

This Position Paper is a work in progress, written by a behavioral scientist in response to concerns about the interpretation and implementation of the “ABR,” including recent OAL decisions. Comments are welcome, from professionals whose interest is in preserving or enhancing the ability of the “ABR” to protect students from bullying. Please distribute widely to such an audience. Comments from attorneys are especially welcome, so that the legal perspective will be as represented as the scientific perspective. Counter-arguments also especially welcome, so that the arguments can be adjusted, strengthened, or further explained as necessary to take all perspectives stemming from concern for students into consideration.

***Falling Apples:  
Analysis of the Impact and Advisability of  
Efforts to Amend or Interpret the Statutory Definition of HIB  
to Incorporate “Power Imbalance” or “Conflict vs. Bullying” Elements***

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**INTRODUCTION**

In New Jersey, the statutory definition of “HIB” that is set forth in the “Anti-Bullying Act” (N.J.S.A. 18A:37-14) is different from the scientific definition of “bullying” that dominates the literature on “evidence-based practices” for bullying prevention. The statutory definition of “HIB” outlines the class of incidents that trigger the requirements of the Anti-Bullying Act, and the scientific definition of “bullying” underlies the research that has produced the “positive school climate” or “whole school” approach to bullying prevention.

The difference between these two definitions has led to a disjunction, and a great deal of confusion, among educators who must merge evidence-based practices with legal compliance, often without a full understanding of the fact that the two goals are founded on substantially different definitions of the behavior in question. It has also led to efforts—sometimes stemming from an understanding of the differences between the two definitions, and sometimes stemming from a lack of recognition that there are two definitions—to reconcile the two definitions with each other. This has led to further lack of clarity and confusion, and unless the issues involved are identified and thought through thoroughly, may lead to—in fact, have already led to—interpretations of the law that promote implementations that are contrary to the welfare of students. Ironically, efforts to reconcile the statutory definition of HIB with the scientific definition of bullying also have the potential to discourage, rather than encourage, the use of evidence-based practices to reduce bullying.

It is the purpose of this paper to describe the difference in purpose and content of scientific vs. statutory definitions, to outline the differences between the scientific definition of “bullying” and the statutory definition of “HIB,” to review efforts to reconcile the two definitions, and to point out the potential unintended consequences of some of these efforts with regard to the welfare of students and the impact of the law, so that purposeful choices can be made to promote the welfare of students and the spirit of the “Anti-Bullying Act,” a.k.a. the “Anti-Bullying Bill of Rights,” or “ABR.”

## SYNOPSIS OF THE ARGUMENT

### Introduction

There have been suggestions and efforts to amend the ABR, or re-interpret its provisions, in order to bring the statutory definition of HIB into greater alignment with the scientific (a.k.a. popular, uniform, or classical) definition of “bullying.” These include: 1) the suggestion that the statute be amended to include the “power imbalance” criterion, and 2) efforts to “read” the missing elements of the scientific definition into the statutory definition, e.g. by disregarding the differences between the two definitions altogether, or by acknowledging the statutory definition, but then supplanting it with the scientific definition in decision-making and guidance processes without clearly recognizing the differences between the two definitions. These approaches are well-intended, and they are based on an assumption that greater similarity between the statutory and scientific definitions will produce less confusion, further the intent of the law to protect students against bullying, and encourage the use of evidence-based strategies that were developed through research that uses the scientific definition of bullying. In fact, however, these two strategies (would) have the opposite impact, i.e., leaving students more vulnerable and disempowered, encouraging ABR implementations that are contrary to evidence-based practices in bullying prevention, making it more difficult for bullied students to obtain effective action within their schools, and putting more obstacles in their path if they seek remedies through a court system. The purpose of this paper is to outline these consequences so that purposeful decisions can be made regarding these strategies. There is, also, a third approach to reconciling the scientific and statutory definitions of bullying, which is: 3) interpretation of the “other distinguishing characteristic clause,” either to permit broad application and/or, more specifically, to permit an observed “power imbalance” to be a tool in the identification of a distinguishing characteristic. This third strategy would help diminish confusion while avoiding the adverse effects of the first two strategies, if accompanied by appropriate guidance.

### Part I: The Purpose of Scientific Definition is Different From the Purpose of Statutory Definition

The purpose of scientific definition is different from the purpose of statutory definition. Therefore, there is no a priori reason to assume that each element in a scientific definition of a behavior (such as “bullying”) should be incorporated into a statutory definition of the same, or that doing so will further the intent of the law to address the behavior in question. (Pages 9-12)

- The purpose of scientific definition is to identify or *describe* a set of human behaviors for the purpose of research, i.e., a class of behaviors that have similar underlying dynamics or *causes*. The purpose of statutory definition is to *prescribe* or *proscribe* a class of behaviors, often because of the actual or presumed harmful *effects* of the behaviors. The law of gravity does not *tell (prescribe)* the apple to fall, and the law against murder does not *describe* a society in which murder does not happen. (page 9)
- Scientific definitions are chosen for their *usefulness*. Different scientists might use different definitions as needed by their research purposes.<sup>1</sup> (page 10).
- *Therefore, there is no a priori reason to assume that a definition that is useful in scientific research will be effective for regulatory or other legal purposes, even if the class of behaviors studied scientifically is the same as the class of behaviors that the law is intended to address.*

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<sup>1</sup> When a field of research reaches a stage of some maturity, a consensus might develop among scientists over a particular definition. The “uniform definition” of bullying announced by the CDC and the US DOE reflects a degree of consensus among scientists over the class of behaviors that should be recognized as bullying for research purposes because they share certain dynamics, effects, and causes; this definition is for use in the collection of data related to bullying. (page 11-12)

**Part II:  
Differences between the Statutory Definition of HIB  
and the Scientific Definition of Bullying.**

There are several differences between the current statutory definition of HIB and the scientific definition of bullying. The most consequential and controversial of these differences are:

- The *scientific* definition identifies bullying as unwanted, one-sided, aggressive behavior involving an actual or perceived power imbalance. This distinguishes “bullying” from “conflict,” which is a mutual interaction involving parties of roughly equal power or status. The *statutory* definition does not distinguish bullying from conflict, and does not include any of the criteria—mutuality/one-sidedness, unwanted/unprovoked, or power imbalance—used in the scientific definition to distinguish conflict from bullying. (page 13-16)
- The *statutory* definition includes the “distinguishing characteristic” criterion, which requires that an incident be “motivated by” an actual or perceived characteristic of the target, in order to be HIB. The *scientific* definition does not require that a bullying incident be based on a characteristic of the target. (page 14-16)
- *Some incidents meet one definition, but not the other. Examples: a child who is chosen to be tormented at random (bullying, probably not HIB) or a child who innocently repeats an offensive word (possibly HIB, not bullying).* (page 16-17)

Evidence-based practices in bullying prevention are based on the findings of research that uses the scientific definition of “bullying.” The requirements of the ABR, including reporting and investigation requirements, apply to statutorily defined “HIB.” Effectiveness training and compliance training are often based, respectively, on these two different definitions, although the difference between the two definitions is rarely clearly explained. Efforts to integrate the two are superficial, e.g., by pointing out that the law requires promotion of a positive school climate and that evidence-based practices are designed to produce a positive school climate; superficial integration does not resolve the underlying discrepancies. This leads to confusion among school personnel, potential errors in the application of evidence-based practices, and potential errors in reporting with possible consequences for compliance and liability. This confusion has led to calls for legislative amendment or interpretations of the law that would bring the statutory definition of HIB into greater agreement with the scientific definition of bullying. (page 17-19). In greater detail:

- The set of evidence-based practices in bullying prevention commonly known as the “positive school climate” approach to addressing bullying is based on scientific research. In other words, this approach is based on research on behavior that meets the scientific definition of bullying, and provides prevention and response strategies for behaviors that fit the scientific definition of bullying, which is different from statutory HIB. (page 13, 17)
- When school personnel are trained in “evidence-based practices” for bullying, they usually learn the scientific definition of bullying, that is, that “bullying” is distinct from “conflict” because it is one-sided and involves a power imbalance. (page 17-18)
- When school personnel are trained in ABR compliance, they learn the statutory definition of HIB. When an incident meets (or might meet) the statutory definition of HIB, it should be reported and investigated. (page 18)
- The difference between these two definitions is rarely explained to school personnel. When an effort is made to integrate compliance training with training in evidence-based practices, at best what passes for “integration” might consist of pointing out that the law requires the promotion of a positive school climate, and that evidence-based practices are designed to produce a positive school climate. Or, there might be a reference to the “spirit” of the law, which is to protect children from bullying, so “evidence-based practices” should be used to comply with the “spirit” of the law. These attempts to integrate are superficial and do not resolve underlying confusion and discrepancies. (page 18-19)
- Failure to clearly recognize the differences between these two definitions (1) leads to confusion, e.g., when school personnel discover that they often cannot answer the basic question “is it bullying?” when confronted with an actual incident; (2) can lead to errors in the application of evidence-based practices, including failure to treat bullying appropriately

if it does not meet the statutory criteria for HIB; and (3) can lead to errors in reporting, including failure to report incidents that are HIB but not bullying. (page 18-19)

- *Because of the confusion caused by the disparity between the scientific and statutory definitions, there have been suggestions and efforts to reconcile the statutory definition with the scientific definition, through either legislative amendment of the statute, or altered interpretations of the statute.* (page 19)

### **Part III:**

#### **The Role of “Power Imbalance” in the Scientific Definition of Bullying and the Purpose of the “Conflict vs Bullying” Distinction in Scientific Research**

The two most common efforts to reconcile the statutory definition of HIB with the scientific definition are: 1) the suggestion that the statute be amended to include the “power imbalance” criterion, and 2) efforts to define bullying as “not conflict” and to incorporate this non-statutory definition into ABR implementation e.g., in NJ DOE guidance, and into legal reasoning, e.g., in the OAL Initial Decision in *Pittsgrove*. Therefore, it is important to understand the role of the “power imbalance” element in the scientific definition of “bullying,” and to understand the purpose of the scientific distinction between “conflict” and “bullying,” before the impact of altering the statute or its interpretation in these ways can be fully understood. (pages 20-27)

- The observation that bullying situations involve a power differential is better understood as a sensitizing insight than as a definitional criterion. The concept of a power dynamic should enhance our understanding of bullying; it should not be used as a “litmus test” which would limit our ability to recognize it. (pages 20-22)
- The power imbalance underlying the dynamics in a bullying situation can be actual or perceived, visible or invisible. Power imbalances can stem from the situation at hand, or they can stem from a larger social context, and they can shift from situation to situation. A power imbalance can also develop, or be created by, a bullying situation, e.g., because bullying damages the self-esteem of the target. Because power dynamics can be subtle, complex, and vary widely, adults might or might not be able to recognize the power dynamics operating in a particular bullying situation. (page 22-24)
- A targeted student might not be able and willing to inform an adult that a power dynamic exists. The student might be disabled or too young to self-reflect or verbalize effectively; the student might be unaware that the existence of a power imbalance would be important information for the adult; the student might be so disempowered by the bullying experience that they will not self-advocate; and, the student might be hesitant to admit feelings of powerlessness, because to do so would increase feelings of vulnerability. (page 23)
- Conflict and bullying are not mutually exhaustive categories of behavior. They can be distinguished prototypically and theoretically for scientific purposes; bullying is one-sided and involves a power imbalance, whereas conflict is a mutual interaction between relative equals. However, in real life, many situations involve elements of both conflict and bullying. Finding that a situation includes elements of conflict does not preclude the possibility that it also includes elements of bullying, in which case an evidence-based response to the situation should be designed to address both elements effectively. The belief that a situation that “is conflict” is therefore “not bullying” would lead to failure to recognize and respond appropriately to bullying dynamics. Nothing is gained by forcing the complex situations students experience in real life into simplistic prototypical categories. (page 26, 33-34)
- Among professionals with knowledge of youth psychology and behavior, there are criticisms of the “power differential” criterion, including:
  - It is an *impossible* criterion to apply, because it takes so many forms and can be so subtle. The fact that an adult does not recognize a power differential does not mean that one does not exist, and students’ ability to be protected from bullying should not be dependent upon adults’ ability to perceive a power imbalance. (pages 25)
  - It is an *inappropriate* criterion, because “it is difficult and often unproductive for schools to allow low-status youth to do things that would be considered bullying if

- high-status youth did them, or to allow students to carry out identical actions toward some of their peers but not toward others” (Stan Davis). (page 25)
- It is *not a useful* criterion, because all interactions between students and their peers involve power imbalances. Andrew Yeager points out that students’ “whole lives” involve power imbalances. Given that youth are surrounded by power differentials, and experience them in virtually all of their interactions, the existence of a power differential is not useful to distinguish one type of interaction from another. (page 25-26)

#### **Part IV: Advisability of Efforts to Reconcile the Statutory Definition of HIB with the Scientific Definition of Bullying**

Those who suggest that the statutory definition should be amended to include “power imbalance,” or that the distinction between conflict and bullying should be read into the statutory definition through interpretation, intend by these changes to further the spirit of the law, which is presumed to be the protection of students against bullying: (page 28).

- Those who suggest bringing the statutory definition into greater alignment with the scientific definition often have the best interests of students in mind, believing that bringing the two definitions into line with each other will reduce confusion and create a law that is more consistent with the evidence-based practices that are designed to reduce bullying and protect children, thereby encouraging schools to use evidence-based practices and ultimately creating safer schools for children and providing greater protection for those who are bullied.
- It is also often argued that, because bullying “is” characterized by power imbalance, that this criterion should be included in the law, so that the law will, in fact, be a law about bullying, i.e., so that it will apply more accurately to those behaviors that are scientifically considered to be “bullying.”
- *Decisions about legislative amendment and incorporating the conflict vs. bullying distinction into the law, however, should be made in the light of a full understanding of the potential impact of these changes on the ability of the law to protect students, especially those students who are most vulnerable.*

At least three different approaches to reconciling the scientific and statutory definitions have been either suggested or utilized. Some of these approaches would have undesirable effects, including effects that would undermine the ability of the ABR to protect bullied students, and effects that would discourage the use of evidence-based practices for addressing bullying.

