

December 17, 2014

Patricia Wright, Chair
NJ Anti-Bullying Task Force
Via email: pwright@njpsa.org

Re: Student Record recommendations

Dear Ms. Wright:

On behalf of Education Law Center, as a member of New Jersey Anti-Bullying Attorneys (NJABA), and joined by fellow NJABA members Jerry Tanenbaum and Julie Warshaw, we submit the following student record recommendations for consideration by the Task Force. We have set forth the two additions to New Jersey's HIB regulations that we propose, followed by an explanation justifying those additions:

Proposed regulations

1. Each District shall ensure that the parent (as defined in N.J.A.C. 6A:32-2.1) of any student found to be the target of prohibited HIB is informed in writing of the specific actions taken by the District to reduce the likelihood of further violations against that student, including, but not limited to, any disciplinary action taken against the person(s) found to have engaged in the prohibited HIB. In disclosing the specific disciplinary action taken, the district will not reveal any other information from the violator(s)' records.
2. N.J.A.C. 6A:32-7.7 (d), which grants parents the right to attach a statement commenting on information in the student's record and any reasons for disagreement, and which requires the District to maintain such attachment for as long as the contested record is maintained by the District, and to disclose such attachment whenever the contested record is disclosed, shall be applicable to HIB appeal decisions issued by District Boards of Education. Each District Board of Education shall ensure that the language of N.J.A.C. 6A:32-7.7(d) is included with the written decision that is issued following an HIB hearing conducted pursuant to N.J.S.A. 18A:37-15(b)(6)(d).

Explanations for Proposals

1. Disclosure of Disciplinary Action Taken.

Very often Districts refuse to provide specifics to the families of students targeted by prohibited HIB as to what steps have been and are being taken to ensure the safety of the targeted child. This failure can at minimum leave the student in a state of high anxiety while at school, and worse, can lead to parents keeping students home from school and/or students refusing to return to school. Such impasses can escalate into demands from the District and even threats of truancy proceedings, which only adds further to the stress and emotional harm already suffered by the student who was the target of HIB. The withholding of such information can turn what should be a relationship of support for the targeted student into an adversarial relationship rife with mistrust between that student and the District.

Districts base their failure to communicate such specifics on a misplaced belief that the discipline they impose on the perpetrator of prohibited HIB is confidential information that cannot be disclosed under the Family Educational Rights and Privacy Act, otherwise known as FERPA. 20 USC Sec. 1232 (g). This is a common misconception that arises from the fact that disciplinary records are *generally* protected as confidential under FERPA.

However, FERPA also provides parents with an absolute legal right to any record that is "directly related to" their child. The United States Office of Civil Rights has on two occasions clarified that records of disciplinary action taken against the perpetrator of harassment is a record that "directly relates to" the child who was the target of the harassment, and therefore is a record that parents of the targeted student have an absolute right to receive. OCR, Dear Colleague Letter, at 13 (April 4, 2011); OCR, Revised Sexual Harassment Preamble (Jan. 19, 2001). OCR makes clear that any such limited disclosure is not in any way a violation of FERPA.

These clarifying directives go further than stating that such records directly relate to the victimized student, and explain that such students often need such information in order to make an informed decision as to whether and under what circumstances they should return to school. Indeed, as stated above, this is exactly the problem we see in New Jersey when such information is withheld. OCR states that such disclosure is therefore an "important part of taking effective responsive action," which is also one of the primary goals of the Anti-Bullying Act. Stated another way – the failure to disclose such information can be a failure to take "effective responsive action."

The OCR documents also make clear that the way to harmonize the mandatory disclosure aspect of FERPA with the confidentiality aspect of FERPA is to ensure that only the parents of the targeted student receive the disclosure, and that no other information in the perpetrating person's file is included in the disclosure. For example, a parent of the targeted child would not be entitled to find out whether the perpetrator had previously been in any disciplinary trouble or had mistreated any other students.

New Jersey regulations are similar. N.J.A.C. 6A:32-7.1 (f) mandates that parents "shall have access" to school records that relate to their children – even if such records exist in a "portion of another student's record." This mirrors the explanations from OCR with respect to records in another student's file may be directly related to the targeted student. *See also, Jensen v. Reeves*, 3 Fed. Appx. 905 (10th Cir., Feb. 9, 2001) (holding that disclosure of student discipline in response to bullying that is made solely to parent of the victimized child does not violate FERPA confidentiality provisions).

Thus, under governing federal and state law, so long as the disclosure is made only to the victimized student, and is limited solely to the specific discipline that relates directly to the interactions with the victimized student, not only is there no violation of confidentiality – but the parents of the targeted child have an absolute right to the records.

The recommendation above would therefore merely effectuate the actual law with respect to FERPA and N.J.A.C. 6A:32-7.1(f), thereby providing needed clarity to Districts in New Jersey on the issue of confidentiality in this specific context, and eliminating the serious suffering experienced by victimized students that is caused by the current misapplication of the law.

2. Parental right to add statements to their student's record.

Currently, when their child has been found to have been the perpetrator of prohibited HIB, many parents in New Jersey are extremely concerned about the stigma of an HIB finding in their child's school records, more so than has previously been seen with other code of conduct violations. The reasons for the increased concern are unknown, but likely arise from the fact that bullying has been successfully elevated in the public eye as behavior that is particularly wrongful. The fear of such stigma often causes such parents to engage in litigation with Districts over incidents that, in years prior to the Anti-Bullying Bill of Rights, they would have responded to with much less emotion and no litigation.

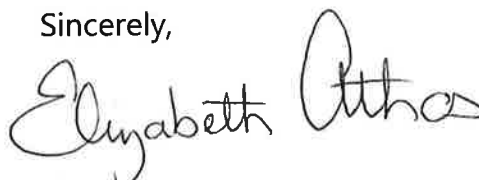
Also, there are some circumstances in which Districts may have applied the "HIB" label to relatively minor student interactions, and parents are rightfully concerned that the school record may appear to equate their child's behavior with much more serious forms of bullying and harassment.

At the same time, there are instances in which Districts have angered the parents of targeted students by failing to sustain a finding of HIB. In those instances when parents might otherwise decide that the time and expense of an appeal is not warranted by the severity of the incident of HIB at issue, they may nonetheless be concerned about future HIB, and consider an appeal to be the only means of expressing their disagreement with an unfavorable finding.

By reminding parents that they have the legal right to add statements to their child's file to provide any context and details they deem necessary to reduce the potential stigma, or to make their objections clear, Districts can reduce the emotional reaction of parents to HIB decisions with which they disagree. As a result, parents need not resort to attorneys to learn of this right, and may even decide to forgo further litigation in favor of exercising this right. The recommended addition to the regulations so that N.J.A.C. 6A:32-7.7 (d) is included specifically in HIB appeal decisions does not in any way alter existing law and would benefit both parents and school districts.

If we can provide additional information or assistance, please do not hesitate to let us know. You can contact us by reply email or by calling me at 973-624-1815, ext. 20. Thank you for inviting our comments.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth Athos". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Elizabeth Athos, Esq.
EDUCATION LAW CENTER

Jerry Tanenbaum, Esq.
For the Firm
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