disciplinary action or is otherwise required by law to be contained in a student's record. The superintendent and board must provide a **signed statement** to the principal attesting to the fact that they have reviewed the form, which shall be kept on file with the report.
7. The principal must keep a **written record** of the date, time, and manner of notifications to parents/guardians.

Anti-Bullying Bill of Rights Act Amendments

8. Establishes the position of **School Climate State Coordinator** to serve as a resource to parents, students, and educators. This individual will distribute updated versions of the NJDOE guidance document on the Anti-Bullying Bill or Rights Act to school districts.
9. The current version of that guidance document must be posted on the **district's homepage**.

Liability for Cyber Harassment

The following amendments and are effective *immediately*.

- Both Anti-Bullying Bill of Rights Act and the New Jersey Criminal Code now provide for civil liability of a parent/guardian who demonstrates willful or wanton disregard in the exercise of supervision and control of the conduct of a minor who is adjudicated delinquent of cyber harassment (which is a fourth-degree crime).
- Under the criminal code, there is also an increase in the fines that may be imposed by the court against parents/guardians who fail to comply with a condition of sentencing imposed by the court for cyber harassment.



QUESTIONS?