#### ***Strategy #1: Add “power imbalance” as an element in the statutory definition of HIB.***

If “power imbalance” were added to the statutory definition of HIB, this would become an additional element that a student would have to assert or an adult would have to observe, and that an ABS would have to recognize and document, in order for the incident to be deemed “HIB” and for the safeguards of the law to apply for the student. This would have the following specific consequences: (pages 29-32)

- Create an additional criterion that would have to be met in order for an incident to be deemed “HIB” and for the safeguards of the law to apply for a student. This makes it more difficult to reach a finding of “HIB,” thus limiting the protections offered by the ABR to those who can demonstrate this additional element. (page 29)
- Create dependency of bullied students (who are already disempowered by the bullying itself) on the ability & willingness of adults to recognize a power imbalance. (pages 29-30)
- Provide adults who are not willing and able to recognize a wide variety of types of power imbalances, or who have a structural interest in reducing reports of “HIB,” with a legitimate and reasonable basis for supporting a determination of “non-HIB” in many cases that should be treated as bullying. (page 30)

- Would provide schools with a loophole to avoid the requirements of the ABR, thus denying the protection of the ABR to students who need it, and undercutting the impact of the ABR (page 30)
- If an adult does not recognize the power imbalance, a student would have to demonstrate the existence of a power imbalance in order to compel protection under the ABR. As noted in Part III, there are many reasons a student might be unable to do so. (page 30)
- During an investigation, the ABS would have to document the power imbalance in order to affirm a case of HIB. Any investigation into the source of a power imbalance between the aggressor and the target implies that a weakness of the target will become a defining criterion for the incident, and that this weakness will have to be demonstrated and documented during the investigation. In other words, information that is not flattering to the bullied student (“he has few friends”? “she is considered ugly by her peers”? “he is awkward and not athletic”?) would have to be collected, documented, and presented. (page 30)
- The fact that the target’s weakness relative to the aggressor would be a point of investigation and documentation is disempowering and damaging to the target. This borders on blaming the victim and focuses attention on the target as a victim. Furthermore, if the case does proceed to appeal, then in order to provide evidence of bullying, the target would have to, effectively, prove their own powerlessness, weakness, or inadequacies, in order to seek protection or remedy. This puts the target in the position of having to demean her or himself or make her/his lack of power a matter of record, in order to seek redress or protection. What this would do psychologically to a youth who had already been bullied by a peer is contrary to the spirit of the ABR, if that spirit is to protect students and enhance their psychological and emotional as well as physical well-being (page 31)
- Disempowering and blaming the victim is contrary to evidence-based practices for bullying. The goal of effectively addressing bullying includes the empowerment and protection of, not the disempowerment and further insult to, the target. (page 31)
- Adding power imbalance to the statutory definition would partially codify into law the distinction between conflict and bullying, thus encouraging the legal interpretation that incidents that are determined to be conflict are, therefore, not HIB. Given that many situations contain elements of both bullying and conflict, this would provide schools with a reasonable basis for classifying any such situation as “conflict” and therefore “not bullying,” thus depriving some students who are experiencing bullying of the protection of the ABR. (page 31)
- Adding “power imbalance” as an element in the statutory definition, *if the concept of power imbalance is properly understood*, is redundant. The “power imbalance” criterion would only allow some situations to be distinguished as “not bullying” if the observer did not fully understand the variety of different types of power imbalances that can be involved in bullying. In other words, adding power imbalance as an independent and additional criterion would serve only to provide schools with a reasonable basis for denying protection to students who need it. (page 31-32)

***Strategy #2: Incorporate the “conflict vs bullying” aspect of the scientific definition of bullying into the law through interpretation, including administrative guidance and/or legal reasoning, thus merging or confounding the two definitions instead of clarifying their differences.***

This has been done, in the NJ DOE Guidance Document, and in the legal reasoning in some OAL cases, most notably the *Pittsgrove* case. (pages 32-37)

- In the guidance document issued by the NJ DOE in 2011, the statutory definition of bullying is given on page 2, and then on page 3, the following explanation is offered: “Bullying vs. conflict – Bullying is not a conflict ... conflict is a mutually competitive or opposing action or engagement,... bullying is one-sided, where one or more students are victims of one or more person’s aggression...” None of the criteria used to distinguish bullying from conflict on page 3 are elements of the statutory definition of HIB, and there is no mention of the fact that the definitions given on page 2 and page 3 are different definitions. Instead, the distinction between conflict and bullying is offered with all the appearance of being

consistent with, and following from, the legal definition. The clear implication is that, if a situation is conflict, that it is therefore not bullying, and that it is simultaneously not HIB. This is factually inaccurate, as the statutory definition does not distinguish conflict from bullying, and makes no reference to one-sidedness, power imbalance, mutuality, or any other concept that distinguishes conflict from bullying. (page 32-33)

- In *Pittsgrove*, the ALJ cites the NJ DOE Guidance, quoting the statutory definition in Title 18A:37-14, and then quoting the NJ DOE guidance on “conflict vs bullying.” Much of the reasoning in the case is based on the “conflict vs bullying” quote, e.g., “this prank was motivated by the ongoing conflict between the students,” and “there was an element of ‘mutuality’ even if C.H. was the more dominant actor.” Although the ALJ makes reference to the fact that the behavior “was not motivated by any actual or perceived characteristic,” the discussion focuses on the argument that the situation was conflict, and therefore not bullying, and this distinction—not the lack of a distinguishing characteristic—is given a prominent role in the conclusion that C.H.’s behavior did not, therefore, constitute HIB. (page 35-36)

Efforts to incorporate the “conflict vs. bullying,” or “bullying is not conflict” definition of bullying into the statutory definition of HIB, implicitly introduce the elements of “power imbalance” and “one-sidedness” into the statutory definition of bullying because these are the criteria distinguishing bullying from conflict. This strategy, therefore, has many of the same detrimental effects as amending the statute to include “power imbalance” would have. In addition, it:

- Fails to resolve confusion over the fact that the two definitions are different (page 33)
- By implying that conflict and bullying are mutually exclusive categories, it misdirects responses to situations that involve elements of both bullying and conflict. From the standpoint of effectiveness, the best way to approach a situation that involves elements of both is to recognize the dynamics of both bullying and conflict within the situation, and, based on an understanding of both dynamics, arrive at a response to the situation that is appropriate to the mix of bullying and conflict in the situation. No useful purpose is served by failing to recognize both dynamics, or by using prototypical criteria to declare that the situation is either bullying or conflict, and not the other. (page 33-35)
- Provides school personnel with a reasonable basis for classifying any incident that involves elements of both conflict and bullying as “conflict, and therefore not bullying,” thereby denying the protections of the ABR to any student whose bullying experience contains any elements of conflict; this would include, for example, students who responded to repeated bullying by retaliating, and students whose situations began as conflict but became bullying when one student moved on, but the other continued to harass. (pages 34-35)
- In order to successfully appeal a determination that a situation is conflict and not bullying, a student would have to demonstrate that the situation was one-sided. Few interactions are entirely one-sided; in order to ensure that their experience conforms to a distorted view of the statutory definition of HIB, a bullied student would have to refrain from all responses to the aggressor, including responses (saying stop, being assertive, etc.) that are recommended. The outcome, therefore, is contrary to evidence-based practices, and contrary to the healthy psychological and social development of youth, because it effectively requires students to behave like victims in order to preserve their ability to demand protection from the school. (page 35)
- The distinction between bullying and conflict, which is found in the scientific definition but not in the statutory definition of HIB, has already appeared in legal reasoning, most notably *Pittsgrove*. (page 35-36). In *Pittsgrove*, the ALJ identified elements of both conflict (mutuality) and bullying (dominance) in the situation, and then concluded, because elements of conflict were present, that the situation was not bullying and, therefore, not HIB.

### ***Strategy #3: Purposeful Interpretations of the “Other Distinguishing Characteristic” Clause of the Statute.***

Thus far, two interpretations of the “other distinguishing characteristic” clause of the statute have been suggested as means to bring the statutory definition of HIB into greater agreement with the scientific definition. Both of these solutions would, if accompanied by appropriate and detailed guidance, avoid the adverse consequences of Strategies #1 and #2, described above. Specifically, purposeful interpretation of the “other distinguishing characteristic” clause, in the ways discussed below, would enhance the ability of the law to protect bullied students, and avoid consequences that are contrary to evidence-based practices. (page 37-42)

#### ***Broad Interpretations of the “Other Distinguishing Characteristic” Clause***

The more broadly the “other distinguishing characteristic” clause is interpreted, the greater the resemblance between the statutory definition of HIB and the scientific definition of bullying. Interpreting the “other distinguishing characteristic” clause narrowly, e.g., as referring only to visible, permanent characteristics, narrows the range of bullying situations that are classifiable as HIB, reducing the overlap between “bullying” and “HIB” and enlarging the “bullying, but not HIB” category. Conversely, interpreting the clause broadly, e.g., as including temporary, perceived, and invisible characteristics, enlarges the range of behaviors that can be classified as HIB, thus increasing the overlap between the two definitions. Since the scientific definition does not include a “distinguishing characteristic” criterion, no matter how broadly this statutory criterion is interpreted, this strategy would only expand the range of HIB to cover a larger proportion of bullying situations, without inappropriately expanding the statutory definition to include situations that would not be considered bullying as per the scientific definition. This strategy, therefore, does help reconcile the impact of the law with the goals of evidence-based practices, creates greater consistency between the scientific and the statutory definitions, does not create additional necessary standards that must be met by a student seeking protection from bullying, does not broaden the definition of statutory HIB beyond the definition of scientific bullying, and furthers the intent of the law which is, arguably, to protect students from actual bullying. (page 37-38)

#### ***Recognizing “power imbalance” as a tool leading toward the identification of distinguishing characteristics.***

In its 2014 annual report, the Anti-Bullying Task Force discusses the possibility that “power imbalance” be incorporated into the statute through interpretation, by recognizing a “power imbalance” as an indicator that a distinguishing characteristic exists, and a “gateway” through which that characteristic can be identified. This solution successfully expands the realm of behaviors that can be identified as HIB to include incidents that are “bullying” in the scientific sense but which might otherwise not be considered HIB. It does so without creating an additional *necessary* criterion that must be met in order to substantiate HIB because it uses a criterion that is already in place in the law—the “other distinguishing characteristic”—and creates an additional *alternative* route toward the identification of “other characteristics,” thereby expanding the definition of HIB rather than narrowing it. This solution, therefore, has none of the negative consequences that would be associated with adding “power imbalance” as an additional necessary criterion through legislative amendment. Given the history of confusion over the fact that the statutory definition of HIB does not already distinguish conflict from bullying, or require a power imbalance, however, training for school personnel should emphasize very clearly the fact that this interpretation of the “other distinguishing characteristic” clause does *not* mean that “power imbalance” has become a necessary criterion, nor that failing to notice a power imbalance, or being able to identify elements of conflict in a situation, are reasonable bases for concluding that an incident is not HIB. (page 38-42). Additional suggestions for guidance are also provided (page 42).

## DETAILS OF THE ARGUMENT WITH EXPLANATIONS, EXAMPLES, & ILLUSTRATIONS

### Part I

#### If We Repeal the Law of Gravity, Would Apples Still Fall? Differences between Scientific Definitions and Statutory Definitions

***Scientific and Statutory Definitions Serve Different Purposes; Therefore, Whether Each Element in A Scientific Definition Should Be Incorporated into a Statutory Definition is a Question for Informed and Intentional Consideration.***

Scientific and statutory definitions serve different purposes. An understanding of these different purposes is necessary before any discussion of the degree to which a statutory definition should include the same elements as a scientific definition can take place. Scientific definitions are *descriptive*, whereas statutory definitions are *prescriptive* or *proscriptive*. The purpose of scientific definition is to describe a phenomenon for the purpose of studying it, whereas the purpose of statutory definition is to distinguish a class of behaviors that is prescribed (a person driving a car must have a driver's license) or proscribed (one must not commit murder). The following anecdote illustrates the difference between the two types of definitions:

#### ***If We Repealed the Law of Gravity, Would Apples Stop Falling?***

This question highlights the difference between two meanings of the word "law" in English, thereby illustrating the difference between scientific definition and statutory definition. The "Law of Gravity" is a scientific *description*: it provides a description of what the apple *does*; it does not command the apple to fall, but rather describes, and provides an explanation for, the fact that the apple *does* fall. However, state and federal laws are *prescriptive* (stating what must be done) or *proscriptive* (stating what must not be done). The law against murder, for example, does not *describe* the fact that murders never take place. Murders *do* take place; the law says that they *shouldn't*.

As another example, many social scientists are familiar with the story, based on actual events that have since been fictionalized, about a state in the United States whose legislature attempted to pass a bill declaring that "pi" (the mathematical constant describing the relationship between the diameter and the circumference of a circle) would be equal to 3.0000.<sup>1</sup> The point of the story is to illustrate the ridiculous outcomes that are possible when efforts to draft legislation fail to recognize the distinction between scientific and statutory definitions.

When a scientific *description* refers to something as complex as human behavior, and we are attempting to regulate that human behavior through legislation that must include a *description* of that behavior in order to *proscribe* it<sup>2</sup>, an understanding of the distinction between the purposes of scientific and statutory definitions is essential, to avoid incorporating into the law elements of a scientific definition that would undermine the purpose of the law, or which would otherwise be inappropriate in a statutory definition. An element in a scientific definition might serve scientific purposes well; this provides no guarantee that the same element, incorporated into a statutory definition, would serve the purposes of the law.

In other words, it would be a mistake to assume a priori that statutory definitions should resemble scientific definitions. The degree to which statutory definitions should reflect scientific definitions is an issue to be considered carefully, in order to reduce the likelihood of enacting legislation, or interpreting existing legislation, in ways that will produce unintended consequences.

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<sup>2</sup> In the case of the ABR, bullying is not *proscribed*; more accurately, the ABR provides a statutory definition of HIB in order to support regulations designed to prevent bullying, rather than to proscribe it directly.

## **Scientific Definitions are Chosen/Developed for Their “Usefulness” in the Context of Specific Research Goals; The “Federal Definition” of Bullying is a Scientific Definition.**

One further distinction will be helpful. The general public is accustomed to *constructive* definitions, that is, definitions that are based on common usage patterns and are typically defined in a dictionary. The general public, therefore, generally thinks in terms of definitions as either “right” or “wrong,” depending on whether they conform to common usage and/or to dictionary definitions. For example, if I saw a “mule” and referred to it as a “donkey,” someone with greater knowledge of animal husbandry would tell me that I was “wrong” because the animal is a “mule” and *not* a “donkey.” The word “mule” is the accepted term for the offspring of a male donkey and a female horse, and in comparison to this common usage, my use of the term “donkey” for such an animal would be *wrong*.

Scientific definitions are not “right” or “wrong” in this sense. Scientific definitions are judged by their *usefulness* for research purposes. Particularly in the study of human behavior, it is important for researchers to define the class of behaviors that they are studying, and to distinguish these behaviors from similar behaviors that are not being studied, and these definitions must fit the purposes of the research. Often, researchers are studying the *causes* of behavior for the purpose of developing strategies for altering that behavior; for example, researchers who study bullying are usually interested in what causes children to bully, so that they can develop strategies for reducing bullying behavior among children. In order to do that, researchers have to study the different variables that might increase or decrease a child’s likelihood of bullying. However, human behavior is very complicated; a single research study cannot include all the possible variables that might impact whether a child bullies. Therefore, researchers generally define specific classes of behaviors to study, so that they can eliminate additional complicating variables, thereby producing findings that more clearly identify the impact of the variables they want to study. The following example illustrates the fact that scientific definitions are chosen for their “usefulness” for specific research purposes:

### ***Scientific Definitions are Chosen for “Usefulness” in the Context of Particular Research Goals, i.e., The Standard is Usefulness, Not “Correctness”***

For example, let’s say I want to study whether or not children who are greeted by name when they enter school are less likely to behave aggressively toward peers during the school day than children who are not greeted by name. Let’s say I think that aggression between siblings has different causes than aggression between un-related classmates. For example, aggression in school between siblings could be caused by events that occur in the family home, and not at school. For the purpose of my research then, when I measure “how aggressive” children are in school, I would only “count” aggressive behavior between un-related students, and I would not “count” any aggressive behavior that occurs between children in the school who are siblings of each other, because it might have different causes and would obscure the causes I am trying to study. So, for the purpose of my research, I would “define” aggressive behavior as behavior that occurs between un-related classmates. Does this mean I don’t think that aggression can occur between siblings? Does it mean that I don’t think sibling aggression is important? Does it mean that a school should adopt a policy under which aggression between siblings should be exempted in the Code of Conduct? No, not at all; what it means is that I want to identify the impact of a morning greeting on students’ aggressive behavior, so to eliminate confounding factors—like family home life--so that I can focus my findings more clearly on the variable I am interested in—the morning greeting—I am defining, *for the purpose of my research*, “aggressive behavior” as aggressive behavior *between un-related classmates only, excluding aggressive behavior between siblings*.

Furthermore, when researchers study a behavior, they can limit their research to prototypical (“perfect”) instances of the behavior they are studying through the methods used to “operationalize” (apply) their chosen definition to the research; most of the real world, however, is not prototypical. For example, if I were studying the impact of racial prejudice on interactions between people of different races, I would *operationalize* the variable “race” by choosing people for the study who are visibly identifiable as members of specific races. Many people, who do not fit the stereotypical or prototypical appearance for their race, are often racially mis-identified.<sup>3</sup> These people are affected by racism, but I would not choose them to be subjects in my research study because, in order to study the effects of racial prejudice on interactions, I have to be sure that the people I am studying *know* that they are interacting with someone of a different race. So, for the purpose of my research, I can create an operational world in which race is visibly identifiable, and people belong clearly to one race or the other. However, when my research is applied to the real world, I have to recognize that racial categories are not clear-cut and mutually exclusive, that racial identity is not always visible and accurately identified, and that racism impacts people whose racial identities are often mistaken as well as people whose racial identities are accurately identified by others. In other words, a criterion that I can operationalize in research is not necessarily a criterion that can be applied easily or appropriately to the real world, because the real world far more complex than the world that I can create for the purpose of research. (See the boxed insert “Scientific Prototypes vs. Application to the Real world” in Part III of this paper for an application of this point to research on bullying, specifically).

Given that different researchers are studying different aspects of a behavior (we would not learn much if all scientists conducted exactly the same experiment), it should not be surprising that different researchers often use different scientific definitions or that they operationalize their definitions differently. For example, one researcher who is studying “bullying” might define bullying as “unprovoked” behavior, whereas another researcher might include both “provoked” and “unprovoked” behaviors in their study. This should not be seen as a problem; if each researcher has defined a class of behaviors for study that is appropriate in light of that researcher’s research goals, then each research study will produce findings that are interpretable and that will add to our knowledge of human behavior. It is not necessary to identify one scientific definition as “right” and others as “wrong,” and there is no need to refer to differences between scientific definitions as “disagreements;” if each definition serves the purpose of the researcher who uses it by producing interpretable findings, each definition advances our understanding of human behavior.

When research into a particular area of human behavior—such as “bullying”—is in its infancy, different researchers will use a variety of different definitions of the behavior. Gradually, as the research accumulates and our understanding of this area of human behavior grows, oftentimes a more-or-less widely accepted definition of the behavior emerges because we now understand the behavior well enough to be able to determine its important parameters, and have come to some agreement over these parameters.<sup>4</sup>

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<sup>3</sup> In an experiment, variables are operationalized through the choice of research subjects, the design of the experiment, and the instructions given the research subjects, as well as the methods used to assess outcome variables. In survey research, operationalization is accomplished through the wording of questions used to assess independent, dependent, and control variables.

<sup>4</sup> Even as consensus grows within the scientific community, some researchers will continue to use definitions that differ from the commonly accepted definition, usually because they have research goals that require a different definition. There is nothing wrong with this; this is how we learn more about the parameters of the behavior, and the factors that cause, or prevent, this behavior and similar behaviors. Sometimes, when a researcher approaches a topic from a different perspective, we discover that there is, in fact, a new and better way to approach the topic. In science, this is called a “paradigm shift.” Sometimes, such research shows that what “everyone knows” to be true based on past research can, in fact, be improved upon.

In other words, concurrence over a scientific definition develops because that definition defines a class of behaviors that has been usefully distinguished from other, similar, behaviors, for the purpose of research. In general, this definition will be useful because the behaviors it defines have similar underlying dynamics or causes. However, regardless of how much consensus develops among researchers with regard to a particular definition of a behavior, it would be misleading to refer to that definition as the “right” definition; scientific definitions are *useful*, they are not “right” in the sense commonly understood by non-scientists.<sup>5</sup>

The publication, *Bullying Surveillance Among Youths: Uniform Definitions for Public Health and Recommended Data Elements*, published jointly by the National Center for Injury Prevention and Control, the Centers for Disease Control and Prevention (CDC), and the United States Department of Education (USDOE), reflects the fact that the field of research on bullying has reached the stage of maturity at which it is possible to outline a widely accepted scientific definition of “bullying” for research purposes. This publication establishes a ‘uniform definition’ of bullying, because the field of bullying research has become sufficiently advanced to warrant such a definition.<sup>6</sup>

To be clear, the announcement of this “uniform definition of bullying” reflects a degree of scientific consensus over the usefulness of this definition for research purposes; it does not indicate that the “correct” definition of bullying has been “discovered,” nor does it imply that this same definition would be appropriate for other purposes, specifically, legal purposes. Whether or not this definition—or each criterion within it—is appropriately included in statutory definitions remains a question to be examined, and this examination must be done with the different purposes of statutory and scientific definitions clearly in mind. A scientific definition of bullying might help us determine through research what factors discourage school bullying, but that does not mean that transporting the scientific definition wholesale into statutory language will produce a law that will likewise succeed in reducing bullying.

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<sup>5</sup> An additional distinction between scientific and statutory definition, which follows from the points made already, is that scientific definitions are developed by researchers because they identify classes of behavior that have particular *causes* that can be identified and studied. Laws, on the other hand, have a different purpose. Laws generally proscribe behaviors because those behaviors are known or believed to have harmful *effects* on others, e.g., murder is proscribed because ending someone’s life is harmful. Although the “impact” of a behavior might not be part of the statutory definition (we don’t have to prove that death is harmful each time we prosecute for murder), the reason a behavior is prohibited is because the behavior is presumed harmful (we outlaw murder because it is commonly agreed that death is a harm). In summary, scientific definitions are usefully based on *causes*, whereas statutory definitions are usefully based on presumed *effects*.

<sup>6</sup> It should also be noted that the content and organization of the report *Bullying Surveillance Among Youths* reflects the fact that “surveillance” here means the collection of data, e.g., data on the prevalence of bullying behaviors. This is a specific research purpose, i.e., measurement, generally for the purposes of public policy, public health, and assessment. In other words, not only is this definition intended for research—not legal—purposes, but it is designed for a specific research purpose, i.e., the measurement of bullying, that is, the collection of standardized data on bullying. See also Footnote 9.

**Part II:**  
**Differences between the Scientific Definition of “Bullying” and the New Jersey Statutory Definition of “HIB”**

***The Uniform Definition of “Bullying”***

The “Uniform Definition” of bullying, published in 2014 by the National Center for Injury Prevention and Control, the Centers for Disease Control and Prevention (CDC), and the United States Department of Education (USDOE), is a scientific definition of bullying that has emerged from decades of research on bullying. It reflects a degree of consensus among researchers over the elements that define “bullying” for the purpose of research into the causes, and strategies to prevent, bullying. The definition, which I will henceforth refer to as the “CDC definition of bullying,” is:

“Bullying is any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated. Bullying may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm.” (2014:7)

Although, as explained above in Part I, different researchers have used a variety of different definitions of “bullying” in their research on bullying, this CDC definition brings together many of the most common criteria used by researchers to define bullying for the purpose of research. It is this research that has given rise to the knowledge we have about “evidence-based practices” in bullying prevention. In other words, this scientific definition of bullying is the definition of bullying upon which “evidence-based practices” are based. These evidence-based practices can be roughly described collectively as the “positive school climate” approach to bullying prevention. At the risk of being redundant, it is very important that the following be understood: These evidence-based strategies—in other words, the positive school climate approach to bullying prevention—are designed to address bullying *as it is defined scientifically*, in other words, these strategies are designed to address the class of behaviors that fit the scientific definition of bullying, which is reasonably summarized by the CDC definition quoted above.

The essential elements of the CDC definition are:

- Unwanted
- Aggressive
- Observed or perceived power imbalance
- Repeated multiple time or highly likely to be repeated
- May inflict physical, psychological, social, or educational harm/distress

Other elements that have often been included in scientific definitions of bullying, but which are not included in the CDC definition, include:

- Intent to harm
- Unprovoked

## ***The Statutory Definition of “Harassment, Intimidation, and Bullying”***

The wording of N.J.S.A. 18A:37-14 is as follows:

"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.

### ***Comparison between The Scientific Definition of “Bullying” and Statutory “HIB”:***

The statutory definition of HIB differs from the scientific definition of “bullying” in many respects. The table on the next page outlines the differences between the two definitions.

This table outlines ten differences between the two definitions. However, out of these ten differences, three differences have been the most consequential and controversial:

- The scientific definition includes the criterion “power imbalance,” which is not included in the statutory definition. In other words, scientifically, bullying is described as a behavior by an actor who has greater perceived or actual power than their target, whereas legally, there is no need to identify a power imbalance to determine if an act is HIB.
- Although the CDC definition of bullying does not specify that bullying is one-sided (or unprovoked), other formulations of the scientific definition of bullying (e.g., NJ DOE guidance, page 3), do include this criterion. The statutory definition of HIB does not include a “one-sided” criterion.
- The statutory definition includes the “distinguishing characteristic” criterion, which is not included in the scientific definition. In other words, scientifically, an incident is bullying regardless of whether a distinguishing characteristics is involved, whereas legally, an incident is only HIB if it is motivated by an actual or perceived distinguishing characteristic of the target.

Those familiar with the scientific definition of bullying, or with the positive school climate approach to bullying prevention, “know” that “conflict” is different from “bullying.” The accepted dogma is that conflict and bullying are distinct forms of behavior, so if a behavior is conflict, it is therefore not bullying, and vice versa. Conflict, on the one hand, is reciprocal behavior that occurs between parties of roughly equal power or status. In a conflict, both parties are engaged as participants, and both parties might behave in harmful or inappropriate ways. The nature of conflict dictates that strategies like mediation and conflict resolution are appropriate responses to address conflict. Bullying, on the other hand, is one-sided and

**Comparison of the Elements in  
the Scientific Definition of “Bullying” and the Statutory Definition of “HIB”**

<b>Scientific Definition of “Bullying” CDC and other research criteria</b>	<b>Statutory Definition of “HIB” (N.J.S.A. 18A:37-14)</b>
<b><i>Similarities between the Scientific Definition of “Bullying” and Statutory “HIB”</i></b>	
Harmful Behavior: “May inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm.” Standard is not actual harm, but possibility of harm.	Harmful Behavior: “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 . . . or damage . . . ; [or] has the effect of insulting or demeaning any student or group of students; or creates a hostile educational environment.” Standard is not actual harm, but reasonable expectation (“will have”) of harm.
<b><i>Criteria Included in the Scientific Definition of “Bullying” that are Not Explicitly Included in the Statutory Definition of “HIB”</i></b>	
“unwanted”	No mention of consent of the target as a criterion; standard is the perception of a “reasonable person” regarding potential for specific harmful impacts
Aggressive	No mention of “aggressiveness” of the actor; statute mentions reasonable person’s assessment of the “effect” including “fear”
Power Imbalance.	No mention of power imbalance
Repeated or likely to be repeated	Specifically states that HIB might be a “single incident or a series of incidents”
Intent to Harm	No mention of intent; “reasonable” expectation of impact is the standard
Unprovoked	No mention of provocation as an excluding criterion; only reference to causality is reference to “motivating characteristics”
One-sided, i.e., not reciprocal. One party is hurting the other, and not vice versa	No mention of reciprocity as a contra-indication, no requirement that the target be blameless or the interaction one-sided, no requirement that the target has never retaliated
<b><i>Criteria Included in the Statutory Definition of HIB that are Not Explicitly Included in the Scientific Definition of “Bullying”</i></b>	
No requirement that the behavior be “motivated” by a “characteristic” of the target.	“Reasonably perceived as being motivated either by any actual or perceived characteristic such as race...or by any other distinguishing characteristic”
No restriction as to where the behavior occurs	“Takes place on school property, at any school-sponsored function, on a school bus, or off school grounds...”
No reference to impact on the social environment (school) except insofar as it might cause educational harm to the target.	“substantially disrupts or interferes with the orderly operation of the school or the rights of other students”

involves a power imbalance, that is, it is hurtful/aggressive behavior perpetrated by one party against a less powerful individual. The term “*mutually* competitive or opposing . . . engagement” is used in NJ DOE guidance (2011) to refer to the reciprocal nature of conflict, as distinct from the one-sided nature of bullying. It is because bullying involves a power dynamic and is not reciprocal, that strategies like mediation and conflict resolution are inappropriate and damaging to use as responses to bullying situations.

Thus, in the table on the previous page, the word “conflict” does not appear. The elements “power imbalance” and “one-sided,” which do appear in the chart, are the elements that distinguish bullying from conflict. In other words, the scientific definition reflected in the text of the CDC definition cited above, and outlined in the table above, is the source of the well-known distinction between bullying and conflict.

To reiterate, the scientific definition of bullying—not the statutory definition of HIB—is the source of the distinction between conflict and bullying, and it is also the scientific definition that has led to the set of evidence-based practices that are commonly known as the “positive school climate” approach to preventing bullying. The statutory definition of HIB does not distinguish “bullying” from “conflict,” nor does it define bullying as behavior that is “not conflict,” nor include the elements that distinguish bullying from conflict, i.e., power imbalance and one-sidedness.

### ***Examples of Incidents that Might Fit One Definition, but Not the Other***

As noted above, the three most consequential differences between the scientific and the statutory definitions of bullying are: 1) the scientific definition includes a “power imbalance” criterion, and 2) a one-sidedness criterion, both of which underlie the distinction made in scientific research on bullying between “conflict” and “bullying” and 3) the statutory definition includes the “motivated by” a “distinguishing characteristic” criterion.

Incidents that fit one or two, but not all three, of these three criteria, might be “bullying” but not “HIB,” or might be “HIB,” but not “bullying.” For example:

*Example #1: Example of An Incident that Is Bullying but Probably Does Not Meet Criteria for Statutory HIB:* An incident in which a student repeatedly harasses a peer, e.g., putting the peer down, encouraging other students to avoid that peer or participate in the harassment, etc., is clearly engaging in bullying behavior by any reasonable application of the scientific definition of “bullying,”<sup>7</sup> but if that aggressor has not chosen to victimize that particular peer because of any discoverable personal characteristic of the victim, then the incident might not constitute statutory HIB, and could probably be reasonably “found” to be “not HIB.”

*Example #2: Example of An Incident that Is Likely to Be Statutory HIB but Is Not Bullying under the Scientific Definition:* An incident in which a student uses language that derogates another student or a group of students, but who is innocently unaware of the fact that the language is

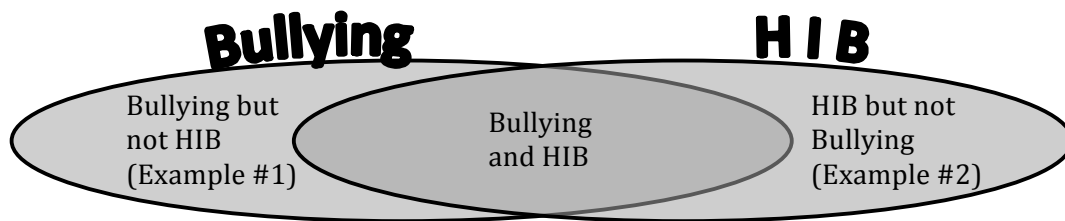
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<sup>7</sup> The apparent power imbalance in this situation is the fact that multiple students are targeting a single student (power of numbers), but there is also a more subtle power imbalance that probably existed even before the primary aggressor encouraged the engagement of other students. As noted in Part III of this paper, a power imbalance can arise within a situation in which repeated harassment damages the self-esteem of the target, thereby creating a psychological power imbalance even where no power imbalance originally existed. This is one reason why, in the scientific definition, “repetition” is sometimes included in the definition; the fact of repetition can allow the inference of an emergent power imbalance, in addition to the fact that, once a bully finds a satisfying victim, the dynamics of bullying are such that the bully will tend to target that same individual again. Like the criterion “power imbalance,” the criterion of “repetition,” is better described as a sensitizing insight, or prototypical characteristic of bullying, rather than as a definitional criterion (see Part III of this paper).

derogatory, might be HIB, but is not bullying. The student using the language might be a student with a disability whose understanding of the effect of their words is limited because of their disability, or it might be a regular education student who is very young, or who has not been educated about the types of comments that, for historical reasons, might be derogatory to various groups of people. If the student is informed that their words are hurtful, and the student regrets the hurt they caused and stops the behavior, this act is not the type of behavior that scientists study as “bullying.” However, this incident might meet the criteria for statutory HIB because the statute does not require intent or knowledge of harm on the part of the offender.

“Evidence-based practices” for preventing and responding to bullying are designed to address the behaviors that fit the scientific definition of bullying, whereas statutory reporting and investigation requirements pertain to behaviors that fit the statutory definition of bullying. These are two different—overlapping, but not identical—sets of behaviors. Like the two examples above, there are many behaviors or types of incidents that fit one definition, but not the other. In other words, there are many incidents that are *not* bullying and are therefore *not* the types of behaviors that evidence-based practices<sup>8</sup> are meant to address, even though they *are* statutory HIB. There are also many incidents that are *not* statutory HIB, but which *are* bullying, and should be responded to using evidence-based practices for responding to bullying, even though HIB reporting and investigation procedures might not apply.

In the examples above, the first incident should be *responded to* as bullying, whereas the second should be *reported and investigated* as HIB. Specifically, conflict resolution strategies and mediation should not be used in the first instance, and the child involved in the second instance should be treated as one who made a social mistake and needs guidance, not as one who “bullied” a peer, even though the incident might be reported as statutory HIB.



### ***Resulting Confusion***

Providers who train educators in “evidence-based practices” for bullying prevention generally use a definition that resembles the CDC definition of bullying. This means that, within the context of training on preventing, identifying and responding to bullying using evidence-based practices, educators are being exposed to a definition of bullying that reflects the scientific definition of bullying, including the power imbalance and one-sided criteria and not including the distinguishing characteristic criterion.

This definition of bullying is consistent with the strategies for preventing, identifying, and responding to bullying that that same provider will teach, i.e., strategies for creating a positive school climate, strategies for determining whether a student is being bullied, and strategies for effectively stopping the bullying behavior. Educators trained by this provider are learning to

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<sup>8</sup> The term “best practices” is often used to refer to strategies or practices that have been shown by research to be more likely to be effective than other strategies or practices, or in comparison to non-action. Such practices are more accurately referred to as “evidence-based practices.” The usage “best practices” should not be taken to indicate that these practices are necessarily *better* than *all* other practices, i.e., the *best*, only that there is research evidence to suggest that they are better than some others, or better than no action at all. The term “best practices” is in common usage, but the more accurate term “evidence-based practices” is used here.

prevent, identify, and respond to the class of behaviors that have been defined scientifically as “bullying.”

Armed with this understanding, and the knowledge that they are required to report “bullying,” school personnel apply their new evidence-based insights as they attempt to determine which incidents to report. However, the scientific definition is different from the statutory definition of bullying, which can lead to errors in judgment regarding which incidents should be reported as potential HIB, and, later, confusion when incidents that are clearly “bullying” according to the evidence-based definition, are determined not to be HIB by the ABS. For example, based on their training in evidence-based practices and the scientific definition of bullying, educators will correctly perceive behavior in which a more powerful child taunts and harasses a less powerful child repeatedly as “bullying,” even if that behavior is not motivated by any personal characteristic of the targeted child. They will also correctly perceive the innocent mistake of a second grader, who uses an offensive term heard on TV without realizing the offensive nature of the term, as an innocent mistake and not as bullying. However, when they report the first, but not the second incident to an administrator as “bullying,” they might be surprised to find out that the first incident is not “HIB” because it did not involve a distinguishing characteristic, whereas the second incident might be HIB because the child’s intent is not a statutory criterion. This leads to unnecessary paperwork in the first instance, and to a regulatory violation with potential consequences for liability in the second instance.

Conversely, personnel who have been trained in the statutory definition, e.g., through a presentation by their school attorney or administrator based on legal advice, would correctly report the second, but not the first, incident to their administrator. However, they might tell the taunted child that “you are not being bullied” or might respond to the taunting with responses like mediation or conflict resolution, which are appropriate for conflict but not for behaviors that fit the scientific definition of bullying. Such responses would be consistent with the law, but contrary to evidence-based practices in bullying response and prevention, and could be quite damaging to the child and ineffective at ending the torment.

Furthermore, the parents of the targeted child in the first instance might be horrified—and angry enough to consult an attorney—when they receive a letter from the school informing them of the “finding” that the incident in which their child was victimized was not “harassment, intimidation, or bullying.” That is, unless a school official has previously explained to them the difference between “bullying” and statutory HIB, and that school personnel understand that their child was victimized, and will be protected, despite the finding of “not HIB.”

Ideally, staff members should receive training in both effective practices and statutory compliance, and in fact the ABR requires both 1) two hours of professional development training on “harassment, intimidation, or bullying prevention” in each PD period for teachers, as well as 2) “ongoing staff training... in fulfilling the reporting requirements” of the ABR. However, the term “bullying” is used for both topics while the distinction between the statutory and the scientific definitions is rarely explained clearly. This leaves staff members with the impression that statutory compliance covers the same set of student behaviors that are addressed by effective practices, and the illusion that they have received a consistent message about “bullying” . . . that is, until they attempt to apply the guidance they have been given, and discover that they often have trouble answering the most basic question, i.e., “is it bullying?” Without a clear answer to that question, the guidance they have received fails to guide them toward the proper course of action, and they may be unsure how to respond or whether to report.

When presenters make an effort to *integrate* compliance guidance with guidance on effective practices, at best, what passes for “integration” might consist of pointing out that the law

requires the promotion of a positive school climate, and “evidence-based practices” are designed to produce a positive climate. Or, there might be a reference to the “spirit” of the law, which is to protect children from bullying, so “evidence-based practices” should be used to comply with the “spirit” of the law. This is an incomplete integration of the two messages because the fact that these evidence-based practices are designed to prevent scientifically-defined bullying, *not HIB*, whereas the reporting and investigation requirements pertain to *HIB*, not scientifically-defined bullying, is glossed over, leaving school personnel still unaware that the two parts of their guidance are based on different definitions of bullying, with the same resulting confusion when they attempt to apply their knowledge to actual incidents.

A metaphor would be a surgeon who treats a deep cut by sewing the skin together over the top, without cleaning the wound or stitching the deeper layers of flesh together before stitching the surface. Underlying fissures will eventually cause surface disruption. Unless the distinction between the definitions is clear, school personnel will continue to be confused by the question “is it bullying?” when they are confronted with any incident that fits one definition but not the other. Each situation is unique, and student behavior often does not fit neatly into categories even when the categories themselves *are* clearly defined; the fact that we have two different definitions for “bullying,” each of which is frequently misunderstood, subject to interpretation, and confounded with the other, multiplies the potential for confusion and misjudgment.

As a result of the confusion caused by the fact that the statutory definition differs from the scientific definition, various efforts—some purposeful, and some not—have been made to reconcile the two definitions with each other. The assumption is that the confusion will be reduced if the differences between the definitions are eliminated. In one approach, it has been suggested that the statutory definition be amended to include “power imbalance” as a criterion. A second approach is exemplified by the NJ DOE guidance; the 2011 guidance document presents the statutory definition of HIB on page 2, and on the next page, defines bullying as distinct from conflict, thereby giving the appearance that the distinction between conflict and bullying is entirely consistent with, and follows from, the statutory definition of HIB. A recent OAL decision incorporated this usage, finding that an incident was not bullying in part because it was “motivated by the ongoing conflict between the students.” Finally, a third approach has been developed by school personnel, some attorneys, and the ABTF, in which the “other distinguishing characteristic” clause is interpreted purposefully in a way that results in greater alignment between the scientific definition of bullying and the statutory definition of HIB.

The various efforts that are currently being made to reconcile the statutory definition with the scientific definition have very different implications and, in some cases, implications that could undercut the intent of the law to protect youth. Next, in Part III of this paper, I will discuss the role of “power imbalance” in the scientific definition of bullying, because the purpose of this element of the definition needs to be further understood before the question of the advisability and impact of adding this element to the statutory definition, through legislative amendment or re-interpretation of the law, can be discussed. After a deeper look at what the power imbalance element in the scientific definition of bullying actually means, and at some of the concerns raised by behaviorists regarding the application of the power imbalance criterion to practical situations, in Part IV the effect that each of the three approaches would have on the impact of the law and its usefulness in providing protection for bullied students will be examined.

**Part III:**  
**The Role of “Power Imbalance” in the Scientific Definition of “Bullying:”**  
**Toward a More Sophisticated Understanding of the Conflict vs. Bullying Distinction**

**True Statements and Sensitizing Insights vs. Definitional Criteria**

As noted above, the purpose of scientific definition is to define a realm of behavior for the purpose of studying that behavior. Often, in everyday language, much of what passes for “definitions” actually consists of “true statements” and “sensitizing insights.” “True statements” help characterize the behavior and apply the definition to practical situations, and “sensitizing insights” help us understand a behavior including how to encourage or discourage it (they sensitize us, or make us aware, of the dynamics of the behavior), whereas definitional “criteria” provide a basis for determining whether or not a particular incident is an example of the behavior.

In the field of bullying, many of the elements that are commonly thought to be part of the “definition” of bullying would be more usefully understood as “true statements” about bullying, or as “sensitizing insights” about bullying. Before we consider including elements from the scientific definition of bullying in the statutory definition of HIB, it is important to understand which elements are, in fact, criteria, and which are more properly understood as true statements (see the boxed insert “What is a Dog?”) or sensitizing insights.

**What is a Dog?**

The scientific definition of “dog” is “a ... domestic mammal closely related to the gray wolf,”\* a member of the genus *canis*, the species *lupus*, and the subspecies *familiaris*. However, if a young child asked “what is a dog?” most adults would not respond, “it’s a domestic mammal.” This definition would not help the child understand what a dog is. Instead, most adults would use a series of true statements to explain to the child what a dog is, e.g., “dogs are animals with four legs and fur. They are different from cats; cats usually have a round head and small pointed ears, but dogs usually have a long nose and long ears. Dogs bark; cats meow.” Most of this explanation consists of true statements, not definitional criteria. For example, there are hairless dogs (e.g., the Xoloitzcuintle, or Mexican hairless dog), there are dogs whose heads are round and whose snouts are not long (e.g., bulldogs), and if a dog lost a leg it would not cease to be a dog. In the CDC “uniform definition” of bullying, the last sentence, “Bullying may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm” is more accurately understood as a true statement; the wording itself (*may* inflict) does not establish this as a definitional criterion of “bullying.” Yes, bullying may inflict harm, but the wording of this uniform definition does *not* define “bullying” as behavior that *does* inflict harm. In other words, a repeated, unwanted, aggressive behavior can be bullying under the CDC definition even if the particular child targeted in the given instance sustains no observable or admitted injury from the behavior.

\*Taken, in part, from the free online Merriam-Webster dictionary

An analogy to another problematic social behavior—rape—can help illustrate the distinction between a sensitizing insight and a definitional criterion. Prior to the 1970s, rape was seen primarily as an expression of male sexual appetite, and attitudes like, “a man can’t rape his wife,” and “it wouldn’t be rape if she would relax and enjoy it,” were not rare. Transcripts of rape trials are replete with examples of judicial understandings of rape as a behavior motivated by sexual desire. To shift public and legal thinking about rape, feminists began arguing that “rape is a crime of violence, not a crime of sex,” and that the cause of rape was male dominance over women, not male sexual appetite. These are sensitizing insights, not definitional criteria. The point was not to define “rape” as an act that had nothing to do with sexual behavior, but

rather to point out the deeper social dynamics involved in rape, in an effort to shift public thinking and understanding about the causes of rape and the consequences that should fall on men who committed the act. In other words, the point was to sensitize the public (and judiciary) to the fact that the dynamics involved in rape involved more than simple male sexual appetite.

To take this example to its ridiculous conclusion, if rape laws had been revised to define rape as an act of “violence” and not “sexual desire,” then an offender could defend himself against a charge of rape by claiming that he was motivated by sexual appetite, in other words, that he was sexually attracted to, not angry with, the woman he raped. Whereas the insight that rape is an act of violence, not sex, was *progressive* (it advanced our understanding of rape dynamics), adding this element to the statutory definition of rape would have had a *regressive*, not a progressive, impact. The intent of the *insight* that rape is an act of violence, not sex, was to raise awareness of the dynamics of rape, not to make it harder to prove that rape had occurred.

### **Power Imbalance is More Properly Understood as a “Sensitizing Insight” than as A Definitional Criterion, Especially when Applied to Real Life Situations.**

The “power differential” element of the scientific definition of “bullying” is more properly understood as a “sensitizing insight” rather than as a “definitional criterion.” Describing bullying as a behavior that involves a power differential directs our attention to the *dynamics* of bullying, and helps us understand why bullying can be so harmful. If we do not understand bullying as a behavior that involves a power dynamic, we are likely to respond to bullying with comments like, “if he didn’t like it, why didn’t he just leave?” “use humor,” and “just ignore it.” Such comments assume that the target can ignore the behavior, has the social skills to respond with humor, or can walk away; the reason this might not be possible for a target is *because* the target lacks power in the situation; how does a socially unskilled youth respond “with humor” to taunts from a verbally skilled, popular peer? How does a 40 pound student “walk away” when kicked and punched by an 80 pound student? How does a teenager “ignore” a web page on which peers in her school degrade her? These statements sound familiar, don’t they? They are exactly the kinds of responses to bullying that researchers in the 1970s—when Olweus first popularized the concept of bullying as a behavior involving a power dynamic—were attempting to dislodge. Today, these responses to bullying are seen, among most in the scientific and educational communities, as outmoded and ignorant, but this shift in public thinking was accomplished by sensitizing insights about bullying as behavior involving a power dynamic. Once we understand that the target is being victimized by a more powerful peer, we can understand why these responses to bullying are not helpful, and why it is important for us, as adults, to step in and address the bullying ourselves. Very similar shifts in thinking have occurred in our society with regard to other social issues, notably including rape and domestic violence, and for very similar reasons.

In other words, when we see behavior that looks like bullying—one child tormenting another--the “power differential” element in the scientific definition of bullying should encourage us to realize that there is probably a power imbalance operating, even if it is not obvious at first glance. Whether or not we can identify the specific power imbalance that is operating in a given situation, therefore, we know that we should not respond to the situation with strategies like conflict resolution and mediation, which can be damaging if a power differential exists. We would understand, for example, that a child who is being bullied probably *feels* powerless so we should seek strategies that will *empower* that child. Power differentials can be actual or perceived, and they might be experienced by a child even if an adult cannot recognize them. Our ability to respond appropriately to a child who is being bullied should not depend on an adult’s ability to recognize whatever power differential a child might be experiencing. For these reasons, “power differential” is best seen as a sensitizing concept, not a definitional criterion. In

other words, the “power differential” element should not be used as a “litmus test;” if we see one child tormenting another, but we don’t see an obvious power differential, we should not therefore declare that the tormenting is “not bullying” because there’s “no power differential;” quite the opposite. When we see bullying, we should *infer* that there *is* a power differential operating, and respond accordingly. Understanding that bullying involves power dynamics should lead us to be *more* aware and sensitive to the need for adult intervention; it should not be a rationale for *failing* to respond appropriately.<sup>9</sup>

An example of the use of the “power imbalance” element as a sensitizing insight rather than as a definitional criterion is found in the National Educational Association’s Bullying Study,<sup>10</sup> which was included among the conference materials at the First White House Conference on Bullying. In this study, “bullying was defined on the survey as ‘...intentional and repeated aggressive acts that can be physical—such as hitting—verbal—such as threats, or name calling—or relational, such as spreading rumors, or influencing social relationships. *Bullying typically occurs in situations in which there is a power or status difference*” (emphasis added).

### What is a Power Imbalance?

The power imbalance underlying the dynamics in a bullying situation can be actual or perceived, and it can be visible or invisible. A situation in which a larger, more aggressive child pushes a smaller, physically weaker child to the ground involves a power imbalance that is easy to detect because it is actual and visible. A *perceived* or *invisible* power imbalance is more difficult to observe, but invokes the same bullying dynamics. Power imbalances can stem from the situation at hand, or they can stem from a larger social context, and they can shift from situation to situation. Moreover, a power imbalance can develop, or be created by, a bullying situation.

A *perceived* power imbalance, in which the targeted student feels less powerful than the aggressor, is as real in its impact as an actual power imbalance that can be identified by an observer. This is because the harm caused by bullying by the power imbalance is harm caused by the target’s *experience* of powerlessness and victimization; a perceived power imbalance is *real* in its consequences. A perceived power imbalance might not be readily apparent to an observer, e.g., an adult who witnesses an incident and must determine whether the incident is bullying. If the power imbalance is not apparent, then the adult observer will not know that the

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<sup>9</sup> One might argue that scientists “themselves” “claim” that power imbalance *is* a definitional criterion, and that by including it in the “uniform definition” of bullying, the CDC and US DOE have codified it as a *definitional criterion* of bullying, and not as a sensitizing insight. However, one must keep in mind that the title of the report in which the CDC and US DOE announce this uniform definition is *Bullying Surveillance among Youths: Uniform Definitions for Public Health and Recommended Data Elements*. In other words, the purpose of the uniform definition is to provide a common standard for the *assessment* of bullying for public health research purposes. The federal government has not announced a “federal definition of bullying;” rather, certain federal agencies have announced a standard for the *measurement* of bullying in public health research. “Data elements” are pieces of information to be collected in research, and each section of the *Bullying Surveillance among Youths* report further illustrates that the purpose of this definition is to collect data for research purposes, e.g., Section 3 is entitled “Considerations When Gathering Data on Bullying Using the Uniform Definition.” “Surveillance” here means data collection, for example, surveys used to measure and monitor the prevalence of bullying. This is a specific research-related purpose; for practical and other purposes such as bullying prevention and incident response, the “power imbalance” element in the scientific definition of bullying is better understood, for the reasons outlined in the text, as a sensitizing insight, and not as a threshold criterion. See the boxed insert “Scientific Prototypes vs. Application to the Real World” for further explanation.

<sup>10</sup> Bradshaw, Waasdorp, O’Brennan, and Gulemetova (2011) *Findings from the National Education Association’s Nationwide Study of Bullying: Teachers’ and Education Support Professionals’ Perspectives on Bullying and Prevention*. Report prepared for the National Educational Association, Washington, DC.

power imbalance exists unless the target is able and willing to inform the adult about the perceived power imbalance.

There are many reasons that the target of a bullying incident might not be able and willing to point out a perceived power imbalance to an adult. First, students who are young or disabled might not recognize that the “bad” feelings they are having are feelings of powerlessness, and they might not be able to express these feelings using words that the adult will understand as an indication of a perceived power imbalance. For example, if a kindergartener merely says she feels that another student is “always mean” to me, the adult might not recognize that what the student might be feeling is victimization, i.e., powerlessness. Second, students of any age, even when they are able to recognize and verbalize their own feelings of powerlessness, might not realize the importance of this aspect of the interaction in requiring the adult to respond; how many students have read the report *Bullying Surveillance among Youths*? How many students have read the NJ DOE guidance document, or attended PD trainings along with their teachers, and would understand the importance of mentioning their feelings of powerlessness if they wanted school personnel to recognize their experience as one of bullying, and not conflict?

Third, the reason that bullying merits adult intervention is *because* the targeted student is disempowered by the interaction; it would, in fact, be in the cases in which a student feels most disempowered already by the bullying interaction, or in which the targeted student has experienced the greatest loss of self-esteem, that they would be least inclined to advocate for themselves by pointing out the power imbalance to an adult. Thus, if the adult fails to recognize the power imbalance, then those students who are most in need of adult assistance will be exactly those students who are least likely to get it because they are the most disempowered and disillusioned, and therefore, the least likely to self-advocate. Fourth, most students would understandably be hesitant to report, or even admit, feelings of powerlessness. Feeling powerless is unpleasant, and acknowledging powerlessness is, itself, disempowering. In the world of bullying, being powerless is to invite further victimization. Requiring a bullied student to admit to their own feelings of powerlessness in order to obtain protection from an aggressor is tantamount to requiring students to re-victimize and dis-empower themselves in order to receive protection from others. The goal of anti-bullying programming and procedures should not be to exacerbate a power imbalance than already exists, but rather to protect and empower the targets, eliminating the power imbalance that fuels the bullying.

Likewise, bullying based on an *invisible* power imbalance can be as, if not more, harmful than bullying based on a visible power imbalance, but might escape the notice of an adult observer. Visible power imbalances would include physical size and strength, number of aggressors vs number of targets, age and grade level, and visible disabilities. Depending on the observer’s ability to “see” (i.e., perceive and understand), visible power imbalances might also include social class differences, sexual orientation status, and other disparities based on enumerated classifications. Invisible power imbalances—again, depending on the observer’s ability to see—might include social standing, number of friends, hidden disabilities, and psychological resilience. Bullying based on invisible power imbalances (such as social status or hidden disabilities) can often be more insidious and therefore more harmful, precisely because they are less likely to be recognized as such and therefore less likely to be responded to promptly and effectively. Most playground aides would respond if a larger child punched a smaller child to the ground, but verbal teasing is less likely to receive such an immediate and certain response. As with perceived power imbalances, invisible power imbalances might be missed by an adult, which would require the child to be able and willing to inform the adult of the power imbalance.

Power imbalances can stem from the situation at hand, they can stem from a larger social context, and they can shift from situation to situation. All of these complexities make it very

difficult for an observer to correctly determine whether or not a power imbalance is operating in a given situation. With regard to the situation at hand, the balance of power can depend on factors such as how many friends each individual involved has in the vicinity, whether either student is in an area of the school that is familiar and “owned” territory (seventh graders often report that the place they fear in school is the “eighth grade hallway”), or whether one student was able to surprise or startle the other.

With regard to the larger social context, the balance of power in an interaction might depend on the students’ relationship with each other outside school, or on factors such as religious background or social class, that students bring from the outside society with them, into school. For example, a racist remark in school carries the weight it does partly because of a history of racial discrimination that took place outside school; disparities in the larger society underlie dynamics that occur in school. A remark about a bad haircut, an ugly dress, or a non-smart flip phone could stem from social class differences in which one student is unable to afford the nice possessions that others value; these social class differences exist outside the school, but are reflected within the school. Thus, a power imbalance between students might be rooted not in the school-based interaction between the students, but instead in the disparities that these students experience outside school.

The balance of power can also shift from situation to situation. For example, online, the student who has greater facility with electronic communication has greater power, whereas in the playground the student with stronger muscles might have greater power. In one class, one student might have many friends, but in another class that same student might be isolated and vulnerable.

Finally, power imbalances can arise from within the bullying context, because one-sided aggressive or hurtful behavior can create a power differential. Over time, the student who is repeatedly insulted or excluded begins to feel “less than” his tormentor (a psychological power differential) because his or her self-esteem has been impacted. The impact on self-esteem can also occur as a result of a single traumatic incident. Also, others might join in, creating a social power differential. Thus, even in the hypothetical case in which the students began as equals, the very fact of one-sided hurtful behavior produces a power imbalance as a result of the bullying dynamic.<sup>11</sup>

Given all these various forms and sources of power imbalance, it is, for practical purposes, impossible for an observer to correctly identify whether a power imbalance is operating in a given interaction or not. It would be a rare situation indeed, in which an aware and sympathetic observer would *not* be able to identify a power imbalance of some kind. At the same time, the situations in which an observer who was not aware or motivated to recognize existing power imbalances could *reasonably fail* to recognize a power imbalance are not rare at all.

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<sup>11</sup> One could, of course, argue that if there had not been an initial power differential, then the interaction would not have been one-sided in the first place, i.e., it would have been mutual conflict, instead. For example, one reason that a targeted student might not respond, thereby allowing the aggression to be one-sided, might be a psychological tendency to internalize instead of externalize, or a lower threshold for assertiveness than the aggressor. This initial difference between the aggressor and the target could be seen as an initial power imbalance, which allowed the interaction to be one-sided in the first place, and which was then compounded by the ongoing, one-sided, hurtful behavior of the aggressor. However, this argument simply returns us to the original point, i.e., that bullying involves a power dynamic regardless of whether observers are able to see it.

## **Scientific Objections to the Inclusion of “Power Imbalance” as A Defining Element in “Bullying,” and/or to the Distinction between Conflict and Bullying**

Not all professionals with knowledge of youth psychology and behavior agree that it is appropriate or useful to include “power imbalance” as a criterion in the definition of bullying, or that conflict and bullying can be distinguished from each other in the manner that has come to dominate public thinking on the matter.

*Power Imbalance is an Impossible Criterion to Apply.* Stan Davis, writing for the Stop Bullying Now” website, commented on the use of distinctions like “power imbalance” to define bullying. He wrote that “I, along with some others in this field, have changed my thinking about the usefulness, and feasibility of making distinctions” on the basis of criteria like power differentials because “It is quite difficult to define or determine power differentials, since social and physical power takes many different forms and is often expressed in subtle ways.”

The variety and subtleties of power imbalances have been described above, in this paper. Given that the power imbalance that underlies a bullying dynamic can be perceived as well as actual, invisible as well as visible, and that it can stem from circumstances outside the incident itself, or arise from within the incident itself, the types of power imbalances are too varied and too difficult to detect for “power imbalance” to be a meaningful criterion to distinguish bullying from non-bullying in the real world. It is more meaningful to identify a situation as bullying, and then seek to understand the situation as one that probably involves a power imbalance, than to look for a power imbalance in order to determine if a situation is bullying. As noted in Part I of this paper, criteria can be useful for scientific purposes because researchers can study prototypical behaviors, even though these same criteria are inappropriate or difficult to apply in a real world in which most behavior is not prototypical. In the case of bullying, as explained in Part III, scientists can study incidents in which a power imbalance is clear, but in the real world, students are impacted by power imbalances even when these imbalances are perceived, subtle, or otherwise difficult for adults to recognize.

*Power Imbalance is an Inappropriate Criterion because the Consequences of Using This Criterion are Inappropriate.* Stan Davis continues, saying “It is difficult and often unproductive for schools to allow low-status youth to do things that would be considered bullying if high-status youth did them, or to allow students to carry out identical actions toward some of their peers but not toward others.” Defining bullying as involving a power differential creates different standards of behavior for different students, in effect turning bullying into a “status” offense. As such, it could easily lead to a situation in which only certain students—those with more physical or social power in school—are corrected when they engage in hurtful behavior. Besides the inherent lack of fairness in this outcome, this would produce a society in which, as shifts in social status occur when students become adults—for example, those at the bottom of the social hierarchy in high school might end up in the managerial and professional positions as adults—those in power have not learned not to bully.

*Power Imbalance Is Not A Useful Criterion, Because All Interactions among Students, And between Students And Their Worlds, Involve Power Imbalances.* Andrew Yeager has pointed out that students’ “whole lives” involve power imbalances.<sup>12</sup> A great deal of youth subculture and interactions revolve around establishing or maintaining social distinctions, many of which are hierarchical. This has to do with the process of psychological development, especially during the adolescent years. Youth struggle with the tension between wanting to feel a sense of belonging, while also wanting to distinguish oneself and be recognized as an individual. Given that youth are

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<sup>12</sup> Personal communication. Andrew Yeager is President of the New Jersey Association of Student Assistance Professionals.

surrounded by power differentials, and experience them in virtually all of their interactions both with other youth and with adults, the existence of a power differential is not useful to distinguish one type of interaction from another.

*Conflict and Bullying are Not Mutually Exhaustive Categories of Human Behavior.* The elements that distinguish conflict from bullying are the power imbalance and the one-sidedness of the interaction that characterize bullying. These, however, are prototypical behavioral categories. As explained in Part I of this paper, researchers often choose to study prototypes for scientific purposes, but the real world is not prototypical, so definitions that work well for the purpose of research are often not easily applied, or are inappropriate, in the real world. (See the boxed insert, “Scientific Prototypes vs Application to the Real World” for an application of this point to research on bullying.) When the prototypical categories “bullying” and “conflict” are applied to actual student behavior, 1) it is often not possible to tell with certainty whether a situation is conflict, or bullying, and 2) some situations have elements of both conflict and bullying, or begin as one, but transform into the other.

Examples of situations that have elements of both conflict and bullying, for the purpose of illustration and demonstration that such situations exist, include: (a) a situation in which a friendship ended in mutual antagonism and hurtful words, but then one party moved on while the other continued to flame the fire and recruited friends to join in the harassment, (b) a situation in which, because of a sensory disability, a child is being bothered by another child who is not behaving in a manner that would irritate most non-disabled children, and who then responds to the irritation with inappropriate aggressive behavior, (c) A situation in which a child who is tormented by another becomes fed up and retaliates violently, starting a fight, (d) a situation in which both children feel intimidated by the other, each one not realizing that the other is also intimidated, (e) a situation in which a cultural difference caused one child to be offended by another when no offense was intended, and a fight began when the offended child accused the other of being racist.

Although we could establish a set of rules that would allow us to make a determination in each case regarding whether the situation involved bullying or not, the fact is that each case involves some elements of bullying, and some elements of conflict. The best way to approach each situation from a standpoint of effectiveness is not to force it into either the “bullying” or the “conflict” category, but to recognize the dynamics of both bullying and conflict within the situation, and, as a result of our understanding of both types of dynamics, arrive at a response to the situation that is appropriate given the mix of bullying and conflict that is occurring in each situation. No useful purpose is served by failing to recognize both dynamics, or by using prototypical criteria to declare that the situation is either bullying or conflict, and not the other.

The relevant point here is that “conflict” and “bullying” are not mutually exclusive categories into which all incidents fit clearly. Therefore, defining “bullying” as “not conflict,” or in contradistinction from “conflict,” would cause some situations that do contain elements of bullying to be classified as “conflict, not bullying,” with a resulting loss of effectiveness and potential harm to the students involved when adults choose responses that are appropriate for “conflict,” but not recommended for “bullying.”

*Power Imbalance is a Meaningless Criterion because, if Understood Properly, It Adds Nothing to the Definition.* If the existence of a power dynamic is a definitional criterion, and we fully understand the variety of different types of power imbalances that can be operating in a bullying situation, then what type of situation would *not* be bullying on the basis of this criterion alone? Such a situation would have to involve aggressive/hurtful behavior, committed by one party against another and not mutual, in which the two parties are exactly equal in status (social status, academic ability, economic status, size and musculature, etc). As noted above, Andrew Yeager

points out that students are surrounded by power imbalances. Two youths are very rarely exactly equal on all potential dimensions (exactly equal in height, athletic ability, number of friends, social skills), so the situation in which there would be *no* power differential would be very rare, if not entirely theoretical. Moreover, given the fact that hurtful behavior can create a power differential over time, the existence of a power imbalance in any situation involving repeated hurtful behavior among youth is virtually a foregone conclusion. Therefore, *looking* for a power imbalance, once we recognize that hurtful behavior is occurring, does not help us distinguish bullying behavior from non-bullying behavior; our failure to detect a power imbalance does not indicate that none exists, and does not provide a rational or useful basis for determining that a situation is “not bullying.” Therefore, *if “power imbalance” is properly understood*, adding it as a criterion to the definition of bullying does not alter the definition.

The “power imbalance” criterion would only allow some situations to be distinguished as “not bullying” if the observer did not fully understand the variety of different types of power imbalances that can be involved in bullying. In other words, the only function served by using “power imbalance” as a criterion, is to provide a rationale for those observers who are not sufficiently sensitive, aware, or concerned about bullying to be able to recognize it, or to identify it as such.

### Scientific Prototypes vs. Application to the Real World

As explained in Part I of this paper, when behavioral scientists study a behavior, in order to isolate and study the impact of the specific variables they are interested in, they choose examples of the behavior that are “prototypical.” That is, they choose to study behaviors that are “perfect” examples of the behavior they want to study. Human behavior is very complex, and most human behavior does not fit perfectly into one scientific category or another. For example, the prototypical bullying incident involves an objectively and observably more powerful aggressor, tormenting a less powerful target, repeatedly and unilaterally, with intent and a harmful outcome. This type of situation fits the scientific definition of “bullying” perfectly, and it is the perfect type of incident to study to generate scientific understanding of the causes, consequences, and effective remedies for bullying. However, most hurtful behavior among youth will not fit this definition perfectly or irrefutably; the power imbalance might be perceived and not actual, the intent of the aggressor might be unclear or the aggressor might claim they didn’t know their actions would be harmful, etc. The incident might resemble bullying in some respects, but not clearly fit the prototype in all respects, or we might not have enough information about the situation to know whether it fits the definition perfectly.

In real life, a situation does not have to be a prototypical example of the behavior studied in order for research on the prototypical example to shed light on the real life situation. If research on prototypes only gave us understanding of the prototype and could not be generalized to similar situations or quasi-prototypes, then we would have very little knowledge of human behavior at all. For example, if we could not generalize from prototypical examples, the only thing we could learn from studying the Holocaust would be how to prevent exactly another Holocaust, but this is not true; by studying the Holocaust, we can learn how to prevent many different types of hatred, injustice, and abuses of power. The more we understand about the dynamics of bullying, and about which factors encourage or discourage bullying, which characteristics of bullying are most likely to cause harm, and why certain responses are effective whereas others are not, the better able we are to analyze real life examples that are not prototypical, and understand what the likely causes, impact, and effective responses will be for those real life situations.

In other words, the fact that scientists choose prototypical examples of “bullying” which include a clear power differential—that is, the fact that some research scientists use the power differential as an operational criterion for research purposes--does not mean that when we apply this scientific definition to real life, we should apply our understanding of bullying only to those situations that fit the prototype. In practice, the power differential criterion should be used as a sensitizing insight, and we should use our understanding of bullying to respond appropriately to each potentially harmful incident between youths; we should not use the power imbalance criterion to eliminate incidents from the application of our understanding.

**Part IV:**  
**The Impact and Advisability of Three Different Strategies to Reconcile the Statutory  
Definition of HIB with the Scientific Definition of Bullying**

**Motivations behind Efforts to Reconcile Statutory Definitions with Scientific Definition**

As noted above, there have been at least three different strategies proposed or utilized in an effort to reconcile the statutory definition of “HIB” with the scientific definition of “bullying.” First, it has been proposed that “power imbalance” be added to the statutory definition of HIB through legislative amendment. Second, the guidance issued by the NJ DOE in 2011 provides the statutory definition of HIB (page 2), but then further defines bullying as distinct from “conflict” (page 3) as if this distinction were consistent with the statutory definition, thus confounding the two definitions with each other. This usage has been incorporated into the legal reasoning in at least one OAL Initial Decision, which was upheld by the Commissioner

Those who suggest or utilize these two strategies have the best interests of students in mind, believing that bringing the two definitions into line with each other will reduce confusion and create a law that is more consistent with the evidence-based practices that are designed to reduce bullying and protect children, thereby encouraging schools to use evidence-based practices and ultimately creating safer schools for children and providing greater protection for those who are bullied. For example, it is often argued that, because bullying “is” characterized by power imbalance, that this criterion should be included in the law, so that the law will, in fact, be a law about bullying, i.e., so that it will apply more accurately to those behaviors that are scientifically considered to be “bullying.”

In fact, however, adding the “power imbalance” criterion to the law would have the opposite impact, i.e., it would leave students more vulnerable and disempowered, and make it more difficult for bullied students to obtain effective action within their schools, and put more obstacles in their path if they seek remedies through a court system. Similarly, interpretations of the law that disregard the differences between the scientific and statutory definitions, and/or allow an incident to be determined to be “not bullying” because it is, instead, “conflict,” would exclude many students who are being truly bullied from the protections afforded by the ABR.

The third strategy involves the purposeful interpretation of the “other distinguishing characteristic” clause of the statutory definition to bring the statute into closer alignment with the scientific definition. One purposeful interpretation is to interpret the “other distinguishing characteristic” clause of the ABR broadly, to permit identification of a distinguishing characteristic in a wide range of situations that meet all other criteria for statutory HIB. Another, suggested by the Anti-Bullying Task Force, is to consider the existence of a power imbalance to be an indication that the behavior is motivated by a distinguishing characteristic, and that the power imbalance can be a “gateway” for the identification of the relevant distinguishing characteristic.

The purpose of Part IV of this paper is to outline the actual impact that each of these approaches to resolving definitional confusion would have on bullied students.

## Strategy #1: Add “Power Imbalance” As An Element in the Statutory Definition of HIB

Adding “power imbalance” to the statutory definition of HIB through legislative amendment would effectively add “power imbalance” as an additional standard to be met in determining whether an incident is an act of HIB or not.

Each required element in the statutory definition of bullying becomes a standard that would have to be met by an alleged HIB incident, before the procedural (reporting and investigation) requirements of the ABR would govern a school’s response to the incident. If it can reasonably be argued that an incident does not meet a necessary element of the statutory definition of HIB, then the protections afforded students by the HIB are denied to the students involved in the incident in question. Therefore, each element that is added to the statutory definition of bullying narrows the realm of behaviors that a school is required to respond to as HIB, restricts the range of situations in which students can expect or compel a school to provide protection, and raises the bar for “finding” HIB. If an added element effectively helps distinguish those incidents that should be responded to as bullying from those that should receive other responses, then adding the element serves the purpose of the law. However, if adding the element would have the effect of making it more difficult for students who are bullied to obtain effective responses from school officials, or would cause the mis-classification of bullying incidents as “not-HIB” or vice versa, then adding the element does not promote the purpose of the law and potentially leaves students more, rather than less, vulnerable.

Adding “power imbalance” to the statutory definition of HIB would not only narrow the impact of the ABR, making it more difficult to “find” HIB, but would do so even in cases of true bullying, and this effect might be greatest for those students who are in school districts in which they have already been least protected. In detail, the effects of adding “power imbalance” to the statutory definition, would include:

- *Increased difficulty of “finding” HIB, thus narrowing the situations in which ABR protections would apply, and making it more difficult for students to access these protections.* If “power imbalance” is added as an element to the statutory definition of HIB, then this becomes an element that a student would have to assert or an adult would have to observe, that the Anti-Bullying Specialist would have to recognize, and that would have to be documented during the investigation, in order for the incident to be deemed “HIB” and for the safeguards of the law to apply to the incident. Each element in the statutory definition of bullying is also an element that a plaintiff would have to prove in a court case that involved an allegation of bullying. Although the ABR itself does not provide students with a right to sue their schools if they experience bullying or are not protected from bullying by their schools, when cases involving bullying are brought to civil court or OAL review, the adequacy and reasonableness of the school’s response is likely to be judged in part by their compliance with ABR procedural requirements.
- *Adding power imbalance to the statutory definition of HIB makes bullied students dependent upon the ability and willingness of adults to recognize a power imbalance, and provides adults who are not willing and able to do so with a legitimate and reasonable basis for supporting a determination of “non-HIB” in cases that should be treated as bullying.* In the case of an actual and visible power imbalance, such as greater size or strength, a trained and responsible observer *should* recognize the power imbalance, and if an observer failed to recognize such a power imbalance, the “reasonable observer” standard is likely to lead to a determination that the observer erred if they failed to report the incident as potential HIB. However, if a power imbalance is invisible or perceived, it might be missed by an

observer who is not well-trained in the variety of power imbalances that might exist, sensitive to and aware of power imbalances based on race, class, disability, sexual orientation, etc., and possessed of an interest—either a personal ethical interest or a structural interest—in recognizing a power imbalance if one exists. An observer who is not well-trained, who does not feel a personal responsibility to protect students from bullying, who is not personally sympathetic to disparities based on race, class, etc., or who feels pressure to reduce paperwork and limit EVVRS reports, could easily—intentionally or unintentionally—fail to observe such a power imbalance and incorrectly identify a bullying situation that otherwise fits the statutory definition of HIB as “not-HIB.”

- *Would provide schools with loophole to avoid the requirements of the ABR, thus denying the protection of the ABR to students who need it, and gutting the impact of the ABR.* Given that the “reasonableness” of the observer is the standard already established by the ABR, as long as the observer’s determination that there is no power imbalance appears “reasonable” (which it likely would, in cases of invisible or perceived power imbalances), and the standard for appellate review is “arbitrary and capricious” because an administrative body acting within its authority is “entitled to a presumption of correctness,”<sup>13</sup> then an observer’s judgment that an incident is not HIB because it involves no power imbalance is unlikely to be challenged successfully. In other words, adding the “power imbalance” criterion to the statutory definition leaves bullied students at the mercy of adults’ ability and willingness to recognize the complex dynamics of a bullying situation. The ABR was necessary because schools exist in which the adults are not already aware of these dynamics; it would be in exactly these schools that the addition of “power imbalance” to the statutory definition of HIB would effectively provide adults with a legal rationale for continuing to ignore bullying.
- *If an adult does not recognize the power imbalance, a student would be in the position of having to demonstrate the existence of a power imbalance in order to compel a response under the ABR.* As noted above under the subheading “What Is A Power Imbalance?” students are not necessarily able and willing to inform an adult that a power imbalance is operating. There are many reasons that the target of a bullying incident might not be able and willing to point out a power imbalance to an adult; the child might be disabled or too young to self-reflect sufficiently or verbalize effectively, the youth might not mention the power imbalance because they might not be aware of the importance of that fact, the student might be too disempowered by the bullying situation to self-advocate, or the student might prefer to deny the feelings of powerlessness evoked by the power imbalance.
- *During Investigation, the ABS would have to document the power imbalance in order to affirm a case of HIB.* In other words, in addition to documenting what distinguishing characteristic was involved, and what potential harm to the student or disruption to the operation of the school had occurred as a result of the incident, the ABS would have to investigate and document the power imbalance involved in the situation. In other words, the ABS would have to identify the source of the target’s lack of power; would the ABS report that the target has “almost no friends” or “fewer friends than the aggressor”? Would the ABS document that the target “is poor, so her clothes are not as good as those of the aggressor’s”? Any investigation into the source of a power imbalance between the aggressor and the target implies that a perceived or actual weakness of the target will become a defining criterion for the incident, and that this weakness will have to be demonstrated and documented during the investigation.

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<sup>13</sup> Wording taken from OAL docket EDU 10826-12.

- *The fact that the target's weakness relative to the aggressor would be a point of investigation and documentation is disempowering and damaging to the target.* An investigation in which a target's lack of power would have to be discovered and documented borders on blaming the victim, focuses attention on the target's weakness, i.e., on the target as a *victim*, and effectively compels the ABS to produce documentation that is, at best, not flattering, to the target and at worst, downright insulting and disempowering. In other words, this would compel the ABS to produce and record evidence that is not flattering to the target. The production of this evidence would presumably come from interviews with the target, the offender, and witnesses, so although the documentation might remain confidential, the process of gathering this evidence is a process of demeaning the target and emphasizing the target's weaknesses. If the investigative report does later become evidence in an appeal, there is also the potential that this evidence will be revealed to other parties, as well. Furthermore, if the case does go to court, then in order to provide evidence of bullying, the target would have to, effectively, *prove their own powerlessness, weakness, or inadequacies*, in order to seek protection or remedy. It would be damaging enough for an ABS to seek out and document evidence that a target "has fewer friends" or is "less athletic" than the aggressor; imagine the damage caused if that student, or that student's parent, had to make these arguments on her or his own behalf, to a school official in the context of requesting protection from a peer, or in a court room if that school official is not convinced--what would this do psychologically to a youth who had already been bullied by a peer?
- *Disempowering and blaming the victim is contrary to evidence-based practices in addressing bullying.* The goal of effectively addressing bullying includes the empowerment and protection of, not the disempowerment and further insult to, the target. This, in fact, is the rationale behind the use of the word "target" instead of the word "victim." However, the ultimate effect of adding "power imbalance" to the statutory definition of HIB would be to compel youth to prove their own powerlessness, in effect, to disempower and demean themselves, in order to seek protection under the ABR. Although it might seem, on the surface, that bringing the statutory definition into line with the scientific definition would clear the way for greater use of evidence-based practices in bullying prevention, in fact, the effect would be the opposite.
- *Adding power imbalance to the statutory definition would partially codify into law the distinction between conflict and bullying, thus encouraging the legal interpretation that incidents that are determined to be conflict are, therefore, not HIB.* If "power imbalance" is added to the statutory definition of HIB, then, given that this is a criterion that distinguishes conflict from bullying in scientific explanations, this would provide a basis for distinguishing bullying from conflict in legal reasoning. In fact, even without adding "power imbalance" to the statutory definition of HIB, the argument that an incident that contains elements of conflict is, therefore, not HIB, has already been made in the *Pittsgrove* case which will be discussed below. In other words, adding "power imbalance" to the statutory definition of HIB would further encourage and provide a basis for the argument that if an incident is found to be conflict, then it is not therefore "bullying." The potential implications of this are discussed in the section on Strategy #2, which is the interpretation of the statute to incorporate the "conflict vs bullying" distinction.
- *Adding "power imbalance" as an element in the statutory definition, if the concept of power imbalance is properly understood, is redundant.* If it is understood that power dynamics

can be actual or perceived, visible or invisible, and can vary across situations, arise from larger contexts, and arise within situations, then adding “power dynamic” to the definition of HIB will not further distinguish incidents that should be classified as “bullying” from incidents that are not “bullying.” As Andrew Yeager points out, virtually all interactions among students involve power differentials so the non-existence of a power differential would not effectively distinguish any situations as non-bullying. Two youths are very rarely exactly equal on all potential dimensions (exactly equal in height, athletic ability, number of friends, social skills), and, given the fact that hurtful behavior can create a power differential over time, the existence of a power imbalance in any situation involving repeated hurtful behavior among youth is virtually a foregone conclusion. Therefore, *looking* for a power imbalance, once we recognize that hurtful behavior is occurring, does not help us distinguish bullying behavior from non-bullying behavior; our failure to detect a power imbalance does not indicate that none exists, and does not provide a rational or useful basis for determining that a situation is “not bullying.” Therefore, if “power imbalance” is properly understood, adding it as a criterion to the definition of bullying does not alter the definition. *However, unless every adult who walks into a school understands the power dynamics of bullying at this educated level, adding power imbalance as an independent and additional criterion will not enhance the definition of bullying; it will, in fact, restrict it.*

**Strategy #2: Issue guidance or develop legal reasoning in which the “conflict vs. bullying” distinction is conflated with or read into the statutory definition, thus confounding the two definitions instead of clarifying the differences between them.**

In the Guidance document issued by the NJ DOE in 2011, the Introduction provides an overview in which bullying is defined. The guidance document first provides a bulleted recitation of the statutory language in 18A:37-14 and then, on the next page (p.3), offers this explanation:

*Bullying vs. Conflict* – Bullying is not a phase young people must endure or outgrow. Bullying is *not a conflict* between students or among groups of students. *Conflict* is a *mutually* competitive or opposing action or engagement, including a disagreement, an argument or a fight which is a normal part of human development. *Bullying* is *one-sided*, where one or more students are *victims* of one or more person’s aggression, which is intended to physically or emotionally hurt the victim(s).

None of the criteria used in this passage to distinguish conflict from bullying are in the statutory definition of HIB, nor are they in the guidance document’s bulleted recitation of the statutory definition on the previous page. The law does not say that “mutuality” in an incident precludes a finding of HIB, or that “one-sidedness” is a criterion for finding HIB. The law does not use the word “victim,” and it refers to the reasonable expectation of harm, not to the actor’s “aggression” or to “intent” to hurt.

Both definitions given in the guidance document are good definitions, but there is no mention in the text of the fact that the statutory definition given on page 2 and the distinction of bullying from conflict on page 3 provide substantially different definitions of bullying. Instead, the distinction between bullying and conflict is provided immediately after, and with all the appearance of being consistent with and following from, the legal definition. Most of the rest of the guidance document provides an excellent review of evidence-based practices for preventing and responding to bullying, but nowhere in the document is the fact that the types of behaviors for which these evidence-based practices are designed is a different set of behaviors than the types of behaviors that must be reported and investigated as statutory HIB under the ABR.

The guidance, therefore, sends a very clear message that if a situation is conflict, that it is therefore not bullying, and that it is simultaneously not HIB. This is factually inaccurate, as the statutory definition does not distinguish conflict from bullying, and makes no reference to one-sidedness, power imbalance, mutuality, or any other concept that distinguishes conflict from bullying.

This message leaves school personnel, who are charged with utilizing effective strategies for creating a positive school climate, and with reporting statutory HIB, with a very unclear understanding of exactly what types of incidents they are supposed to report. The confounding of the two definitions might have been intentional if the distinction between the scientific and statutory definitions was clear to the authors of the document and they assumed that disregarding the differences between the two definitions would allow the law to more effectively protect students against bullying, or it might have been unintentional if the document were written without a clear understanding of the difference between the two definitions. It is understandable that individuals might have read the word “bullying” in the statute and took it as a reference to the type of behavior they already understood to be bullying, despite the existence of an explicitly different definition of “HIB” in the statute itself. Nevertheless, confounding the two definitions instead of acknowledging the differences between them, does not produce less confusion regarding the basic question, “is it bullying?”

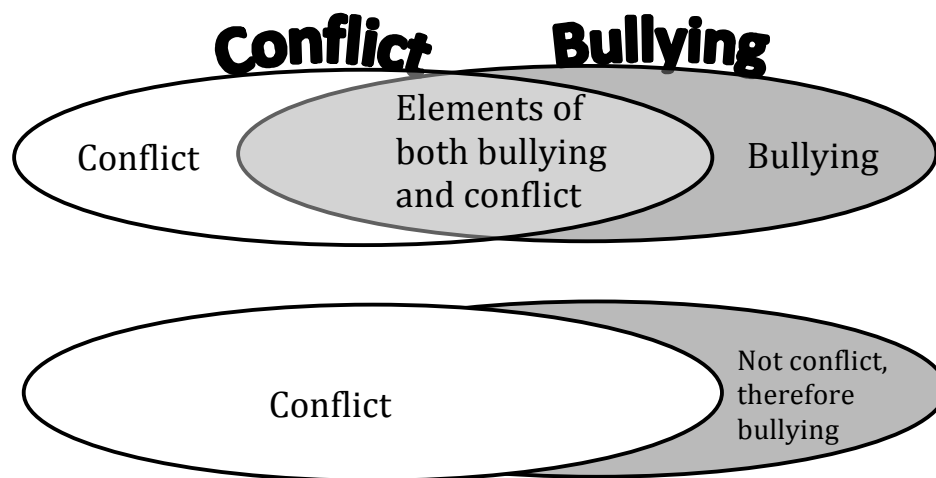
As detrimental as confusion among personnel might be, an even greater danger is that the “if it’s conflict, it’s not bullying” definition of bullying (hereafter, the “not-conflict definition”) will find its way into legal reasoning. In fact, this argument has already found its way into legal reasoning, in the *Pittsgrove* case, discussed below. If it becomes reasonable for school personnel, ABSs, and courts, to determine that an incident is “conflict” and therefore, not bullying, the results could be harmful to bullied students, for the following reasons.

As noted above under the subheading “Scientific Objections,” conflict and bullying are not mutually exclusive categories of behavior. When the definitions of conflict and bullying are applied to real life situations, 1) it is often not possible to tell with certainty whether a situation is conflict, or bullying, and 2) some situations have elements of both conflict and bullying, or begin as one, but transform into the other. Several examples of types of situations that contain elements of both conflict and bullying were given under this earlier subheading, but in summary, the types of situations that include elements of both conflict and bullying, or which cannot be easily classified as conflict or bullying for other reasons, include: 1) situations that involve victimization, but which are not one-sided, for example, situations in which bullying is followed by retaliation, thus creating the superficial appearance of conflict, 2) situations in which conflict is transformed into bullying, e.g., when one party to the conflict either continues the behavior after the other has stopped, or when one party gains a consistently upper hand in the interaction, 3) situations involving students who have legitimately different perceptions of the incident, e.g., when each student feels intimidated by the other (that is, in which each is *experiencing* bullying, so the “power imbalance” cuts both ways), or 4) in which bullying is experienced or perceived by one student whereas conflict is perceived by the other (which could arise particularly in situations in which one or both students have disabilities that impact social perceptions), and 5) situations involving cultural differences, leading to legitimately different perceptions of a situation.

Also, as noted above, in situations that cannot be clearly classified as either conflict or bullying, the best approach from a standpoint of effectiveness is to recognize the dynamics of both bullying and conflict within the situation. Then, by applying understanding of the dynamics of both bullying and conflict to the situation, choose a response to the situation that is responsive to the unique mix of bullying elements and conflict elements in the situation, thereby maximizing

effectiveness for each of the students involved. For example, if both children involved are *experiencing* bullying because both feel intimidated by the other, then both children need to receive support as bullying targets. If a situation that began as conflict has degenerated into a bullying situation, then the bullying behavior needs to be corrected first, and then, if residual conflict issues remain, the source of the original conflict can be addressed through conflict resolution or mediation. If a student was bullied, and then responded with retaliation, the original bullying should be dealt with as bullying, and there should also be an effort to provide the bullied student with alternatives to retaliation, and to make sure that adults are more vigilant in the future so as to prevent another situation in which a child feels so unprotected as to have to “take matters into their own hands.”

Nothing is gained, in terms of effectiveness and conformity to evidence-based practices, by forcing a situation that has elements of both conflict and bullying into only one of those categories, and then either following only the response procedures for bullying, or only the response procedures for conflict-not-bullying.



If the “not-conflict” definition of bullying is allowed to persist, then any situation that contains elements of both conflict and bullying could reasonably be classified as “conflict” and therefore as “not bullying” by an adult observer, by an ABS, by a school board, and by the OAL and the NJ DOE upon appeal. In other words, if the situation contained any characteristic of conflict, then the situation could “reasonably” be determined to be conflict and, therefore, it could be reasonably determined to be not bullying. Conversely, in order to demonstrate that a finding that an incident was not HIB was not reasonable, a student would have to demonstrate that the situation contained no elements of conflict. Given that the criteria distinguishing conflict from bullying are power imbalance and one-sidedness, the targeted student would have to demonstrate that the incident involved a power dynamic, and/or that it was entirely one-sided.

The issues that arise with regard to demonstrating that a power imbalance is present were discussed above, in relation to the suggestion that “power imbalance” be added explicitly to the statutory definition of HIB, and those arguments are relevant here as well, but will not be repeated here.

The requirement that a student be able to demonstrate that a situation is entirely one-sided raises similar issues, as it, too, represents another criterion that must be met in order for a school staff member to report an incident, for a bullied child to compel a school to respond effectively, or for a plaintiff to prove bullying. Thus, it narrows rather than expands the realm of situations in which a student could expect or compel their school to provide protection from peer aggression. Also, like the “power imbalance” element, demonstrating one-sidedness is

difficult, if not impossible, and furthermore the requirement that one would have to demonstrate one-sidedness produces outcomes that are contrary to evidence-based practices, as explained in the next two paragraphs.

Demonstrating one-sidedness is difficult because few interactions are entirely one-sided; if the student tried to verbally ask the aggressor to stop, then the interaction is not one-sided. One could say that a reasonable person would understand that saying “stop” does not qualify the interaction as conflict, but the fact is, that the criterion advanced in the distinction between conflict and bullying is that bullying is one-sided whereas conflict is mutual. There is no further specification of how much each person must engage in the interaction (what if the student said more than “stop” in an effort to end the harassment?) before the interaction becomes conflict and not bullying, nor what the quality of that engagement must be, because this was intended as a criterion in a *scientific* definition for research purposes, not a criterion for statutory purposes. In fact, “saying stop” is an “opposing action,” which the NJ DOE distinction between conflict and bullying, as put forth on page 3 of the NJ DOE guidance document, would characterize as an element of conflict, not bullying.

This might seem a ridiculous outcome. It is. Confounding the “not conflict” definition with the statutory definition provides an avenue by which a reasonable person could point out that the interaction in which one student said “stop” or otherwise opposed the efforts of a bully to intimidate, was a *mutual* interaction, and which is therefore not bullying because of its mutuality. In order for a student to be able to present a case in which an interaction was truly and unarguably one-sided, the student would have to completely ignore, and walk away from, the offender, without even saying “stop.” In most anti-bullying programs, the lessons for students advise students to first tell someone that their behavior is bothersome, in case the offender doesn’t realize the harm they are causing, and to give them a chance to stop. In other words, students are taught to be assertive and to not “be victims.” To require a student to give no response at all, or to be non-assertive and not stand up for themselves, or to allow bullying to continue for the purpose of being able to “prove” later that it was bullying, is contrary to effective practices in bullying prevention, and requires a student to disempower her/himself in order to ensure that their experience conforms to a distorted view of the statutory definition of HIB. This is contrary to evidence-based practices for bullying prevention, and contrary to the healthy psychological and social development of youth.

In fact, this outcome has already been realized in the legal reasoning in the *J.A.H. on behalf of Minor Child, C.H. vs. Pittsgrove* case. There have been other cases in which OAL Initial Decisions included the argument that an incident was conflict and therefore not bullying, but this argument is particularly well developed and central in the legal reasoning in the *Pittsgrove* case. In this case, a district had found C.H.’s behavior toward “Bobby” to be HIB, but found that “Bobby’s” behavior toward C.H. was not HIB. In the “Legal Discussion,” the ALJ quotes the statutory definition in Title 18A:37-14, and immediately thereafter notes that the NJ DOE guidance “distinguishes the characteristics of bullying as opposed to student conflicts,” and quotes the “conflict vs. bullying” paragraph from page 3 of the guidance document. The ALJ then notes that the factual record “confirms that there was an ongoing conflict between these students” and that the events between the students “were not ‘motivated either by any actual or perceived characteristic, such as race, color....’” The finding that the incidents were not motivated by an actual or perceived characteristic would presumably be sufficient to determine that the incident was not HIB,<sup>14</sup> but the weight of the reasoning in the Legal Discussion is based on the “conflict vs. bullying” distinction,

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<sup>14</sup> A more expansive interpretation of the “other distinguishing characteristic” clause, such as suggested in the 2014 report of the ABTF, might have permitted the identification of a distinguishing characteristic in this situation. Although such an interpretation should, arguably, have led to a different decision in this case, this is incidental to the point being made here in the text.

not on the absence of a distinguishing characteristic. Points in the argument include, for example, “this prank was motivated by the ongoing conflict between the students,” reference to a teacher’s comment that “both boys are regularly quarreling in my class.”

The ALJ, noting that “an agency decision may be overturned if the determination violates the legislative policies expressed or implied in the act governing the agency,” concluded that the district erred in “sustaining the bullying charge only against C.H.” (and not also against Bobby), because in doing so, the district did “not address” the fact there was an “ongoing and unresolved student conflict between C.H. and Bobby.” In other words, the district’s decision was in error because it did not take into account the history of ongoing conflict (not because it failed to find a distinguishing characteristic).

The ALJ notes that a teacher perceives “C.H. as the stronger and more dominate actor” who “does at times intentionally provoke and antagonize Bobby.” Summarizing, the ALJ commented that “there was an element of ‘mutuality’ even if C.H. was the more dominate actor,” thus citing two criteria that are not explicit in the statute—mutuality and power imbalance. The “mutuality” of the situation is an element of “conflict,” whereas the fact that one of the students was the “more dominate actor” is an element of “bullying.” In other words, according to the evidence included in the Decision, this is exactly the type of case discussed earlier in this paper, i.e., a case that includes elements of both conflict and bullying. If the “not conflict” definition of bullying is permitted as a legal argument, then the danger is that such cases will be directed to the “conflict” category, thus denying the protections of the ABR, and this is exactly the outcome in *Pittsgrove*. In this case, the school district had determined C.H.’s behavior to be HIB and the OAL reversed. Although the fact that the ALJ found that neither child’s actions were motivated by a “distinguishing characteristic” could have probably also led to a finding that the district’s decision to sustain HIB charges against one child but not the other was improper, the ALJ’s conclusion was based heavily on the “conflict, not bullying” reasoning, with the weight given to the evidence of conflict (“mutuality”) over the evidence of bullying (“dominate actor”).

In the conclusion, the ALJ makes seven references to the “bullying vs. conflict” distinction, no reference to the lack of a “motivating characteristic,” and one reference to statutory wording pertaining to the severity of the behavior, suggesting that the weight of the reasoning rested on the distinction between bullying and conflict, and, furthermore, on the evidence that suggested conflict over the evidence that suggested bullying.

In other words, the distinction between bullying and conflict, most notably the criterion of “mutuality,” although not a criterion in the law, played a more central role in the reasoning in *Pittsgrove* than did the actual statutory definition, and this reasoning is clearly rooted in the NJ DOE guidance that effectively supplanted the statutory definition with the scientific definition that includes the elements of power imbalance and one-sidedness. The legislature did not see fit to include “power imbalance” or “mutuality” as criteria in the statutory definition of HIB, which, in light of the arguments made in this paper, furthers the ability of the law to protect students from bullying; yet, NJ DOE guidance has led to the incorporation of these criteria into legal reasoning. The NJ DOE is charged with providing guidance for compliance with the ABR; but to what extent is the NJ DOE empowered to supplant statutory standards with different standards?

All cases of true bullying are egregious, but perhaps the most egregious cases are those in which a bullied child reaches the breaking point, feels that adults won’t, can’t, or haven’t provided any help, and proceeds to “take care of the matter” themselves through retaliation. Retaliation is not a recommended response, and the retaliation should have been prevented because school personnel should have become aware of the problem and addressed it before a child reached the point of feeling that their best or only option was to retaliate. That said, however, once the target retaliates,

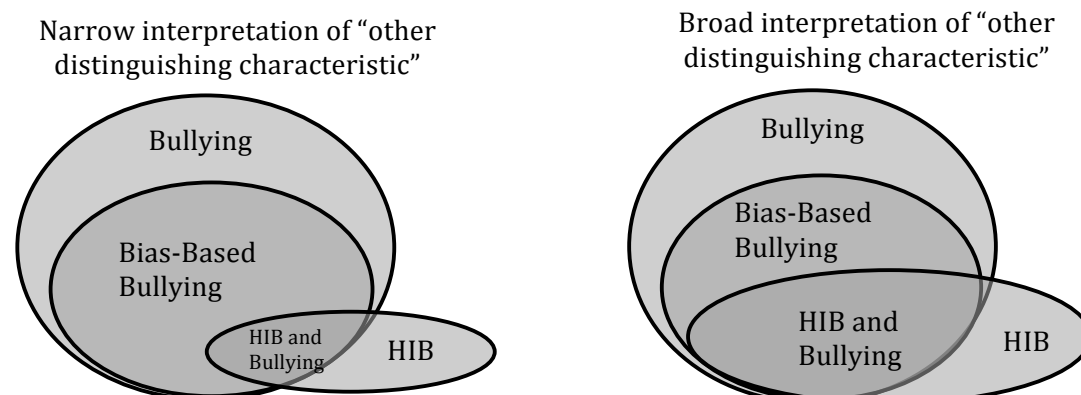
the situation is now one in which both students have aggressed against the other. The incident now comes to the attention of school personnel, who receive complaints from each student about the aggression of the other, and both students may well be accusing the other of “bullying.” If “conflict” is allowed to become a contra-indication for bullying, then school personnel can very reasonably receive these reports and conclude that this situation involved mutual aggression or conflict even if they know that one student “started it” (after all, conflict usually is started by one side), and therefore not bullying. In other words, allowing the statutory definition of HIB to become confounded with the “not conflict” definition of bullying, or replaced altogether with the “not conflict” definition, removes protection from those students who are *most vulnerable*, *most severely* bullied, and who have already been *the least protected* by their schools.

### Strategy #3: Interpretation of the “Other Distinguishing Characteristic” Clause

Thus far, two interpretations of the “other distinguishing characteristic” clause of the statute have been suggested as means to bring the statutory definition of HIB into greater agreement with the scientific definition. In contrast to Strategies #1 and #2, both versions of Strategy #3 would enhance the ability of the law to protect bullied students, and avoid consequences that are contrary to evidence-based practices.<sup>15</sup>

#### *Broad Interpretations of the “Other Distinguishing Characteristic” Clause*

The fact that a behavior must be “motivated by” an “actual or perceived characteristic” of the targeted student in order to be confirmed as HIB effectively limits the scope of the ABR to one specific form of bullying, that is, bias-based bullying. Bullying that is not based on a distinguishing characteristic of the target is not statutory HIB. There is, however, a great deal of variability possible in the interpretation of the “any other distinguishing characteristic” clause. Interpreting the “other distinguishing characteristic” clause narrowly, e.g., as referring only to visible, permanent characteristics, narrows the range of bullying situations that are classifiable as HIB, reducing the overlap between “bullying” and “HIB” and enlarging the “bullying, but not HIB” category. Conversely, interpreting the clause broadly, e.g., as including temporary, perceived, and invisible characteristics, enlarges the range of behaviors that can be classified as HIB, thus increasing the overlap between the two definitions. Since the scientific definition does not include a “distinguishing characteristic” criterion, no matter how broadly this statutory criterion is interpreted, this strategy would only expand the range of HIB to cover a larger proportion of *bullying* situations, without inappropriately expanding the statutory definition to include situations that would not be considered bullying as per the scientific definition.



<sup>15</sup> This does not imply that all suggested interpretations would necessarily be equally positive in their impact. If other interpretations are suggested as means to reconcile statutory HIB with scientific bullying, then each of these interpretations would have to be evaluated on its own merits.

In other words, the more broadly the “any other distinguishing characteristic” clause is interpreted, the more closely the statutory definition of HIB resembles the scientific definition of bullying and the greater the overlap between behaviors that constitute statutory HIB and behaviors that constitute scientifically-defined bullying. This approach, therefore, has the potential to diminish confusion over which incidents should be classified as “bullying” or “HIB,” while avoiding the adverse effects of the first two strategies, because: 1) it helps reconcile the two definitions without confounding them, 2) does not introduce an additional statutory requirement that would present a barrier to students who need the protections of the ABR, and 3) creates no additional structural interests for schools that would discourage the use of evidence-based practices. This strategy, therefore, helps reconcile the impact of the law with the goals of evidence-based practices, creates greater consistency between the scientific and the statutory definitions, does not broaden the definition of statutory HIB beyond the definition of scientific bullying, and furthers the intent of the law which is, arguably, to protect students from actual bullying.

*Recognizing “power imbalance” as an indicator of the existence of a distinguishing characteristic.* A more specific way in which the “other distinguishing characteristic” clause can be interpreted broadly is suggested by the Anti-Bullying Task Force’s 2014 annual report. On pages 15-17 of the report, the Task Force suggests that,

“While the statute does not specifically reference power differential, research and experience have shown that the imbalance of power is a common denominator which is present in all bullying incidents. Power imbalance takes into account the relative power (actual or perceived) of the aggressor and target, in relation to specific distinguishing characteristics, such as physical strength, popularity or social standing the use of embarrassing information related to the target, socio-economic status, or other characteristics that may, in fact, be fluid and change over time. These characteristics are just as real as race, ethnicity, sexual orientation, or others that are specified in the statute. However, they require the investigator to consider the context and the relative positions of the alleged aggressor and victim, rather than focusing solely on the real or perceived characteristics of the target.

“For many ABSs and principals, there has been confusion as to whether or not these other contextual characteristics may be considered as motivating factors. . . .

“The power differential between two children is not a visible characteristic itself, but rather the interplay of a distinguishing and motivating characteristic of the target, namely a perceived weakness in terms of physical strength, popularity, socio-economic status, or a myriad of other characteristics, relative to the aggressor. The perceived weakness of the target and the power or perceived power of the aggressor makes it possible for the aggressor to bully.

“The power differential can become a kind of gateway through which we can view motivating characteristics in a broader way that takes into account the relative position of the aggressor and target. In this way, it can be a tool by which the less obvious motivating characteristics can be discovered.... However, bullying behavior would not occur unless the aggressor felt confident of his/her success; the aggressor’s perception that the target is weak or vulnerable establishes the condition which makes HIB possible. Consider a less obvious example, socio-economic status, which may not be evident to a watchful teacher trying to discern whether HIB or normal social conflict is taking place. The socio-economic status is not readily evident to the observer. However, the weakness of the HIB target, relative to the aggressor, is more identifiable and the existence of this power imbalance should spur further inquiry to determine the underlying reason that the

imbalance exists. This is true for other less obvious characteristics, such as social awkwardness, being a new student in school, popularity, etc.

“Even in the case in which there may be no other physical motivating characteristic, the weakness of the respective target, relative to the aggressor, in terms of less tangible factors, such as, social standing and popularity, becomes a motivating characteristic. ABTF analysis revealed that, in many instances, there is no motivating characteristic other than the aggressor’s perception that the target is weak (because of the relative position of the students involved in one or more less tangible areas), and is therefore, perceived as an easy target for bullying.”

In other words, first, the ABTF is describing a broad view of “power imbalance,” which is entirely in keeping with scientific understandings, in which a power imbalance can be subtle, invisible, perceived, and/or might stem from contextual factors including factors (such as socio-economic status) that are external to both the bullying situation and external to the school. Second, if a power imbalance exists, then the existence of this power imbalance implies the existence of a distinguishing characteristic, because a power imbalance implies a difference between the aggressor and the target (if they were identical in all respects there could be no power imbalance), so whatever the characteristic of the target is that marks the target as less powerful than the aggressor, is the distinguishing characteristic that qualifies the situation as HIB. If, for example, the power imbalance is a physical power imbalance, then it is the physical weakness of the target that is the distinguishing characteristic. The target’s physical weakness distinguishes the target as an individual, and also in relation to the aggressor, because the target has less, and the aggressor has more, physical power. Third, as explained in Part II of this paper, the concept of a power imbalance in scientific understandings of bullying is best understood as a sensitizing insight, which leads us to understand the dynamics of bullying. Specifically, a student who bullies *chooses* a particular target because they expect to be successful in their aggression against that target; this expectation of success is based on the *perception* that the chosen target is less powerful, i.e., vulnerable and “bulliable.” Thus, the bully’s *perception* that the target is *weaker* constitutes the *perceived characteristic* of the target that motivates the bully’s selection of that target, and bullying behavior toward that target.

In other words, the existence of a power imbalance implies the existence of a distinguishing characteristic, so in any situation in which an observer can perceive a power imbalance, that observer should also be able to find a distinguishing characteristic. The observer should be able to identify the distinguishing characteristic by using the power imbalance as a guide. Therefore, any situation that meets the scientific criterion of “power imbalance” will also meet the statutory criterion of “distinguishing characteristic.” Thus, the two criteria become one and the same in their application.<sup>16</sup>

The approach suggested by the ABTF is different from another approach reportedly being used by some school districts, which is to consider the power imbalance itself a distinguishing characteristic. Strictly speaking, a power imbalance resides in the *relationship*, or *relative position*, of two individuals (or groups), and is not a characteristic of the target per se. The wording of the statute refers to an actual or perceived characteristic *of the target*. However, since that characteristic might be perceived by the aggressor, and need not be an actual characteristic of the target, in a sense one might argue that this, too, resides in the relationship,

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<sup>16</sup> The wording of the statute is, arguably, an issue here. What does it mean to say that bullying is “motivated by” a characteristic of the target? Whether the characteristic is actual or perceived, such wording implies that the target is the cause of the bullying, i.e., that the target is to be blamed for the bullying. In fact, it is *the aggressor’s perception of the characteristics of the target*, not any aspect of the target, which is at the root of the bullying.

or relative position of, the aggressor and the target, because it is a matter of the *perception* by the aggressor, *of* the target.

This solution—whether the power imbalance is seen as the characteristic itself, or as the lens through which a distinguishing characteristic can be identified--successfully expands the realm of behaviors that can be identified as HIB to include incidents that are “bullying” in the scientific sense but which might otherwise not be considered HIB. Even more importantly, it does so without creating an *additional* criterion that must be met in order to substantiate HIB. This solution uses a criterion that is already in place in the law—the “other distinguishing characteristic” and applies it in such a way as to effectively include all situations in which a power imbalance can be identified. This solution, therefore, like the more general solution of interpreting the “other distinguishing characteristic” broadly, has none of the negative consequences associated with Strategies #1 or #2 discussed above.

It is important to note that this solution does *not* require the identification of a power imbalance in order to identify a distinguishing characteristic, but merely provides *another route* to the identification of a distinguishing characteristic. An observer who witnesses a situation in which there is an evident distinguishing characteristic, but who does not see an imbalance of power in the situation, need not look for an imbalance of power; the statutory criterion, i.e., the distinguishing characteristic, has already been met. For example, if one student taunts another with a racially derogatory term, the incident is HIB on the basis of race as an actual or perceived characteristic (as long as it also meets the other statutory criteria); there is no need for the observer to look for or identify a power imbalance as well. However, in a situation in which the observer does not immediately perceive a distinguishing characteristic, but does recognize the situation as one of victimization, then the fact of victimization implies a power differential, which can then lead the observer to identify the relevant distinguishing characteristic. In other words, this solution creates an additional *contingent* criterion, i.e., if a distinguishing characteristic is observed directly, or if a power imbalance is observed, then either observation provides a route toward fulfillment of the “distinguishing characteristic” criterion of the statutory definition of HIB. An additional *necessary* criterion—as would be the case if “power imbalance” were added to the statutory definition through legislative amendment—narrows the applicability of the ABR and impedes students’ efforts to seek protection under the ABR, whereas an additional *contingent* criterion expands the definition of HIB and facilitates the ability of the ABR to provide protection for students. Also as noted above, any broadening of the “distinguishing characteristic” clause—whether in general, or with specific reference to the above arguments regarding power imbalance—could expand the range of HIB to cover a larger proportion of *bullying* situations, without inappropriately expanding the statutory definition to include situations that would not be considered bullying as per the scientific definition.

Two caveats are in order, however. First, given the history of confusion over the distinction between the statutory definition of HIB and the scientific definition of bullying, and the fact that there is already a widespread misguided belief among school personnel that if a situation is conflict, it must not be HIB, it is important to stress in education for ABCs, ABSs, school administrators, and school staff, that the fact that a power imbalance may indicate the existence of an “other distinguishing characteristics” does NOT mean that an incident *must* involve a power imbalance in order to be substantiated as HIB. In order to protect children and avoid the ridiculous and harmful outcomes described in this paper, it is essential that it be widely understood, and that it be true, with no standing legal reasoning to the contrary, that the ability of a staff member to perceive, or a student to demonstrate, a power imbalance is *not* a statutory requirement for a finding of HIB.

Second, in cases in which a distinguishing characteristic is not immediately observed, but is later found through the “gateway” provided by the observation of a power imbalance, the distinguishing characteristic that is thereby identified will likely be one that reflects negatively upon the target. This is because the characteristic that is identified by this means will be one that marks the target as less powerful than the aggressor, e.g., being less strong physically, having fewer friends, being socially unskilled, etc. Earlier in Part IV of this paper, it was pointed out that one of the undesirable effects of adding “power imbalance” as a necessary criterion to the statutory definition of HIB through legislative amendment would be that it would further victimize and disempower bullied students, whose weaknesses would then have to be documented and “proven” in order to support a determination that the situation is HIB. This would force the student to put forth evidence of their own weakness, and/or require the ABS to collect documentation of the students’ weakness. The detrimental effect of this on the student, and the fact that this would lead to outcomes that are contrary to evidence-based practices, have already been discussed above. If a distinguishing characteristic is found through the “gateway” provided by an observed power imbalance, the same detrimental impact might well follow.

Therefore, guidance to schools should include the suggestion that, if a distinguishing characteristic is identified through the lens provided by a power imbalance, that, once the distinguishing characteristic is identified, efforts should be made to reconstitute this distinguishing characteristic in terms that are not demeaning to the targeted student. For example, if the power imbalance is that the aggressor is physically stronger than the target, then the distinguishing characteristic identified through the lens provided by this power imbalance would be “physical weakness.” However, instead of documenting that the target is “physically weak” or “physically weaker than the aggressor,” the reporting and investigation procedure could document that the target has a different “body type” than the aggressor. As another example, if the power imbalance is social standing, in which the aggressor is more popular than the target, then the initially identified distinguishing characteristic of the target would be “few friends” or “fewer friends,” but for the purpose of reporting and investigation, this could be reconstituted as “has a smaller circle of friends,” or “belongs to a different group of friends than the aggressor” or “was perceived by the aggressor to be unsupported by friends.”

In summary, broadening the interpretation of the “other distinguishing characteristic” clause, either in general or with specific reference to the power imbalance as a lens through which to identify a distinguishing characteristic, is a strategy that would:

- Provide greater consistency between the scientific definition of “bullying” and the statutory definition of “HIB,” without further confounding them with each other, and thereby
- Reduce confusion caused by the discrepancies between the two definitions
- Without creating additional barriers or evidentiary requirements for students who seek protection from their schools against bullying, and
- Without creating additional structural interests on the part of schools that would discourage the use of evidence-based practices, and
- Without creating loopholes that could be used to create “reasonable” determinations of non-HIB that would deny protection against bullying to students who need it, and which therefore
- Helps reconcile the impact of the law with the goals of evidence-based practices, and therefore
- Furthers the intent of the law, which is, presumably, to protect students from actual bullying.

However, this strategy must be accompanied by detailed guidance for school districts on many points, including:

- Clarity regarding the fact that the statutory definition of HIB is different from the scientific definition of “bullying” upon which “evidence-based” techniques for addressing bullying are based.
- Clarity regarding the fact that evidence-based strategies for preventing, identifying, and responding to bullying are designed to address behaviors that are “bullying” under the *scientific definition*, whereas statutory reporting and investigation requirements of the ABR are triggered when the elements of the *statutory definition* of “HIB” are, or might be, met.
- Use of the scientific definition, i.e., the “bullying involves a power differential and is different from conflict” definition, for the purpose of identifying, reporting, investigating, and determining HIB will lead to errors and regulatory non-compliance.
- Use of the statutory definition of HIB to determine appropriate responses based on evidence-base strategies for addressing bullying will lead to errors in responses to students, thus undermining the effectiveness of bullying-prevention efforts.
- The statute does not include “power imbalance” as a criterion of statutory HIB; therefore, there is no need to identify a power imbalance in order to determine that an incident constitutes HIB
- The statute does not include “one-sidedness” as a criterion, and does not distinguish conflict from bullying; therefore, observing elements of conflict in a situation does not justify a determination that the situation is not bullying, nor that the situation is not HIB
- The suggestion that a power imbalance might lead an observer to identify the relevant distinguishing characteristic does not mean that a power imbalance has to be identified in order to identify the distinguishing characteristic
- If a distinguishing characteristic is identified through the lens provided by an observed power imbalance, then, once the distinguishing characteristic is identified, efforts should be made to reconstitute this distinguishing characteristic in terms that are not demeaning to the targeted student.